



Victorian Law Reform Commission

A.R.T., Surrogacy and Legal Parentage: A Comparative Legislative Review

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Preface

This is one of three Occasional Papers published by the Victorian Law Reform Commission as part of the Commission's work on assisted reproduction and adoption. Occasional Papers provide background information which is relevant to questions which the Commission is considering as part of a law reform project.

A central issue which arises in the context of assisted reproduction is how to recognise and protect the best interests of children who are conceived through assisted reproduction. The three Occasional Papers deal with different aspects of this question.

This Paper examines how laws in the other Australian states, and in the United States, United Kingdom and Canada regulate access to assisted reproduction, control the use of surrogacy and deal with issues relating to parentage of children conceived through assisted reproduction. Generally, this legislation gives priority to protecting the best interests of children, but the way in which this is done varies considerably.

This Occasional Paper was prepared by Adjunct Professor John Seymour, Faculty of Law, The Australian National University, who was formerly a Reader in the Faculty and has a special interest in laws relating to children and parenthood; and by Sonia Magri, who is a doctoral candidate at the University of Melbourne and lectures at Melbourne Law School. Sonia Magri was responsible for most of the original research for this Paper and the draft was jointly prepared by the two authors. I thank them both for their contribution to this important debate.

The two other Occasional Papers in this series include a Paper reviewing a large number of studies on the health and wellbeing of children conceived through assisted reproduction, written by Dr Ruth McNair, Senior Lecturer, University of Melbourne. The other Paper, which examines the meaning of the best interests of children in light of the provisions of the Convention on the Rights of the Child, was written by John Tobin, Lecturer, Melbourne Law School.

The Commission publishes Occasional Papers to inform public debate on areas of law reform we are considering. Occasional Papers reflect the views of their authors and do not contain policy recommendations.

The Commission will be publishing an Interim Report on Assisted Reproduction and Adoption early in 2005. We will then consult further on the draft recommendations in the Interim Report.

Abbreviations

ACT	Australian Capital Territory
ART	Assisted Reproductive Technology
BCHRT	British Columbia Human Rights Tribunal
HFEA	Human Fertilisation and Embryology Act
NHMRC	National Health and Medical Research Council
NSW	New South Wales
NT	Northern Territory
SA	South Australia
SAA	Surrogacy Arrangements Act 1985
UPA	Uniform Parentage Act 1973
WA	Western Australia

Chapter 1

Introduction

1.1 The Victorian Law Reform Commission's reference on the *Infertility Treatment Act 1995* identifies a number of issues relating to assisted reproduction and surrogacy. The purpose of this paper is to examine the way these issues are dealt with in relevant United States, Canadian, United Kingdom and Australian legislation.¹

1.2 The paper considers the extent to which laws in these jurisdictions regulate access to assisted reproductive technology (ART) and control the use of surrogacy and payments made to surrogate mothers. The paper also reviews the varied answers offered to the questions about parenthood that arise when either method of assisted conception results in the birth of a child. One aspect of this review is a discussion of the law of adoption: if parenthood is uncertain, doubts can be put to rest by permitting a beneficiary of ART or a surrogacy arrangement to adopt the child.

1.3 The review seeks to identify models which may assist in the further development of the law in Victoria. It is not intended to provide a detailed and exhaustive description of the relevant legislation. Rather, the aim is to identify differences in approach and style. These differences reflect contrasting perceptions of the role the law should play in the highly personal matter of human reproduction. On the one hand, some of the laws embody the belief that legal intervention in this field should be kept to a minimum and decisions about the use of ART and surrogacy should be left to those involved and those who advise them. On the other hand, there are laws that are specific and closely regulate the use of various forms of assisted conception. Midway between these two models are laws creating a framework within which assisted conception may occur. Such legislation imposes constraints, but is primarily concerned with establishing a licensing system. In some cases, the laws include broad statements of principle designed to control and guide health care professionals in the exercise of their discretion.

1 The paper is limited in its scope in that only these Western jurisdictions are considered. The intention is not however to imply that satisfactory models could not be found in other jurisdictions. Rather, the intention is to provide a starting point in considering different legislative approaches to the issues raised herein.

1.4 Chapter 2 compares Victoria's ART legislation with that in the United States, Canada, the United Kingdom and other parts of Australia. The focus is upon criteria determining eligibility for the various forms of ART and the legal parentage of children born as a result of ART. Chapter 3 considers model approaches concerning eligibility criteria that a surrogate, her partner (if any) and the commissioning parents need to meet in order to access ART. It also considers different approaches to whether any payment or reward should be made to a surrogate mother, and how the legal parentage of children born following surrogacy arrangements should be addressed. Both chapters conclude by comparing the various models discussed.

1.5 Chapter 4 extends the discussion of parentage by considering situations in which adoption orders may be relevant. It discusses adoption by a birth mother's female partner, adoption by same-sex couples and adoption following surrogacy arrangements. Chapter 5 concludes with a brief discussion of some options for Victoria.

Chapter 2

Assisted Reproductive Technology

2.1 This chapter compares Victoria's ART legislation with that in force in the United States, Canada, the United Kingdom and other parts of Australia. The analysis will focus on how these laws address the following matters:

- criteria determining eligibility for the various forms of ART; and
- the legal parentage of children born as a result of ART.

VICTORIA

LEGISLATIVE FRAMEWORK

2.2 The *Infertility Treatment Act 1995* regulates the use of ART in Victoria. The Act establishes the Infertility Treatment Authority.² One of the functions of the Authority is to administer the licensing and approval systems with respect to 'treatment procedures'.³ In general, ART procedures may be performed only by approved doctors at licensed hospitals or day procedure centres, or licensed research institutions. An approved doctor can perform donor insemination outside a licensed place.⁴

2.3 Among the guiding principles set out in the Act are that:

- the welfare and interests of any person born, or to be born, as a result of a treatment procedure are paramount;
- human life should be preserved and protected;
- the interests of the family should be considered; and
- infertile couples should be assisted in fulfilling their desire to have children.

2 *Infertility Treatment Act 1995*, s 121.

3 'Treatment procedure' means the artificial insemination of a woman with sperm from a man who is not her husband, or a fertilisation procedure: s 3.

4 Section 6.

These principles are listed in descending order of importance and must be applied in that order.⁵

ELIGIBILITY

2.4 Section 8 of the Victorian Act defines eligibility criteria. It provides that a woman who undergoes a treatment procedure must be married or living with a man in a de facto relationship. Both she and her husband must consent to the procedure. It must be established that the woman is ‘unlikely to become pregnant’ or that she or her spouse is likely to pass on a genetic abnormality or disease to a person born to them without the assistance of ART.

2.5 In *McBain v State of Victoria*,⁶ a challenge to these requirements successfully argued that they unlawfully discriminated against women on the basis of their marital status, in breach of the *Sex Discrimination Act 1984* (Cth). Following this decision, the Infertility Treatment Authority accepted that the requirement the recipient be married or in a de facto relationship no longer applies. This allows unmarried women to access ART services. However, access for such women has been limited to those who are ‘clinically infertile’.⁷

2.6 Section 20 defines the circumstances in which a donor procedure may be used. The section is complex, but its general effect is as follows. It prevents a woman from undergoing a treatment procedure involving the use of donor sperm, or an embryo formed from her ovum and donor sperm, unless the woman is unlikely to become pregnant from the sperm of her husband or a genetic abnormality or disease might be transmitted as a result of using his sperm. It also prevents a woman from undergoing a procedure involving the use of an embryo formed from a donated ovum and her husband’s sperm unless she is unlikely to become pregnant using her own ovum or is likely to transmit a genetic abnormality or disease to a resulting child. In addition, it prevents a woman undergoing a procedure involving the use both of donated sperm and a donated ovum unless the woman is unlikely to become pregnant or is likely to transmit a genetic abnormality or disease by using both her own and her husband’s gametes.

5 *Infertility Treatment Act 1995* s 5.

6 [2000] FCR 1009.

7 Based on an opinion dated 16 May 2002, provided to the Infertility Treatment Authority by Gavan Griffith QC.

PARENTAGE

2.7 In Victoria, the *Status of Children Act 1974* defines who the parents are of a child born as a result of a medical procedure (whether the child was conceived through the licensed clinic system or not).

2.8 When, with the consent of her husband, a married woman⁸ has undergone artificial insemination using donor sperm, the husband is presumed to be the father of the resulting child and the donor is presumed not to be the father.⁹ Similarly, when the procedure involves an ovum or embryo transfer (whether or not the woman's ovum or the husband's sperm is used) the woman's husband is presumed to be the father; the sperm or egg donor (if any) is presumed not to be a parent of the child. Where a donor ovum is used to allow a married woman to conceive, she is presumed to be the mother.¹⁰ When donor sperm is used for the artificial insemination of an unmarried woman, or of a married woman without the consent of her husband, the donor 'has no rights and incurs no liabilities' in respect of the resulting child unless he becomes the husband of the child's mother.¹¹ The Act does not specify that the semen donor is not the father of the child in this situation. The Victorian Law Reform Commission has noted that it is not clear whether such a donor would be regarded as the child's father under the *Family Law Act 1975* (Cth).¹²

The Act is silent about whether an unmarried woman who conceives as a result of ART using a donated ovum, is the child's mother. If the birth mother of a child conceived by way of ART is in a same-sex relationship, the law does not recognise her partner as a parent of the child.¹³

8 A married woman includes a woman who is living with a man on a bona fide domestic basis: *Status of Children Act 1974* s 10A(1).

9 *Status of Children Act 1974* s 10C.

10 *Status of Children Act 1974* s 10D, 10E.

11 *Status of Children Act 1974* s 10F(1).

12 Victorian Law Reform Commission, *Assisted Reproductive Technology & Adoption: Should the Current Eligibility Criteria In Victoria be Changed?* (2004) paras 5.23–28.

13 For a fuller discussion on Victoria's laws on parentage after the use of artificial conception procedures, and of the application of the *Family Law Act 1975* (Cth) s 60H, see Victorian Law Reform Commission, *Assisted Reproductive Technology & Adoption: Should the Current Eligibility Criteria in Victoria be Changed?* (2004) paras 2.6–2.17.

UNITED STATES

ELIGIBILITY

2.9 There is no federal regulation of ART in the United States. Approximately 33 states have enacted statutes addressing aspects of the use of this technology.

2.10 Only one state—New Hampshire—explicitly restricts access to artificial conception procedures. Under New Hampshire law, in-vitro fertilisation and pre-embryo transfer are available only to a woman who is aged 21 years or over, and who has been medically evaluated and received counselling.¹⁴ In the remaining jurisdictions, none of the relevant statutes expressly prohibits access to ART by single women. However, some states imply that only married women will employ ART. Others implicitly recognise that unmarried women may access ART.

2.11 In a number of states the legislation provides that when a married woman is artificially inseminated with semen donated by a man not her husband, and her husband consented to the procedure, the husband is treated in law as the natural father of the resulting child. In each of these jurisdictions, the relevant section is supplemented by another which states that the donor of semen provided to a licensed physician for use in the artificial insemination of a married woman, other than the donor's wife, is treated in law as if he were not the natural father of the child.¹⁵ In combination, these provisions reflect the assumption that ART will be employed only by married heterosexual couples. Such laws may indirectly suggest that ART should not be employed by other persons.

2.12 In contrast with these statutes are those which, after dealing with the use of ART by married couples, include a provision such as the following: 'The donor of semen provided to a licensed physician and surgeon for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived.'¹⁶ The significance of this wording is that it refers to the insemination of a 'woman' rather than a 'married woman'. In *Jhordan C v Mary K*, the California Court of Appeals held that the effect of the adoption of this wording

14 NH Rev Stat Ann § 168-B:13.

15 For example, Ala Code § 26-17-21(a); Alaska Stat § 25.202.045; Mass Gen Laws § 46.4B; MCLS § 333.2824; Minn Stat § 257.56; Mont Code Ann § 40.6.106; NY Domestic Relations Law (Consol) § 73; NC Gen Stat § 49A-1. It is not clear whether the references in this legislation to 'husband', 'wife', 'married woman' and 'spouse' are to be interpreted narrowly—so that they apply only to those who are lawfully married—or whether they apply to members of couples cohabiting in a stable relationship.

16 CA Family Code § 7613(b). Other similar provisions are as follows: Col Rev Stat § 19.4.106; Ill Ann Stat Ch 750.40/3(a); NJ Stat Ann § 9.17.44; NM Stat Ann § 40.11.6; Ohio Rev Code Ann § 3111.30 to 3111.38; Wis Stat Ann § 891.40(1); Wyo Stat § 14.2.103.

is to provide an unmarried woman with ‘a vehicle for obtaining semen for artificial insemination without fear the donor may claim paternity’.¹⁷ Similarly, in *In the Interest of RC*, the Colorado Supreme Court—commenting on a provision that made no reference to the marital status of the recipient—held that ‘the primary purpose of this section is to provide a legal mechanism for married and unmarried women to obtain a supply of semen for use in artificial insemination...’.¹⁸

DEFINING THE FORMS OF ART TO BE REGULATED

2.13 Many of the Acts refer to ‘artificial insemination’.¹⁹ This term may not apply to forms of ART other than those involving sperm donation. In some jurisdictions, it is clear the legislation has a narrow application. The legislation may refer only to a procedure by which a wife is ‘inseminated artificially with semen donated by a man not her husband’.²⁰ The same result may be achieved in statutes that narrowly define ‘artificial insemination’.²¹

2.14 In contrast, there are states in which it is clear that the legislation applies to various forms of ART and is not limited to artificial insemination. Such legislation refers, for example, to a wife agreeing to assisted reproduction with an egg donated by another woman,²² to ‘in-vitro fertilisation’ as well as to ‘artificial insemination’,²³ to ‘in-vitro fertilisation’ and ‘pre-embryo transfer’,²⁴ or to ‘heterologous artificial insemination’ and ‘heterologous oocyte donation’.²⁵ North Dakota law defines ‘assisted conception’ as:

17 224 Cal Rptr 530, 534 (Californian Ct of App, 1986).

18 775 P.2d 27, 35 (Colorado Supreme Court, 1989).

19 For example, Alaska Stat 25.20.045; ASA § 9.10.201(a); Conn ch 803a § 45a.771(b); Kan Stat Ann § 23.128; Mass ch 46 § 4B; NC Gen Stat Ann § 49A-1; Or Rev Stat ch 109.239; and Tenn Code Ann § 68.3.306.

20 For example, Ala Code § 26.17.21; CA Family Code § 7613(a); 750 ILCS 40/3(a); Minn Stat ch 257.56.1 (2003); Nev Rev Stat § 126.061; and Wis Stat § 981.40.

21 For example, in the District of Columbia ‘artificial insemination’ is defined as ‘the process by which a man’s fresh or frozen sperm is introduced into a woman’s vagina, other than by sexual intercourse, under the supervision of a physician’: DC Code Ann § 16-401. Idaho has a similar definition: Idaho Code (Michie) § 39.5401.

22 Colo Rev Stat § 19.4.106(1).

23 DC Code Ann § 16-401.

24 NH Rev Stat Ann § 168-B:13.

25 Okla Stat § 10.551 and § 10-553.

a pregnancy resulting from insemination of an egg of a woman with sperm of a man by means other than sexual intercourse, or by removal and implantation of an embryo after sexual intercourse, but does not include a pregnancy resulting from the insemination of an egg of a wife using her husband's sperm.²⁶

In Texas, 'assisted reproduction' is defined as a method of causing pregnancy other than sexual intercourse. It includes intra-uterine insemination, donation of eggs, donation of embryos, in-vitro fertilisation and transfer of embryos, and intra-cytoplasmic sperm injection.²⁷

2.15 Virginia has a comprehensive and highly specific definition. In that state 'assisted conception' means:

a pregnancy resulting from any intervening medical technology, whether in vivo or in vitro, which completely or partially replaces sexual intercourse as a means of conception. Such intervening medical technology includes, but is not limited to, conventional medical and surgical treatment as well as noncoital reproductive technology such as artificial insemination by donor, cryopreservation of gametes and embryos, in vitro fertilisation, uterine embryo lavage, embryo transfer, gamete intrafallopian tube transfer, and low tubal ovum transfer.²⁸

A number of the terms used in this definition are also defined.²⁹

2.16 The differences in the various statutory definitions are significant. When the Acts too narrowly define the techniques to which they apply, other techniques may be left unregulated. When the Acts are too specific, they do not leave room for developments in technology. In either case, there may be some forms of ART not covered by the legislation—access to these may be left to the discretion of individual practitioners.

26 ND Cent Code § 14.18.01.

27 Tex Code Ann § 160.102.

28 Va Code Ann § 20-156.

29 The following definitions are given: 'cryopreservation' means the freezing and storing of gametes and embryos for possible future use in assisted conception; 'gamete' means either a sperm or an ovum; 'embryo' means the organism resulting from the union of a sperm and an ovum from first cell division until approximately the end of the second month of gestation; '[i]n vitro fertilisation' means the fertilisation of ova by sperm in an artificial environment: Va Code Ann § 20-156.

THE ROLE OF THE MEDICAL PRACTITIONER

2.17 Much of the legislation applies only when assisted reproduction procedures are carried out under the supervision of a registered medical practitioner.³⁰ The Ohio Act makes it clear that supervision requires the availability of a doctor for consultation and direction, but does not necessarily require the personal presence of the doctor during the procedure.³¹ In some states it is an offence for any person other than a licensed physician (or persons under his or her supervision) to perform artificial insemination.³²

2.18 That the legislation assumes ART may be made available only by a registered medical practitioner has important implications for access. There are obvious advantages in laws indicating that the use of all forms of ART be under medical supervision. These laws allow health checks to be carried out on donors and recipients. Some Acts impose obligations on doctors in an attempt to ensure donors will be tested. In Ohio, for example, before fresh semen is used the doctor must obtain the donor's medical history and the donor must be physically examined and tested for blood type and Rh factor. The same state requires acceptable results to be obtained from laboratory tests before frozen semen is used.³³

PARENTAGE

2.19 Rather than focusing on access and eligibility criteria, the United States legislation has principally concerned itself with the question of the parentage of children born as a result of ART.

2.20 As noted in paragraph 2.12, a number of the statutes provide that when, under the supervision of a registered medical practitioner, a married woman (with the consent of her husband) is artificially inseminated with semen donated by a man not her husband, the husband is treated in law as the natural father of the resulting child. This is reinforced by provisions stating that the donor of semen provided to a registered medical practitioner for use in the artificial insemination of a woman other than the donor's wife is treated in law as if he were not the natural father of the child.³⁴

30 For example, Ala Code § 26.17.21(a); CA Family Code § 7613(a); Col Rev Stat § 19–4–106(1); 750 Ill Comp Stat 40/3(a); Minn Stat ch 257.56(1) (2003); MO Rev Stat § 210.824.1, Nev Rev Stat § 126.061.1, NM Stat Ann § 40.11.6 A; and Wis Stat § 891.40(1).

31 Ohio Rev Code § 3111.90.

32 Ga Code Ann § 43.34.42; Idaho Code § 39.5402 and § 39.5407; Okla Stat § 10.553.

33 Ohio Rev Code § 3111.91.

34 For example, Ala Code § 26.17.21; CA Family Code § 7613; 750 Ill Comp Stat 40/3; Minn Stat § 257.56; MO Rev Stat § 210.824; Nev Rev Stat § 126.061 and Wis Stat § 891.40.

2.21 There are a number of provisions dealing with other aspects of sperm donation. Under Delaware law, a donor who provides sperm for assisted reproduction of a woman with intent to be a parent of her child is a parent of the resulting child.³⁵ In New Mexico, such a donor may be treated as the natural father of the child if he consents in writing.³⁶ Texas law makes it clear that a husband who provides sperm for assisted reproduction by his wife is the father of the resulting child.³⁷

2.22 The question of who is the mother of the child is frequently resolved by a provision applying to both members of a married couple. The presumption is that—in the absence of a surrogacy arrangement—a child born as a result of ART to a woman who was married at the time of the birth is presumed to be the child of the woman and her husband. Both spouses must have consented to the procedure.³⁸ In Virginia, the legislation states that the gestational mother of the child is the child’s mother.³⁹ Under Arkansas law, a child born as a result of ART to a woman who was unmarried at the time of the birth is, in the absence of a surrogacy arrangement, presumed to be the child of the woman.⁴⁰

2.23 In a number of states, the law on the parentage of artificially conceived children has been influenced by the Uniform Parentage Act 1973 (UPA),⁴¹ which provides a model for legislation on the subject. This Act left unresolved the question of the paternity of a child born by ART to an unmarried woman. As discussed at paragraph 2.12, other states addressed the issue by simply omitting the term ‘married’ from their statutory provisions relating to paternity.⁴² In both cases, it has been said that such laws do not adequately protect the familial expectations of unmarried

35 Del Code Ann § 8.703.

36 NM Stat Ann § 40.11.6 B.

37 Tex Code Ann § 160.703.

38 For example, Ala Code § 25.20.045; Conn Gen Stat § 45a-774; Fla Stat § 742.11; 750 ILCS 40/2; Mass Fen Laws ch 46 § 4B; NY Law (Consol) § 73.1; NC Gen Stat § 49A-1; Okla Stat § 10.552 and § 10.554; and Or Rev Stat § 109.243.

39 Va Code Ann § 20.158.

40 Ark Code Ann § 9.10.201(c).

41 An Act drafted by the National Conference of Commissioners on uniform state laws, which provides model approaches to laws concerning parentage. States may choose to adopt all or any part of this model Act. Many states have adopted some sections of the Act but not the entire statute. There are two versions of the Act: the Uniform Parentage Act 1973 and the revised version 2000.

42 For example, CA Family Code § 7613(b); Col Rev Stat § 19.4.106; Ill Ann Stat Ch 750.40/3(a); NJ Stat Ann § 9.17.44; NM Stat Ann § 40.11.6; Ohio Rev Code Ann § 3111.30 to 3111.38; Wis Stat Ann § 891.40(1); Wyo Stat § 14.2.103.

women who conceive by ART.⁴³ Thus, in some instances, though the relevant statutes appear to govern the parentage of artificially conceived children born to unmarried women, case law demonstrated ‘a judicial search for one mother and one father’.⁴⁴ For example, despite the plain language to be found in the Colorado Act,⁴⁵ in *In Re RC*, the Colorado Supreme Court found that although the legislative scheme protected unmarried women from paternity suits by unknown donors, the provision as applied to the rights of *known* donors and unmarried women was ambiguous.⁴⁶ In this case, the court, while conceding that the wording of the statute permitted unmarried women to obtain its protection, noted that it did not refer to the ‘rights and obligations of a known donor who provides his semen to a licensed physician for use in artificially inseminating an unmarried woman’.⁴⁷

2.24 In 2000, a revised version of the UPA was drafted. The significance of the relevant changes has been explained as follows:

In 2000, the Conference went well beyond the narrow scope it presented in 1973...The 2000 Act...removed the bias in favor of married couples, in recognition of the current reality that single women and gay couples are also using artificial insemination. Under all circumstances, however, ‘a donor is not a parent of a child conceived by means of assisted reproduction’.⁴⁸

Delaware, Texas, Washington and Wyoming have adopted versions of the UPA 2000.⁴⁹

2.25 None of the United States statutes addresses the issue of a same-sex partner of a woman who conceives using ART when the partner is not biologically related to a child. The question of parentage in such a case must be resolved by way of adoption law. This subject will be discussed in Chapter 4.

43 Vicky L Henry, ‘A Tale of Three Women: A Survey of the Rights and Responsibilities of Unmarried Women who Conceive by Alternative Insemination and a Model for Legislative Reform’ (1993) 19 *American Journal of Law and Medicine* 285.

44 Ibid.

45 ‘A donor is not a parent of a child conceived by means of assisted reproduction...’: Colo Rev Stat § 19–4–106(2).

46 775 P.2d 27, 35 (Colorado Supreme Court, 1989)

47 Ibid.

48 Bernie D Jones, ‘Symposium: Subversive legacies: Learning from history/constructing the future: Single motherhood by choice, libertarian feminism, and the Uniform Parentage Act’ (2003) 12 *Texas Journal of Women and Law* 419, 440, citing UPA 2000 § 702.

49 Uniform Law Commissioners, *A Few Facts about the Uniform Parentage Act 2000*, <www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-upa.asp> at 30 June 2004.

CANADA

LEGISLATIVE FRAMEWORK

2.26 Canada's *Assisted Human Reproduction Act 2004* combines a number of approaches to the problem of regulating the use of ART. A feature of the Act is its declaration of the following principles:

- (a) the health and well-being of children born through the application of assisted human reproductive technologies must be given priority in all decisions respecting their use;
- (b) the benefits of assisted human reproductive technologies and related research for individuals, for families and for society in general can be most effectively secured by taking appropriate measures for the protection and promotion of human health, safety, dignity and rights in the use of these technologies and in related research;
- (c) while all persons are affected by these technologies, women more than men are directly and significantly affected by their application and the health and well-being of women must be protected in the application of these technologies;
- (d) the principle of free and informed consent must be promoted and applied as a fundamental condition of the use of assisted human reproductive technologies;
- (e) persons who seek to undergo assisted reproduction procedures must not be discriminated against, including on the basis of their sexual orientation or marital status;
- (f) trade in the reproductive capabilities of women and men and the exploitation of children, women and men for commercial ends raise health and ethical concerns that justify their prohibition;
- (g) human individuality and diversity, and the integrity of the human genome, must be preserved and protected.⁵⁰

2.27 The Act regulates the undertaking of any 'controlled activity'—an assisted reproduction procedure that may be employed only in accordance with regulations made under the Act and pursuant to a licence.⁵¹ To oversee the system of regulation

50 *Assisted Human Reproduction Act 2004* (Canada) s 2. In its analysis of the Bill, the Parliamentary Research Branch stated that '...because they are enshrined in a "statutory declaration" as opposed to a preamble, these principles have greater legal force than if they were set out in a preamble'. (Parliamentary Research Branch, 'Legislative Summary: Bill C-6: Assisted Human Reproduction Act', 17 February 2004, Library of Parliament, <www.parl.gc.ca/common/Bills_ls.asp?Parl=37&Ses=3&ls=C6> at 15 March 2004.)

51 'Controlled activities' include altering, manipulating or treating any human reproductive material for the purpose of creating an embryo; altering, manipulating, treating or using an in-vitro embryo; and obtaining, storing, transferring, destroying, importing or exporting a sperm or ovum for the purpose of creating an embryo or obtaining, storing, transferring, destroying, importing or exporting an in-vitro embryo for any purpose. See ss 3, 10–12.

created by the Act, the Parliament established the Assisted Human Reproduction Agency of Canada.⁵² The objectives of the Agency are:

(a) to protect and promote the health and safety, and the human dignity and human rights, of Canadians, and

(b) to foster the application of ethical principles

in relation to assisted human reproduction and other matters to which [the] Act applies.⁵³

2.28 The issuing of licences authorising persons to undertake any ‘controlled activity’ is one of the functions of the Agency.

ELIGIBILITY

2.29 Two of the principles embodied in the Assisted Human Reproduction Act are of special relevance to the matter of eligibility for ART. Section 2(a) provides:

the health and wellbeing of children born through the application of assisted human reproductive technologies must be given priority in all decisions respecting their use.

Section 2(e) provides:

persons who seek to undergo assisted reproduction procedures must not be discriminated against, including on the basis of their sexual orientation or marital status.

2.30 Adoption of the broad criterion incorporated in section 2(a)—that priority be given to the health and wellbeing of children born as a result of ART—has the potential to allow access to ART to be denied to those who are considered likely to prove unsuitable parents. Which criteria would be used to determine suitability, and who will make such decisions is unclear.

2.31 Section 2(e) is intended to prevent discrimination based on sexual orientation or marital status. Before the passing of the Act, this issue had attracted attention and had resulted in litigation. The leading case was *Potter v Korn*.⁵⁴ In this case an obstetrician had refused to provide artificial insemination to a woman in a lesbian relationship. The British Columbia Council of Human Rights determined that the doctor had unlawfully discriminated against her on the basis of her sexual orientation.⁵⁵ The British Columbia Supreme Court dismissed the doctor’s application for review of this finding in 1996.⁵⁶ While this case was thought to open the way to

52 The Agency is established under s 21(1); its powers are listed in s 24.

53 *Assisted Human Reproduction Act 2004* (Canada) s 22.

54 (1995) 23 C.H.R.R. D/319.

55 (1995) 23 C.H.R.R. D/319.

56 *Korn v Potter* (1996) 25 C.H.R.R. D/141.

access to artificial insemination for single women and same-sex couples in Canada, there were still instances in which such access was refused. Section 2(e) may prevent this.

PARENTAGE

2.32 Three of Canada's provinces—Newfoundland, Quebec and the Yukon— have legislation dealing with the parentage of children born as a result of ART.

2.33 In Newfoundland and the Yukon, a man who was married to or cohabiting with a woman at the time of her donor insemination, and who consented in advance to the procedure, is the father of the resulting child. Similarly, when a man was cohabiting with a woman at the time of her donor insemination, he is the father of the resulting child unless it is proved he refused to consent to assume the responsibilities of parenthood. A man whose semen is used to artificially inseminate a woman to whom he is not married or with whom he is not cohabiting at the time of the insemination is not in law the father of the resulting child.⁵⁷ Both Acts include provisions enabling a court to make declaratory orders as to legal motherhood should it be in question.⁵⁸

2.34 In Quebec, the provisions regarding the legal parentage status of husbands, male partners and donors are similar.⁵⁹ However, the Quebec Act also deals with parentage when a child is born to a same-sex couple. It provides:

[I]f both parents are women, the rights and obligations assigned by law to the father, insofar as they differ from the mother's, are assigned to the mother who did not give birth to the child.⁶⁰

2.35 In provinces where the legislation has not addressed this issue, reliance may be placed on the guarantee of equality in the Canadian Charter of Rights and Freedoms⁶¹ or on provincial human rights legislation. For example, when a complaint alleging

57 *Children's Law Act*, RNSL 1990, Chapter C-13 s 12 (Newfoundland); *Revised Statutes of Yukon*, Chapter 31, *Children's Act* s 13; *Civil Code of Quebec* SQ 1991, Title 2, Filiation, Chapter I.1 In addition, the Yukon law provides that where a married or cohabiting man has not consented to the insemination or the assumption of parental responsibilities, he is deemed in law to be the father of the resulting child if he has demonstrated a settled intention to treat the child as his own, unless it is proved that he did not know that the child resulted from artificial insemination.

58 *Children's Law Act* RNSL 1990, Chapter C-13 s 5 (Newfoundland); *Revised Statutes of Yukon*, Chapter 31, *Children's Act* s 8.

59 *Civil Code of Quebec* SQ 1991, Title 2, Filiation, Chapter I.1 s 538.2.

60 *Ibid* s 539.1.

61 *Canadian Charter of Rights and Freedoms* s 15(1).

discrimination in this area is filed, recognition may be given to the relationship between a lesbian woman and the child of her partner. In 2001, the British Columbia Human Rights Tribunal (BCHRT) ruled that lesbians who have a child together with sperm from an anonymous donor could both register as parents on the child's birth certificate.⁶² The Vital Statistics Agency had been returning as 'wrong' birth certificates on which both parents had female names, although it had never taken steps to confirm that a man listed on a birth certificate was indeed the biological father of the child. This practice was challenged by two lesbian couples. In its ruling, the BCHRT stated:

It is evident that the Birth Registration regime established by Vital Statistics has not kept up with reproductive technologies. The same-sex partner of the biological mother of a child is denied the presumptive proof of her relationship to the child, including the right to register her child in school, to obtain airline tickets and passports for her child, as well as denying her the ability to assert her child's rights with respect to a myriad of other laws, from the *B.C. Benefits (Child Care) Act* to the *Young Offenders Act*, unless and until she resorts to the adoption process.⁶³

2.36 The BCHRT ordered Vital Statistics 'to establish [birth registration] forms to register a birth in a way that does not discriminate against same-sex parents'. Such registration obviates the need for the co-mother to adopt the child to establish their relationship.⁶⁴

THE UNITED KINGDOM

LEGISLATIVE FRAMEWORK

2.37 The *Human Fertilisation and Embryology Act 1990* (UK) (HFEA) established the Human Fertilisation and Embryology Authority. One of the functions of the Authority is to grant licences 'authorising activities in the course of providing treatment services'.⁶⁵ The Authority must also maintain 'a code of practice giving guidance about the proper conduct of activities carried out in pursuance of a licence'.⁶⁶

62 *Gill and Maber, Murray and Popoff v Ministry of Health and the Ministry Responsible for Seniors Vital Statistic Agency*, 2001, BCHRT 34, <www.bchrt.bc.ca/popt/decisions/2001_reason_for_decision.htm> at 23 June 2004. These proceedings were brought under the *Human Rights Code RSBC 1996*, c 210.

63 *Ibid* para 81.

64 The British Columbia Government has challenged the Tribunal's authority to order the amendment of the forms in the BC Supreme Court: Sarah Rose Werner, *Lesbians and Donor Insemination* (2002) <<http://familypride.uwo.ca/articles/insemination.html>> at 23 June 2004.

65 'Treatment services' are defined as 'medical, surgical or obstetric services provided to the public or a section of the public for the purpose of assisting women to carry children': *Human Fertilisation and Embryology Act 1990* (UK) s 2. A licence regarding the provision of treatment services may authorise: the creation of

ELIGIBILITY

2.38 Section 13(5) of the HFEA is particularly important with regard to access to ART. It states:

A woman shall not be provided with treatment services unless account has been taken of the welfare of any child who may be born as a result of the treatment (including the need of that child for a father), and of any other child who may be affected by the birth.

2.39 Similarly, the HFEA requires the code to include guidance for those providing treatment services about the obligation to take account of the welfare of a child born as a result of ART (including the child's need for a father) and the welfare of any child who may be affected by the birth.⁶⁷

2.40 These provisions give effect to the Warnock Committee's⁶⁸ conclusion that: 'we believe as a general rule, it is better for children to be born into a two-parent family, with both father and mother'.⁶⁹

2.41 This aspect of the policy reflected in section 13(5) has attracted comment. The current chairperson of the Authority has drawn attention to the possibility of discrimination against single women and lesbians who want to have children using assisted conception techniques. Speaking at the Authority's annual conference, she said she thought the welfare provisions of the HFEA should be brought into line with the needs of modern society:

'It is absolutely clear if you think about the changes in society and the different ways that families can be constituted that it is anachronistic for the law to include the statement about a child's need for a father'.⁷⁰

embryos in vitro, keeping embryos, using gametes, practices designed to ensure that embryos are in a suitable condition, placing any embryo in a woman, and such other practices as are permitted under the regulations: para 1 sch 2.

66 *Human Fertilisation and Embryology Act 1990* (UK) s 25(1).

67 *Human Fertilisation and Embryology Act 1990* (UK) s 25(2). This directive is reflected in the Code of Practice Part 3: 'Welfare of the Child and the Assessment of those Seeking Treatment'.

68 The Committee was convened by the UK Government shortly after the first IVF baby was born in 1978. Its purpose was to consider recent and potential developments in medicine and science related to human fertilisation and embryology; to consider what policies and safeguards should be applied, including consideration of the social, ethical and legal implications of these developments; and to make recommendations: Mary Warnock, *Report of the Committee of Inquiry into Human Fertilisation and Embryology* (1984) (London: Department of Health and Social Security). (The Warnock Report).

69 The Warnock Report para 2.11.

70 Suzi Leather, Human Fertilisation and Embryology Authority: Annual Conference 2004 as reported in 'IVF 'father figure' law attacked' *BBC News: UK Edition*, (United Kingdom) 21 January 2004 <<http://news.bbc.co.uk/1/hi/health/3416055.stm>> at 30 May 2004.

Instead, she posited that women should be assessed on their medical and social circumstances. This comment, however, identifies another problematic feature of the subsection. It envisages an assessment being made of the prospective parents' aptitude for parenthood. Moreover, it seems to be assumed that the doctors who control access to ART will make this assessment. Jackson has observed:

[D]octors are manifestly not well positioned to make complex judgments about whether a couple will prove to be competent parents. Doctors are not trained to be proficient judges of future parenting ability, and unless we give infertility clinics access to more detailed information about potential patients' backgrounds, personalities, previous relationships etc, then we are expecting them to make complex assessments with wholly inadequate knowledge. Either we do require serious and thorough consideration of a person's aptitude for parenthood, involving full investigation of their circumstances, or we do not.⁷¹

The analysis concludes with a warning of the danger that the assessments will be 'perfunctory and at times ill-judged.'⁷² Section 13(5) is currently being reviewed.

PARENTAGE

2.42 Under the HFEA, a woman who gives birth to a child conceived as a result of ART is the mother,⁷³ and, if married and her husband consented to the procedure, her husband is the father.⁷⁴ If a woman is unmarried, but treatment services are provided for her and a man together, that man shall be treated as the father.⁷⁵

2.43 The HFEA is limited in the way it deals with a single woman, or a woman in a lesbian relationship, who accesses ART. In *Re R (A Child)*, Hale LJ stated:

71 E Jackson, *Regulating Reproduction: Law, Technology and Autonomy* 196.

72 Ibid 197.

73 'The woman who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs, and no other woman, is to be treated as the mother of the child': s 27(1).

74 *Human Fertilisation and Embryology Act 1990* (UK) s 28(2).

75 *Human Fertilisation and Embryology Act 1990* (UK) s 28(3).

While it is clearly in a child's interests to have a legal father if possible, the Act not only contemplates but [also] expressly provides for two situations in which the child will have no legal father. One is where anonymous sperm donation results in the birth of a child in circumstances where section 28(2) or (3) do not apply, for example to a single woman or a woman in a lesbian relationship. The other, perhaps more surprising, is where the sperm of a man, or any embryo the creation of which was brought about by his sperm, was used after his death... The Act does not on the face of it address paternity issues in situations where an unmarried woman accesses ART alone.⁷⁶

2.44 Thus, although the HFEA seems to reflect the belief that a two-parent family—consisting of a male and a female—is the ideal, it does not go so far as to impose paternity on the male sperm donor in situations where he does not consent to the woman's treatment or has no relationship with her. Jackson states:

Where a woman's husband does not consent to her treatment, or where an unmarried woman is not treated 'together' with a man, then the child will have no legal father.

Section 28 of the [Act] thus creates what Derek Morgan and Robert Lee have referred to as 'a new class of child, the (legally) fatherless child'...⁷⁷

2.45 The HFEA does not resolve the legal parentage issues that concern the second parent in a same-sex couple where one parent has conceived following ART. As in Canada and the United States, it seems the only alternative for same-sex couples is to pursue legal adoption.

AUSTRALIA

2.46 It is not within the legislative power of the Commonwealth of Australia to legislate on the subject of ART. Each state and territory is responsible for designing and implementing its own regulatory regime. Only three states—Victoria, Western Australia and South Australia—have done so. The majority of the other states and territories adhere to ethical guidelines formulated by bodies such as the National Health and Medical Research Council (NHMRC) and the Fertility Society of Australia.

76 [2003] EWCA Civ 182.

77 E Jackson, *Regulating Reproduction: Law, Technology and Autonomy* 240. Of course, children born out of wedlock were regarded as illegitimate and lacking a legal father until the status of illegitimacy was abolished. In Victoria this was done by the *Status of Children Act 1974*.

WESTERN AUSTRALIA

LEGISLATIVE FRAMEWORK

2.47 The *Human Reproductive Technology Act 1991* (WA) established the Western Australian Reproductive Technology Council. Normally, no artificial fertilisation procedure⁷⁸ may be carried out except pursuant to a licence.⁷⁹ Under the Act, the Commissioner of Health may issue practice licences.⁸⁰ Before a practice licence (or exemption) is granted, the Commissioner must refer an application to the Council.⁸¹ Another function of the Council is to publish a Code of Practice, which sets out guidelines, and establishes ethical standards required of licensees.⁸² No such code has yet been drafted; instead, some guidelines are contained in Directions formulated by the Commissioner.⁸³ The use of Directions allows greater flexibility than would be possible under a Code.

ELIGIBILITY

2.48 The Act includes a number of provisions regarding access to ART. The Act seeks to ensure that:

- artificial fertilisation procedures are carried out only for the benefit of persons eligible under the Act;
- the participants are adequately assessed and counselled;
- the welfare of the participants is properly promoted;
- the prospective welfare of any child to be born as a result of the procedure is properly taken into consideration; and
- equity, welfare and general standards prevailing in the community are taken into account in the practice of reproductive technology.⁸⁴

78 Artificial fertilisation procedure is defined by the Act as ‘any artificial insemination procedure, or in-vitro fertilisation procedure’: *Human Reproductive Technology Act 1991* (WA) s 3.

79 *Human Reproductive Technology Act 1991* (WA) s 6(1)(c); an exemption from the licence requirement may be granted in respect of artificial insemination: s 28. See also *Human Reproductive Technology (Licences and Registers) Regulations 1993*.

80 *Human Reproductive Technology Act 1991* (WA) s 27(3).

81 *Human Reproductive Technology Act 1991* (WA) s 27(1).

82 *Human Reproductive Technology Act 1991* (WA) s 14.

83 Human Reproductive Technology Directions.

84 *Human Reproductive Technology Act 1991* (WA) s 4.

2.49 Section 23 deals with access to one form of ART. This section provides that an in-vitro fertilisation procedure may be carried out where it would be likely to benefit:

- persons who, as a couple, are unable to conceive a child due to medical reasons;
- a woman who is unable to conceive a child due to medical reasons;⁸⁵ or
- a couple or a woman whose child would otherwise be likely to be affected by a genetic abnormality or disease.

In addition:

- effective consent must be given;
- persons seeking to be treated as a couple must be married or in a de facto relationship and must be of the opposite sex to each other;
- the reason for infertility must not be age or some other prescribed cause;⁸⁶ and
- consideration must be given to the welfare and interests of the participants and of any child likely to be born as a result of the procedure.

The Directions issued under the Act state ‘the Licensee must ensure that the medical practitioner treating the patient makes the final decision as to the eligibility of any participant on both legal and medical grounds’.⁸⁷

PARENTAGE

2.50 Parentage of children born as a result of an ‘artificial fertilisation procedure’⁸⁸ is determined under the *Artificial Conception Act 1985* (WA). The Act lays down a number of rules. Where a woman uses a donated ovum, she is the mother of any child born as a result of the pregnancy.⁸⁹ Where a married woman⁹⁰ undergoes, with the consent of her husband, an artificial fertilisation procedure, the husband is the father of any child born.⁹¹ Where a woman who is in a de facto relationship⁹² with another

85 ‘Medical reasons’ are interpreted as clinical infertility. This is because IVF would be employed only by women who cannot conceive using artificial insemination which is made available to all women, regardless of sexual orientation, marital status or fertility.

86 No other cause has yet been prescribed.

87 Human Reproductive Technology Act Directions (WA) s 7.

88 Defined in s 3 of the *Human Reproductive Technology Act 1991* (WA), as any artificial insemination procedure or in-vitro fertilisation procedure.

89 *Artificial Conception Act 1985* (WA) s 5.

90 A reference to a married woman includes a reference to a woman in a de facto relationship: s 3(1).

91 *Artificial Conception Act 1985* (WA) s 6(1)(a), (b).

92 Under s 13A(1) of the *Interpretation Act 1984* (WA) a reference in any law to a de facto relationship is construed as a reference to a relationship (other than a legal marriage) between two persons who live

woman undergoes, with the consent of her de facto partner, an artificial fertilisation procedure, the de facto partner of the pregnant woman is conclusively presumed to be a parent of the unborn child and is a parent of any child born as a result of the pregnancy.⁹³ Where a woman becomes pregnant in consequence of an artificial fertilisation procedure using a donated ovum, the donor is not the mother of the child; and when donated sperm is used, the donor is presumed not to have caused the pregnancy and is not the father of the child.⁹⁴

2.51 Western Australia's Registry of Births, Deaths and Marriages allows for registration of a parent other than a 'mother' and/or 'father' on the birth documents of the child. The birth registration form provides same-sex couples with the option of describing themselves as 'mother' and 'parent'; 'mother' and 'mother'; or 'parent' and 'parent'.⁹⁵ Donors are not recorded on the birth certificate, as they are not legally recognised as parents under the Artificial Conception Act.

SOUTH AUSTRALIA

LEGISLATIVE FRAMEWORK

2.52 The South Australian Council on Reproductive Technology is established under the *Reproductive Technology (Clinical Practices) Act 1988* (SA). The Act empowers the Council to formulate a code of ethical practice to govern the use of artificial fertilisation procedures.⁹⁶ This code is set out as a schedule to the *Reproductive Technology (Code of Ethical Clinical Practice) Regulations 1995*. In general, a person may not carry out an artificial fertilisation procedure except under a licence granted by

together in a marriage-like relationship. Section 13A (3)(a) states that 'it does not matter whether the persons are different sexes or the same sex'.

93 *Artificial Conception Act 1985* (WA) s 6A(1)(a), (b). This section refers to 'an artificial fertilisation procedure', a term that includes both an artificial insemination procedure and an in-vitro fertilisation procedure. It should be noted that under s 23 of the *Human Reproductive Technology Act 1991*, a woman in a same-sex relationship who wishes to undergo in-vitro fertilisation, would have to be treated as 'a woman who is unable to conceive a child due to medical reasons' (s23(a)(ia)), rather than as a member of a couple (the Act provides that persons seeking to be treated as members of a couple be married or in a de facto relationship and of the opposite sex: s23(c)(i), (ii)). Nonetheless, provided proper consent (pursuant to Part 3.4 of the *Human Reproductive Technology Act 1991* Directions) has been given by both the woman and her same-sex partner, the partner will conclusively be presumed to be the parent of any resulting child.

94 *Artificial Conception Act 1985* (WA) s 7.

95 See Registry of Births, Deaths & Marriages—Western Australia, 'Birth registration form & application for birth certificate', www.justice.wa.gov.au/portal/server.pt at 16 August 2004.

96 'Artificial fertilisation procedure' means any medical procedure directed at fertilisation of a human ovum by artificial means and includes an in-vitro fertilisation procedure: *Reproductive Technology (Clinical Practices) Act 1988* s 3.

the Minister.⁹⁷ A licence is not required in respect of artificial insemination if a registered medical practitioner who has given an undertaking to observe the code of ethical practice carries it out, or if it is carried out gratuitously.⁹⁸

ELIGIBILITY

2.53 The legislation indicates that licensees may provide artificial fertilisation procedures only for the benefit of married couples in the following circumstances: the husband or wife (or both) appear to be infertile, or there appears to be a risk that a genetic defect would be transmitted to a child conceived naturally.⁹⁹ In 1996 the Supreme Court of South Australia found that the restriction of access to treatment on the basis of marital status contravened the *Sex Discrimination Act 1984* (Cth).¹⁰⁰ Thus single women and couples who do not meet the Act's criterion as to marital status may now access treatment. Such people must meet all other eligibility criteria—they therefore must be infertile,¹⁰¹ or there must appear to be a risk that a genetic defect would be transmitted to a child conceived naturally.¹⁰²

2.54 In recognising that lesbian women may have an interest in seeking access to reproductive technology the South Australian Council of Reproductive Technology states:

if a lesbian woman is medically infertile, she would be eligible for treatment the same as any other infertile woman. Lesbian woman who are fertile [do not] require invasive treatments like IVF. They need only donor conception treatment using donated sperm. They can organise this in their own homes or through a medical practitioner registered to provide such services.¹⁰³

2.55 When an artificial fertilisation procedure is carried out by a licensed medical practitioner, the code of ethical practice stipulates that the licensee must be furnished with a statutory declaration from the patient and partner (if any) that neither has been

97 *Reproductive Technology (Clinical Practices) Act 1988* (SA) s 13(1).

98 *Reproductive Technology (Clinical Practices) Act 1988* (SA) s 13(7).

99 *Reproductive Technology (Clinical Practices) Act 1988* (SA) s 13(2).

100 *Pearce v South Australian Health Commission* (1996) 66 SASR 486.

101 The South Australia Council on Reproductive Technology has determined 'the Act intends treatment to be offered in cases of medical infertility (rather than social infertility) as described by the World Health Organisation: 12 months of unprotected heterosexual intercourse with no resulting pregnancy': SA Council on Reproductive Technology, *Eligibility fact sheet: Reproductive technology legislation and regulation in SA*, <www.dh.sa.gov.au/reproductive-technology/fact%20sheets.asp> at 11 August 2004.

102 *Reproductive Technology (Clinical Practices) Act 1988* (SA) s 13(2).

103 SA Council on Reproductive Technology, *Eligibility fact sheet: Reproductive technology legislation and regulation in SA* <www.dh.sa.gov.au/reproductive-technology/fact%20sheets.asp> at 11 August 2004.

found guilty of a sexual offence involving a child or of a violent offence, and that neither has had a child permanently removed from their guardianship.¹⁰⁴ Information must also be provided by a medical practitioner indicating that neither the patient nor her partner (if any) is suffering from any illness, disease or disability that might interfere with their ability to care for the child.¹⁰⁵ In deciding whether to make infertility treatment available, a licensee must also ‘treat the welfare of any child that may be born in consequence of the treatment as the paramount consideration’.¹⁰⁶ The code also makes it clear that the licensee is free to refuse to give infertility treatment to a person on ‘any reasonable ground’.¹⁰⁷

PARENTAGE

2.56 Parentage of children born as a result of a ‘fertilisation procedure’¹⁰⁸ is determined pursuant to the *Family Relationships Act 1975* (SA). The Act provides that a woman who gives birth to a child is the mother of the child notwithstanding that the child was conceived by the fertilisation of an ovum taken from some other woman.¹⁰⁹ Where a married woman¹¹⁰ undergoes, with the consent of her husband, an artificial fertilisation procedure, the husband is the father of any child born.¹¹¹ Where a woman becomes pregnant in consequence of a fertilisation procedure using donated ova or sperm, the donor is not a parent of the resulting child.¹¹² Unlike its Western Australian counterpart, the Act does not include a provision for parentage applying to same-sex couples.

THE NORTHERN TERRITORY

2.57 No specific reproductive technology legislation exists in the Northern Territory, but reproductive medicine services in the territory are provided by South

104 *Reproductive Technology (Code of Ethical Clinical Practice) Regulations 1995* clause 11(c).

105 *Reproductive Technology (Code of Ethical Clinical Practice) Regulations 1995* clause 11(b).

106 *Reproductive Technology (Code of Ethical Clinical Practice) Regulations 1995* clause 13.

107 *Reproductive Technology (Code of Ethical Clinical Practice) Regulations 1995* clause 14.

108 A ‘fertilisation procedure’ means ‘artificial insemination; the procedure of fertilising a human ovum outside the body and transferring the fertilised ovum into the body; or the procedure of transferring an unfertilised human ovum into the body for the purpose of fertilisation within the body’: *Family Relationships Act 1975* (SA) s 10a(1).

109 *Family Relationships Act 1975* (SA) s 10c.

110 A ‘married woman’ includes a woman who is living with a man as his wife on a genuine domestic basis: s 10a(1).

111 *Family Relationships Act 1975* (SA) s 10d(a), (b).

112 *Family Relationships Act 1975* (SA) s 10e.

Australian clinicians operating under guidelines consistent with the South Australian legislation.

2.58 The Department of Health requires its clinics to adhere to South Australian legislation but with some minor changes. For example, the South Australian legislation complies with the *Sex Discrimination Act 1984* (Cth) and allows access to infertility treatments for all infertile women, but the Northern Territory *Anti-Discrimination Act 1992* provisions preventing discrimination in relation to services does not apply to the carrying out of an artificial fertilisation procedure.¹¹³ Thus, only married or heterosexual de facto couples can access infertility treatments.

THE AUSTRALIAN CAPITAL TERRITORY

2.59 There is no explicit regulation of access to ART in the Australian Capital Territory (ACT). Rather, the legislation concerning parentage embodies a series of presumptions arising if a woman undergoes a procedure as a result of which she becomes pregnant.¹¹⁴ The woman is conclusively presumed to be the mother of the resulting child. If another woman produced the ovum used in the procedure, the other woman is conclusively presumed not to be the child's mother. If the woman undergoes the procedure with the consent of her domestic partner, the partner is conclusively presumed to be a parent of the child. If a man other than the woman's domestic partner produced semen used in the procedure, the man who produced the semen is conclusively presumed not to be the father of the child. It should be noted that under section 169 of the *Legislation Act 2001* (ACT) a reference to a person's 'domestic partner' is a reference to someone who lives with a person in a domestic partnership and includes a reference to a person's spouse. The significance of this is that, when two women are in a same-sex relationship, and one of them gives birth as a result of ART, her partner is presumed to be a parent of the child.

2.60 The ACT's birth registration process allows for a person to be registered as a 'mother', 'father' or 'parent'.¹¹⁵ This enables same-sex couples to be recognised as parents on a child's birth documents.

113 *Anti-Discrimination Act 1992* (NT) s 4(8).

114 *Parentage Act 2004* (ACT) s 11.

115 'Parent' of a child means 'the child's mother; or the child's father; or someone else who is presumed under Part II of the *Parentage Act 2004*, to be the parent of a child': see generally ACT Government Registrar-General's Office, Birth Registration Statement.

NEW SOUTH WALES, TASMANIA AND QUEENSLAND

2.61 None of the other states or territories has legislation on ART. Instead, health professionals, clinics, and those generally practising in the area of reproductive therapy follow the NHMRC Ethical Guidelines on Assisted Reproductive Technology 1996¹¹⁶ and the Fertility Society of Australia's Reproductive Technology Accreditation Committee's Code of Practice.¹¹⁷ The guidelines encompass all aspects of the technologies, including accreditation and approval processes, counselling, research requirements, storage of human tissue, record keeping, complaints and appeals processes, and prohibited and unacceptable practices.

ELIGIBILITY

2.62 Even in the absence of specific legislation, there are circumstances in which the courts will scrutinise the way in which eligibility is determined. For example, *Jennifer Morgan v GK*¹¹⁸ provides an illustration of a medical practitioner denying access on the basis of marital status or sexual orientation. In this case, a medical practitioner had refused to provide ART to a lesbian. After proceedings before the Queensland Anti-Discrimination Tribunal, the Queensland Supreme Court, and Court of Appeal,¹¹⁹ the matter was remitted to the Anti-Discrimination Tribunal. There it was held that the doctor had acted reasonably in dealing with the woman and did not discriminate against her on the basis of her lesbian relationship. In the Tribunal's view, the doctor was properly engaged in the treatment of infertility and had denied the woman treatment, not because she was a lesbian, but because she was fertile. Commenting on this outcome, the Queensland Anti-Discrimination Commission stated that the decision was based on 'a very technical point' and left the door open to lesbian women 'to challenge the various bodies who define and implement policies and guidelines restricting these types of services'.¹²⁰

2.63 Evidence on doctors' practices in other states is anecdotal. The New South Wales Government website notes that '[w]hile donor insemination is legally available to all women through fertility clinics in NSW, not all fertility services provide access to

116 Currently being revised.

117 Code of Practice for Centres Using Assisted Reproductive Technology, April 2002.

118 [2001] QADT 10; (2001) EOC 93–154.

119 QFG v JM (1997) EOC 92–902; BC9705768; JM v QFG [1998] QCA 228; [2000] 1 Qd R 373; (2000) EOC 93–047; BC9804065.

120 Media release 23 May 2001.

lesbians or “single” women’.¹²¹ Such discrimination may be unlawful under NSW anti-discrimination law.¹²²

PARENTAGE

2.64 In those Australian jurisdictions where there are no statutes regulating ART, there are laws relating to the parentage of children conceived as a result of fertilisation procedures. The various Acts provide as follows:

- where a married woman or a woman in a de facto relationship becomes pregnant as a result of a fertilisation procedure she is presumed to be the mother and her husband, provided he consented to the procedure, is presumed to be the father;
- where a woman becomes pregnant by means of a fertilisation procedure using sperm obtained from a man who is not her husband, the donor is presumed not to be the father; or
- where a woman becomes pregnant by means of a fertilisation procedure using another woman’s ovum, the donor is presumed not to be the mother.¹²³

COMPARING THE VARIOUS MODELS

2.65 The foregoing review of the laws in the United States, Canada, the United Kingdom and Australia reveals differing answers to the question of how close legislative regulation of ART should be. Some approaches favour no legislative, or other form of, control. Others include prescriptive requirements embodied in legislation, a licensing system, codes or directions, broad guiding principles, or a combination of one or more of these options.

2.66 In the United States, a laissez-faire approach frequently prevails. While in many states the legislators have recognised that women regularly access ART, the statutes do not explicitly prescribe eligibility criteria. Instead, they confine themselves to dealing with the parentage of children born as a result of assisted reproduction. Nevertheless, controls may be implicit in the legislation. A number of the Acts reflect the assumption that ART will be available only to married couples. Others implicitly accept that unmarried women may access ART also. In addition, it may be assumed (or, in some states, prescribed) that artificial conception should occur only under the

121 <www.actsofpassion.nsw.gov.au/cpd/aop.nsf/pages/parenting> as at 21 July 2004.

122 *Anti-Discrimination Act 1977* (NSW) s 47.

123 See *Status of Children Act 1996* (NSW) s 14; *Status of Children Act 1978* (Qld) ss 15–17; *Status of Children Act 1974* (Tas) s 10C.

supervision of a medical practitioner. When this is so, the way is opened for a system of informal regulation on a case-by-case basis. Overall, however, the model offered by the United States legislation is one of minimal intervention. Underlying this model is the view that decisions as to the use of, and access to, ART should be left to the intending parents and those who advise them.

2.67 In Canada, the United Kingdom and Australia, the legislators have been more willing to impose controls on access to ART. There are variations in the way this has been done. The Australian Acts are most likely to include specific criteria on the basis of which ART services may lawfully be made available. The Victorian and South Australian Acts expressly sought to confine the use of ART to married couples, although this restriction has been held to contravene the *Sex Discrimination Act 1984* (Cth). In Victoria and South Australia a woman is not eligible to undergo a medically supervised ART procedure unless she is unable to conceive a child naturally or is likely to give birth to a child suffering from a genetic abnormality or disease. Western Australia allows access to artificial insemination by all women, but a woman must be unable to conceive for 'medical reasons' to access IVF. These are examples of legislatures spelling out requirements that must be satisfied by those wishing to access ART.

2.68 In addition to, or instead of, setting out requirements in the legislation, a licensing system may apply. This course has been taken not only in Victoria, Western Australia and South Australia, but also in the United Kingdom. The administration of a licensing system requires the creation of a statutory agency, such as the United Kingdom's Human Fertilisation and Embryology Authority or the Western Australian Reproductive Technology Council. A model of this kind requires doctors providing ART to work within a bureaucratic structure. In other Australian states without legislative provisions, the adherence to best practice guidelines and standards for infertility treatment as set by the NHMRC, and/or the Reproductive Technology Accreditation Committee, may achieve the same result.

2.69 The legislation may add another component to a framework of this kind. It can direct that a code of practice be formulated. The United Kingdom Act does this. The Human Fertilisation and Embryology Authority Code of Practice 1998 is extensive and detailed. It lays down guidelines on a wide variety of matters, including the number of embryos that may be transferred, techniques that may be employed to produce in-vitro embryos, the duty to inform prospective patients about success rates, the need to take account of the ages of potential patients, the setting of age limits for donors, the information to be given to donors, the obligation to offer counselling to donors, the child's right to access information about donors, and the hereditary conditions for which donated gametes should be screened.

2.70 The South Australian statute also makes provision for a code. The Western Australian Act achieves the same result by authorising the issuing of a code of practice and/or directions.

2.71 A less restrictive approach is for the legislation to include broad principles to which those providing ART must adhere. The Canadian Act offers an example. Its prohibition of discrimination based on sexual orientation or marital status directly addresses an issue that had to be resolved by the courts in Australia. Equally important is the Canadian Act's declaration of the principle that in all decisions relating to ART, priority be given to the health and wellbeing of the child. This policy is also reflected in the Victorian Act's guiding principles (it is identified as the most important in the list)¹²⁴ and in the Western Australian Act's statement of objects.¹²⁵ In addition, the latter Act requires that consideration of the welfare and interests of the child to be born as a result of ART is a factor to be taken into account in deciding whether the procedure should be carried out.¹²⁶

2.72 The United Kingdom has adopted a similar approach. Section 13(5) of the *Human Fertilisation and Embryology Act 1990* (UK) states that treatment services should not be provided to a woman 'unless account has been taken of the welfare of any child who may be born as a result of the treatment (including the need of that child for a father), and of any other child who may be affected by the birth'. As has been noted earlier in the chapter, Jackson has raised doubts about the capacity of treating doctors to assess prospective parents' aptitude for parenthood.

2.73 The central question emerging from this comparison of statutory models relates to the form of legislative regulation of ART. How specific should such legislation be? There are obvious dangers in legislation that is too restrictive. Yet there are also dangers in a system that allows those providing ART services to exercise discretion on a case-by-case basis. As Jackson has noted, control becomes 'invisible' if exercised in this way. In her view, 'clinical judgment is...extraordinarily resilient to legal scrutiny':

Clear statutory prohibition upon infertility treatment outside of the heterosexual nuclear family might seem obviously and unacceptably discriminatory. It is much more difficult to challenge discrimination when it is obscured by the interjection of the supposed neutrality and beneficence of the infertility doctor's discretion.¹²⁷

124 *Infertility Treatment Act 1995* (Vic) s 5.

125 *Human Reproductive Technology Act 1991* (WA) s 4.

126 *Human Reproductive Technology Act 1991* (WA) s 23.

127 E Jackson, *Regulating Reproduction: Law, Technology and Autonomy* 194.

2.74 It is not clear how this problem can be overcome. Licensing systems may allow close surveillance and regulation. They can be supplemented by codes and guidelines indicating how discretion should be exercised. These, in turn, can reflect statutory principles such as those forbidding discrimination on the basis of gender or marital status and the need to give priority to the wellbeing of the child who will be born as a result of ART.

Chapter 3

Surrogacy

3.1 Surrogacy is the practice by which a woman who is, or is to become, pregnant agrees permanently to surrender the child born of that pregnancy to another person or couple, with the intent that the other person or couple will be the parent or parents of the child. The woman who bears the child is known as the surrogate mother and the person or persons to whom the child is surrendered are known as the commissioning or intended parent or parents.

3.2 Surrogacy arrangements may be ‘altruistic’ (where the surrogate mother receives no payment or only the reimbursement of reasonable expenses) or ‘commercial’ (where the mother may be paid a fee).

3.3 Surrogacy may or may not require the use of ART. Some surrogacy arrangements involve the surrogate mother carrying a child that is her own genetic offspring. Such a child may be conceived by sexual intercourse, by the woman inseminating herself, or by medically supervised artificial insemination. In either case, the sperm of the commissioning father is usually used. Alternatively, the child may be the genetic offspring of other persons. In this case, ART must be employed—an embryo, created in vitro, is transferred to the surrogate mother’s uterus. This embryo will be created using eggs and sperm of the commissioning couple, or eggs provided by an egg donor, fertilised by the commissioning father.

3.4 The essential difference between the two types of surrogacy is that in the former the surrogate mother is biologically related to the child and in the latter she is not. An English commentator has described the former as ‘partial’ surrogacy and the latter as ‘full’ surrogacy.¹²⁸ In the United States, the terms ‘traditional surrogacy’ and ‘gestational surrogacy’ are used to distinguish between arrangements resulting in the birth of a child to whom the surrogate is biologically related and those in which there is no such relationship.

3.5 In its inquiry, the Victorian Law Reform Commission is required to focus on certain aspects of surrogacy which, because they involve the use of ART, are regulated by Victoria's *Infertility Treatment Act 1995*. In addition, the inquiry encompasses other matters relating to surrogacy. The Terms of Reference require the Commission to:

consider the meaning and efficacy of sections 8, 20 and 59 [of the Act] in relation to altruistic surrogacy, and clarification of the legal status of any child born of such an arrangement.

3.6 Section 8 prescribes who may undergo an artificial insemination or fertilisation procedure. Section 20 prescribes the circumstances in which these procedures may be employed.¹²⁹ Section 59 prohibits the making or receiving of a payment in relation to a surrogacy agreement.

3.7 Thus there are three issues to be considered:

- the eligibility criteria a surrogate mother, her partner (if any) and the commissioning parents need to meet in order to access ART;
- whether any form of payment or reward should be made to a surrogate mother and, in particular, whether she should receive reasonable medical and other expenses; and
- the legal parentage of children born following a surrogacy agreement.

3.8 This chapter compares Victoria's legislation on surrogacy with the statutes enacted in the United States, Canada, the United Kingdom and other parts of Australia. The comparison will be confined to the three issues of eligibility criteria, payment and parentage.

3.9 In the course of this discussion, attention will be given to the legality of surrogacy contracts and whether or not they are enforceable. These issues are relevant to the parentage of a child born after a surrogacy contract has been concluded. If the legality of the contract is recognised (and it is therefore enforceable), the parties' intentions will be realised and the commissioning or intended parents will assume the rights and responsibilities of parenthood. If, however, the contract is unenforceable, it must be determined whether the presumptions applying generally to parenthood (and particularly the presumption that a woman who gives birth to a child is the mother) will be displaced.

129 Sections 8 and 20 are discussed in Chapter 2, paragraphs 2.4–2.6.

VICTORIA

ELIGIBILITY

3.10 The provisions relating to ART procedures discussed in paragraphs 2.4 to 2.6, also apply to surrogacy treatments. The effect of section 8 is that a woman who is married (or in a heterosexual de facto relationship) and who intends to act as a surrogate may access ART only if she is ‘unlikely to become pregnant’ or likely to transmit a disease or genetic abnormality to a child. As has been noted in Chapter 2, the criterion that the woman must be ‘unlikely to become pregnant’ has, when applied to a single woman, been interpreted as indicating that she must be clinically infertile.¹³⁰

3.11 Section 20 can be interpreted as imposing a similar restriction. It can be argued that before a married woman wishing to act as a surrogate mother may employ ART involving the use of donated sperm and a donated ovum, she would have to be ‘unlikely to become pregnant’, or both she and her male partner would have to be likely to pass on a disease or genetic abnormality.¹³¹ This would prevent surrogacy in a situation in which a heterosexual couple wishes to have a child created from their own sperm and egg. If this conclusion is accepted, the circumstances in which a married woman may lawfully act as a surrogate mother are extremely limited. There will be very few situations in which a married woman and her partner will meet the statutory criteria.

PAYMENT

3.12 Under the Victorian Act a person must not make, give or receive (or agree to make, give or receive) a payment or reward in relation to or under a surrogacy agreement.¹³² Thus, commercial surrogacy is prohibited and it would be an offence to reimburse a surrogate mother for any expenses incurred in relation to her pregnancy.

130 Opinion of Gavan Griffith QC, 4 August 2000, cited in Victorian Law Reform Commission, *Assisted Reproductive Technology & Adoption: Should the Current Eligibility Criteria in Victoria be Changed?* (2004) xiv.

131 Opinion of Gavan Griffith QC, 16 May 2002, cited in Victorian Law Reform Commission, *Assisted Reproductive Technology & Adoption: Should the Current Eligibility Criteria in Victoria be Changed?* (2004) xxi.

132 *Infertility Treatment Act 1995* (Vic) s 59.

PARENTAGE

3.13 The parentage of a child born pursuant to a surrogacy agreement is not determined by the agreement between the parties,¹³³ but under the *Status of Children Act 1974* (Vic). This Act provides that when a married woman (or one in a de facto relationship) gives birth to a child conceived as a result of ART, her husband is presumed to be the father; any sperm or egg donor is presumed not to be a parent of the child.¹³⁴ Where a donor ovum is used to allow a married woman to conceive, she is presumed to be the mother.¹³⁵ The Act is silent as to whether an unmarried woman who conceives as a result of ART using a donated ovum is the child's mother.¹³⁶ When donor semen is used for the artificial insemination of an unmarried woman, or of a married woman without the consent of her husband, the donor 'has no rights and incurs no liabilities' in respect of the resulting child.¹³⁷

UNITED STATES

3.14 Numerous states have enacted laws dealing with surrogacy. There are great variations in the approaches adopted. Some Acts have provisions prohibiting surrogacy contracts or declaring them void or unenforceable. Others expressly authorise and regulate surrogacy agreements. Altruistic, but not commercial, arrangements may be permitted. Not all states distinguish between traditional and gestational surrogacy. In states where there is no relevant legislation, there may be case law on certain aspects of surrogacy, especially on the question of parentage.

ACTS PROHIBITING SURROGACY CONTRACTS OR DECLARING THEM UNENFORCEABLE

3.15 In Arizona, Michigan and the District of Columbia, the legislation expressly forbids surrogacy contracts—paid or unpaid.¹³⁸ In these jurisdictions it is an offence to enter into such a contract. The laws in states such as New Mexico, Utah and Washington prohibit payment to a woman for acting as a surrogate. In these states, a

133 Because the agreement is void: *Infertility Treatment Act 1995* (Vic) s 61.

134 *Status of Children Act 1974* (Vic) ss 10C–10E.

135 *Status of Children Act 1974* (Vic) s 10E(2)(a).

136 This may be because it was not anticipated that a single woman would be able to access ART and/or to conceive a child using a donated ovum particularly as the *Infertility Treatment Act 1995* restricted treatment to married women. However, it also creates uncertainty if the woman becomes pregnant from the use of donated ova outside of Victoria.

137 *Status of Children Act 1974* (Vic) s 10F(1).

138 Ariz Rev Stat § 25.218/A; MCLS § 722.857 and 722–859; DC Code Ann § 16:402.

person entering into a *commercial* surrogacy arrangement will be treated as having committed a criminal misdemeanor.¹³⁹ More common are laws which provide that a surrogacy agreement is 'null', 'void', 'void and unenforceable', or 'unenforceable'. In some jurisdictions, such a provision applies to any surrogacy agreement (altruistic or commercial),¹⁴⁰ while in others it applies only to agreements involving payment.¹⁴¹

3.16 There are differences in the way proscribed payments are described. For example, the law in Nebraska declares void and unenforceable a surrogate parenthood contract 'by which a woman is to be *compensated* for bearing a child of a man who is not her husband'.¹⁴² Not only does this provision leave open the possibility of a woman entering into an altruistic arrangement, but it also raises questions about the meaning of compensation. In other jurisdictions, different language is used. The Louisiana Act makes null, void and unenforceable any surrogacy agreement 'for valuable consideration'.¹⁴³ The New Mexico Act prohibits 'payment to a woman for conceiving and carrying a child',¹⁴⁴ while Utah law punishes any person who is a party to a surrogacy contract 'for profit or gain'.¹⁴⁵ The problem with these different formulations is that they give rise to uncertainty as to whether *any* form of payment to a surrogate mother is unacceptable (including reimbursement of medical expenses and lost wages), or whether it is only the payment of a fee which should be discouraged or disallowed. On this matter the law in New York is clearer: although commercial surrogacy is prohibited, payments for reasonable and actual medical fees and hospital expenses for artificial insemination or in-vitro fertilisation services incurred by the mother in connection with the birth of the child are permitted.¹⁴⁶

3.17 When the legislation prohibits surrogacy arrangements, or makes surrogacy contracts unenforceable, it may still address the question of the parentage of the resulting child. In Arizona, North Dakota and Utah, for example, the surrogate is the legal mother and, if she is married, her husband is the legal father.¹⁴⁷ In Nebraska, the *biological father* of a child born under a surrogacy parenthood contract has all the

139 NMSA § 32A.5.34F; Utah Code Ann § 76.7.204; RCW § 26.26.230.

140 For example, Indiana (Burns Ind Code Ann § 31.20.1.2); New York (NY CLS Dom Rel § 122); North Dakota (ND Cent Code § 14.18.05).

141 For example, Nebraska (Neb Rev Stat § 25.21.200); Louisiana (La Rev Stat § 9:2713).

142 Neb Rev Stat § 25.21.200.

143 La Rev Stat § 9.2713 B.

144 NMSA § 32A.5.34.

145 Utah Code Ann § 76.7.204(1).

146 NY Dom Rel Law (Consol) ch 14, Article 8, § 123(b).

147 Ariz Rev Stat § 25.218:B and C; ND Cent Code § 14.18.05; Utah Code Ann 76.7.204.

rights and obligations with respect to such a child.¹⁴⁸ In New York, legal parentage is determined by a court. Regard must be had ‘to the circumstances of the case’,¹⁴⁹ and the court is directed ‘not to consider the birth mother’s participation in a surrogate parenting contract as adverse to her parental rights, status or obligation’.¹⁵⁰

ACTS AUTHORISING AND REGULATING SURROGACY CONTRACTS

3.18 In contrast with the jurisdictions in which surrogacy agreements are prohibited or discouraged, there are several states in which the legislation authorises and regulates the making of these agreements. For the purposes of this chapter, the most important of these laws are the New Hampshire and Virginia Acts¹⁵¹ (which apply to traditional and gestational surrogacy) and the Florida and Texas statutes¹⁵² (which apply only to gestational surrogacy). These Acts offer interesting models for the regulation of surrogacy arrangements, particularly with regard to the issues of eligibility criteria, payment to the surrogate mother and the parentage of the child she bears.

TRADITIONAL AND GESTATIONAL AGREEMENTS

3.19 Under New Hampshire law, a surrogacy contract¹⁵³ must be signed by the intended parents (defined as persons who are married to each other),¹⁵⁴ the surrogate and, if she is married, the surrogate’s husband. The contract must provide that the surrogate will consent to surrendering the custody of the child or accept the obligation of parenthood if she elects to keep the child. Similarly, if she is married, her husband must consent to the surrender of custody or to an acceptance of the obligation of parenthood. The contract must state that the surrogate has the right to keep the child if she elects to do so within a specified time (normally within 72 hours after the birth). The consent of the intended parents to accept the obligation of parenthood—unless the surrogate gives notice of her intention to keep the child—must also be recorded. Provided the above requirements are met, the intended parents will be the legal parents of the child. Any payment to the surrogate is to be limited to reimbursement

148 Neb Rev Stat § 25–21,200.

149 NY (Dom Rel) CLS, ch14, Article 8 § 124(2).

150 NY (Dom Rel) CLS, ch 14, Article 8 § 124(1).

151 NH Rev Stat Ann § 168.B:1; Va Code Ann § 20.156–165.

152 Fla Stat § 742.15; Texas Stat. Title 5 § 160.754.

153 A surrogacy contract is one providing for a ‘surrogacy arrangement’, defined as ‘any arrangement by which a woman agrees to be impregnated using either the intended father’s sperm, the intended mother’s egg, or their pre-embryo with the intent that the intended parents are to become the parents of the resulting child after the child’s birth’: NH Rev Stat Ann § 168–B:1 XII and XII.

154 NH Rev Stat Ann § 168–B:1 VII.

of pregnancy-related medical expenses; actual lost wages; health, disability and life insurance during the term of the pregnancy; and legal and counselling fees.¹⁵⁵

3.20 In Virginia, a woman and her husband (if she is married) and the intended parents¹⁵⁶ may enter into a surrogacy contract under which the woman agrees to relinquish her rights and duties as a parent of a child conceived through assisted conception and the intended parents may become the legal parents.¹⁵⁷ The Circuit Court must approve the agreement *before* the procedure is performed. The court must appoint a guardian *ad litem*¹⁵⁸ to represent the interests of the future child and counsel to represent the surrogate. Before making an order approving the surrogacy contract and authorising the performance of assisted conception, the court must also make a number of findings, including the following:

- a home study has been conducted of the intended parents, the surrogate and her husband;
- the intended parents, the surrogate and her husband meet the standards of fitness applicable to adoptive parents;
- all the parties have voluntarily entered into the contract and understand its terms;
- the agreement contains adequate provisions to guarantee the payment of reasonable medical and ancillary costs;¹⁵⁹
- the surrogate is married and has had at least one pregnancy and has experienced at least one live birth, and bearing another child does not pose an unreasonable risk to her physical or mental health or that of the resulting child;

155 NH Rev Stat Ann § 168–B:25.

156 ‘Intended parents’ means ‘a man and a woman, married to each other, who enter into an agreement with a surrogate...’: Va Code Ann § 20–156.

157 Va Code Ann § 20–159A. A surrogacy contract means an agreement in which the surrogate agrees to be impregnated through the use of assisted conception; ‘assisted conception’ means ‘a pregnancy resulting from any intervening medical technology, whether in vivo or in vitro, which completely or partially replaces sexual intercourse as the means of conception’: § 20–156.

158 Lat. ‘a guardian at law’. The guardian ad litem is an advocate for a child whose welfare is a matter of concern for the court.

159 ‘Reasonable medical and ancillary costs’ means ‘the costs of the performance of assisted conception, the costs of prenatal maternal health care, the costs of maternal and child health care for a reasonable post partum period, the reasonable costs for medications and maternity clothes, and any additional and reasonable costs for housing and other living expenses attributable to the pregnancy’: Va Code Ann 20–156.

- prior to signing the surrogacy contract the intended parents, the surrogate and her husband have submitted to physical examinations and psychological evaluations;
- the intended mother is infertile, is unable to bear a child, or is unable to do so without unreasonable risk to the unborn child or to the physical or mental health of the intended mother or the child;
- at least one of the intended parents is expected to be the genetic parent of the resulting child;
- all parties have received counselling concerning the effects of surrogacy; and
- the agreement would not be substantially detrimental to the interests of any of the affected persons.¹⁶⁰

3.21 If the procedures laid down with respect to court approval of a surrogacy contract have been followed, the court must, after receiving notice of the birth of the child and making a finding that at least one of the intended parents is a genetic parent, order the issuing of a new birth certificate naming the intended parents as the parents of the child. If evidence cannot be produced that at least one of the intended parents is a genetic parent of the child, the court may not make such an order, and the surrogate and her husband will be the parents of the child.¹⁶¹

3.22 Court approved agreements may be terminated by filing a notice of termination with the court subsequent to the order but before the surrogate becomes pregnant,¹⁶² or within 180 days after the last performance of any assisted conception if the surrogate parent is also a genetic parent of the child.¹⁶³ Unless otherwise provided in the contract as approved, the surrogate incurs no liability to the intended parents for exercising her rights of termination.¹⁶⁴

3.23 A non court-approved contract is enforceable provided the contract is in writing, signed by all parties, and the surrogate, her husband (if she is married) and the intended parents are parties to the contract. The Act provides that upon the expiration of 25 days following the birth of the child, the surrogate may relinquish her parental rights to the intended parents, provided at least one of the intended parents is the genetic parent of the child, by signing a surrogate consent and report form. Upon the

160 Va Code Ann § 20–159B and § 20–160.

161 Va Code Ann § 20–158D and § 20–160D.

162 Va Code Ann § 20–161(A).

163 Va Code Ann § 20–161(B).

164 Va Code Ann § 20–161.

filing of the surrogate consent and report form and supporting documents, a new birth certificate is issued naming the intended parents as the parents of the child.¹⁶⁵

3.24 If a surrogacy agreement has not received prior court approval, parentage of any resulting child is determined as follows. The gestational mother is the child's mother unless the intended mother is a genetic parent, in which case the intended mother is the mother.¹⁶⁶ If either of the intended parents is a genetic parent of the resulting child, the intended father is the child's father.¹⁶⁷ However, if the surrogate is married, her husband is a party to the contract, and the surrogate exercises her right to retain custody of, and parental rights to, the child, then the surrogate and her husband are the parents.¹⁶⁸ The Act also provides that the intended parents will be the parents of any resulting child only when the surrogate relinquishes her parental rights and a new birth certificate is issued.¹⁶⁹ If neither of the intended parents is a genetic parent of the child, the surrogate is the mother and her husband is the child's father if he is a party to the contract and the intended parents may obtain parental rights only through adoption.¹⁷⁰

3.25 It is not clear how the parentage provisions discussed in paragraph 3.24 relate to the provisions requiring the surrogate to relinquish her parental rights. A possible reading is that if the surrogate is unmarried, and either of the intended parents is a genetic parent of the resulting child, the provision requiring relinquishment of parental rights does not apply.

3.26 In a contract not approved by a court, a provision providing for compensation to be paid to the surrogate is void and unenforceable.¹⁷¹ Under any contract that does not allocate responsibility for reasonable medical and ancillary costs, in the event of termination of pregnancy, termination of the contract, or breach of the contract by either party:

- if all parties agree to the termination of the contract the intending parents are responsible for all reasonable medical and ancillary costs for a period of six weeks following the termination;

165 Va Code Ann § 20-162A 1-4.

166 Va Code Ann § 20-158E(1).

167 Va Code Ann § 20-158E(2).

168 Va Code Ann § 20-158E(2).

169 Va Code Ann § 20-162B(1).

170 Va Code Ann § 20-158E(3).

171 Va Code Ann § 20-162A.

- if the surrogate voluntarily terminates the contract during pregnancy, without the consent of the intended parents, the intended parents are responsible for half of the reasonable medical and ancillary costs incurred prior to the termination; and
- if after the birth of any resulting child, the surrogate fails to relinquish parental rights to the intended parents, the intended parents are responsible for half of the reasonable medical and ancillary costs incurred prior to the birth.¹⁷²

This applies whether or not the contract is court approved.

3.27 The Act also proscribes surrogacy brokering. It is unlawful to accept compensation for recruiting or procuring surrogates. Such conduct is not only a criminal offence, but it also makes a person who acts as a surrogate broker liable to pay damages to the surrogate and the intended parents.¹⁷³

GESTATIONAL AGREEMENTS

3.28 In Florida, a woman who agrees to engage in ‘gestational surrogacy’¹⁷⁴ must enter into a binding and enforceable ‘gestational surrogacy contract’ with the commissioning couple. A contract is not binding and enforceable unless the surrogate is 18 years of age or older and the commissioning couple are legally married¹⁷⁵ and are both 18 years of age or older. Before a contract is made, it must be established that the commissioning mother cannot physically gestate a pregnancy to term, or the gestation will cause a risk to the commissioning mother, or the gestation will cause a risk to the health of the foetus.¹⁷⁶

3.29 The contract must include the following provisions. The commissioning couple must agree that the gestational surrogate will be the sole source of consent with respect to clinical intervention and management of the pregnancy. The gestational surrogate must agree to submit to reasonable medical evaluation and treatment and to adhere to reasonable medical instructions about her prenatal health. Where either member of the commissioning couple is genetically related to the child, the gestational

172 Va Code Ann § 20–162(C).

173 Va Code Ann § 20–165.

174 ‘Gestational surrogacy’ means ‘a state that results from a process in which a commissioning couple’s eggs or sperm, or both, are mixed in vitro and the resulting pre-embryo is implanted within another woman’s body’: Fla Stat § 742.13.

175 The reference to the need for the commissioning couple to be legally married was reinforced in Florida when the Florida Court of Appeal noted that the right to enter into surrogate–parenting agreements is reserved for married couples only and is one of the many rights not given to domestic partners: *Lowe v Broward County*, 766 So 2d 1199 (Fla Dist Ct App 2000).

176 Fla Stat § 742.15(2).

surrogate agrees to relinquish her parental rights and the commissioning couple agrees to accept custody of, and assume full parental rights and responsibilities for, the child immediately upon birth and regardless of any impairment of the child. However, if it is determined that neither member of the commissioning couple is a genetic parent of the child, the surrogate must agree to assume parental rights and responsibilities for the child.¹⁷⁷ The commissioning couple may agree to pay only reasonable living, legal, medical, psychological and psychiatric expenses of the gestational surrogate directly related to the duration of the pregnancy and the pre and postnatal periods.¹⁷⁸ Finally, the commissioning couple must within three days after the birth of the child petition a court for an expedited affirmation of parental status.¹⁷⁹ Provided at least one of the commissioning parents is genetically related to the child, the couple is presumed to be the natural parent of the child.¹⁸⁰

3.30 Texas has adopted the Uniform Parentage Act 2000. Section 160.754 of the Act authorises a prospective gestational mother, her husband, if she is married, each donor and the intended parents¹⁸¹ to enter into a written gestational agreement.¹⁸² Such an agreement does not apply to the birth of a child conceived by sexual intercourse. The agreement must require that the eggs used be retrieved from an intended parent or donor. The gestational mother's eggs are not used in the procedure. The agreement must be entered into before the fourteenth day preceding the transfer of the eggs, sperm or embryos to the surrogate. The parties may take court proceedings to validate the agreement.¹⁸³ The court may validate it only if it finds:

- the intended mother is unable to carry a pregnancy to term and give birth without unreasonable risk to her physical or mental health or to the health of the child;

177 This would appear to be so even if the surrogate mother had used donor gametes, provided such gametes were not from one or both of the commissioning couple.

178 Fla Stat § 742.15(4).

179 Fla Stat § 742.16(1).

180 Fla Stat § 742.16(7).

181 'Intended parents' mean 'individuals who enter into an agreement providing that the individuals will be the parents of a child born to a gestational mother by means of assisted reproduction, regardless of whether either individual has a genetic relationship with the child': Uniform Parentage Act § 160.102(9). To be a party to a gestational agreement under the Act, however, the intended parents must be married to each other: § 160.754(b).

182 In Texas, agreements that do not qualify as 'gestational agreements' are unenforceable but not illegal. Under these agreements, the relationship between the parties and the child will be determined under general Texas family law.

183 The Act does not stipulate when such proceedings must be taken but it may be inferred that this is to occur prior to the birth of the child.

- unless waived by the court, the intended parents have undergone a home study and meet the standards of fitness applicable to adoptive parents;
- the gestational mother has had at least one previous pregnancy and delivery and carrying another pregnancy to term and giving birth would not pose an unreasonable risk to the child's health or to her physical or mental health; and
- the parties have adequately determined which party is responsible for all reasonable health-care expenses associated with the pregnancy.

If the court is satisfied as to all the statutory requirements, it may make an order validating the agreement and declaring that the intended parents will be the parents of a child born under the agreement.¹⁸⁴

3.31 Several aspects of the United States legislation regulating surrogacy warrant comment. The statutes in New Hampshire, Virginia, Florida and Texas stipulate that only heterosexual married couples may enter into surrogacy contracts. This is done either by the relevant provisions referring to contracts to which a married couple are parties, or by defining the term 'intended parents' as meaning a man and a woman married to each other.

3.32 In Virginia, Florida and Texas, a number of requirements must be met before a surrogacy agreement will attract the protections conferred by the statutes. The Virginian and Texan Acts provide a detailed list of the conditions that must be satisfied before a court may approve a surrogacy contract. These relate to the suitability of the intended parents and to the situation and obstetric history of the woman who is to act as the surrogate mother. Another restriction in these states is the requirement that the intended mother be unable to bear a child, or unable to do so without unreasonable risk to herself or the child. A similar criterion is included in the Florida Act.

The Virginian and Florida statutes indicate that at least one of the intended parents should be the genetic parent of the resulting child. Rather than making this explicit, the Florida provision assumes that the gestational mother will accept parental rights and responsibilities for the child if neither member of the commissioning couple is a genetic parent. The Texan law states that the eggs used be retrieved from an intended parent or donor and that the gestational mother's eggs are not used in the procedure. The Florida Act sets minimum age limits for the parties to a surrogacy contract.

CANADA

3.33 Canada's *Assisted Human Reproduction Act 2004* does not explicitly regulate who may or may not enter into a surrogacy arrangement. It forbids the payment of consideration to a woman to be a surrogate mother.¹⁸⁵ This is consistent with the principle, set out in section 2(f) that 'trade in the reproductive capabilities of women...and the exploitation of...women for commercial ends raise health and ethical concerns that justify their prohibition'. In addition, the Act forbids the payment to another person to arrange the services of a surrogate mother.¹⁸⁶ It is an offence to counsel or induce a female believed to be under 21 years of age to become a surrogate or to perform any medical procedure to assist such a person to become a surrogate.¹⁸⁷

3.34 A surrogate mother may be reimbursed for expenditure incurred in relation to her surrogacy if a receipt is provided. She may also be reimbursed for loss of work-related income incurred during her pregnancy provided certain conditions are fulfilled.¹⁸⁸

3.35 There have been a number of provincial judgments that have ordered that commissioning parents be recorded on the birth certificate as the legal parents of the child born as a result of gestational surrogacy arrangements.¹⁸⁹ In addition, a number of provinces provide that any person having an interest may apply to a court for a declaratory order of parentage.¹⁹⁰

UNITED KINGDOM

3.36 In the United Kingdom, the law on surrogacy is found in the *Surrogacy Arrangements Act 1985* (SAA) and the *Human Fertilisation and Embryology Act 1990* (HFEA).

3.37 The SAA applies to surrogacy arrangements whether or not they are lawful and whether or not they are enforceable.¹⁹¹ No surrogacy arrangement is enforceable by or

185 *Assisted Human Reproduction Act 2004* (Can) s 6(1).

186 *Assisted Human Reproduction Act 2004* (Can) s 6(2).

187 *Assisted Human Reproduction Act 2004* (Can) s 6(4).

188 *Assisted Human Reproduction Act 2004* (Can) s 12.

189 *Rypkema v British Columbia* [2003] BCJ No 2721; 2003 BCSC 1784; *JR v LH* [2002] OJ No 3998.

190 For example, *The Children's Law Act* (Saskatchewan) ss 40–59; *The Family Maintenance Act* (Manitoba) s 19(1); *The Children's Law Act* (Newfoundland) ss 3(1), 6, 7; Revised Statutes of Yukon, ch 31, *Children's Act* ss 8–9; *Consolidation of Children's Law Act* (North West Territories) Parts 1 and 2.

191 *Surrogacy Arrangements Act 1985* (UK) s 1(9).

against any of the persons making it.¹⁹² The Act defines ‘surrogate mother’ as a woman who carries a child under an arrangement made *before* she became pregnant; this arrangement is one made with a view to the child being handed over to another person or persons who will (so far as practicable) exercise parental rights.¹⁹³

3.38 Section 2 (1) deals with the subject of payment. It states that no person shall on a commercial basis initiate or take part in any negotiations with a view to making a surrogacy arrangement.¹⁹⁴ A person does an act on a commercial basis if any payment is, or is to be, received. The prohibition does not, however, apply to the potential surrogate mother or to an intended parent. The Act reinforces this by stating that ‘payment’ does not include payment to or for the benefit of a surrogate mother or prospective surrogate mother.¹⁹⁵

3.39 Although the SAA does not make explicit what kind of ‘payment’ may be made to a surrogate or prospective surrogate mother, some regulation does occur, since any payment received by her will be assessed when parental or adoption orders are sought.¹⁹⁶ As noted in a 1997 review of arrangements for payments and regulations on surrogacy, ‘[W]hen a commissioning couple apply for a parental order, or to adopt the child, it is in theory a bar to the grant of such an order that the surrogate mother has been paid more than reasonable expenses’.¹⁹⁷ This is a reference to the view taken by the courts that no money other than ‘reasonable expenses’ should be paid to a surrogate.¹⁹⁸ As the issue of what is ‘reasonable’ is decided on a case-by-case basis, uncertainty exists for any individual seeking to conclude a surrogacy agreement. Persons making surrogate arrangements must rely on retrospective approval of ‘expenses’ if a parental order or adoption is to be approved.¹⁹⁹

3.40 The subject of parentage is dealt with in the HFEA. Section 27 provides that the woman who is carrying or has carried a child as a result of the placing in her of an

192 *Surrogacy Arrangements Act 1985* (UK) s 1A.

193 *Surrogacy Arrangements Act 1985* (UK) s 1(2).

194 It is also an offence to advertise a willingness to negotiate or enter into a surrogacy arrangement: s 3.

195 *Surrogacy Arrangements Act 1985* (UK) s 2(2), (3).

196 See *Human Fertilisation and Embryology Act 1990* (UK) s 30, which states that no money (other than expenses approved by the court) must have been paid.

197 M Brazier, S Golombok, A Campbell, *Surrogacy: Review for the UK Health Minister of Current Arrangements for Payments and Regulation: Report of the Review Team* (1997) 3 (6) *Human Reproduction Update* 623, 626.

198 See for example: *Re C, Application by Mr and Mrs X under s 30 of the Human Fertilisation and Embryology Act 1990* [2002] EWHC 157 (Fam), [2002] 1 FLR 909.

199 M Brazier, S Golombok, A Campbell, *Surrogacy: Review for the UK Health Minister of Current Arrangements for Payments and Regulation: Report of the Review Team* (1997) 3 (6) *Human Reproduction Update* 623, 626.

embryo, or sperm and eggs, is to be treated as the mother of the child. If the woman is married and her husband consented to the procedure, and the embryo was not brought about with his sperm, he is treated as the father of the child.²⁰⁰ If the woman is not married, but she has accessed treatment services jointly with a man and his sperm was not used, the man is treated as the father of the child.²⁰¹ Two implications of these provisions should be noted. If the surrogate mother changes her mind and decides to keep the child she is legally entitled to do so—she is the mother. If the commissioning couple decide to reject the child, he or she will remain the legal responsibility of the surrogate mother and her husband or de facto partner (if any).

3.41 Section 30 of the HFEA creates a procedure by which the commissioning parents will be treated as the parents of the child. A court may make a parental order in their favour. It may do so only if the following conditions are satisfied:

- the commissioning couple are married;
- the gametes of the husband or the wife, or both, were used to bring about the creation of the embryo;
- the application to the court is made within six months of the birth of the child;
- at the time of the application the child's home is with the husband and the wife;
- at the time of the making of the order both the husband and wife have attained the age of 18; and
- the court is satisfied that no money or other benefit (other than for expenses reasonably incurred) has been given or received by the husband or the wife under the surrogacy agreement (although the court may authorise such a payment).

3.42 In situations where the Act does not apply²⁰² (for example, when the commissioning couple are not married, or when neither of them is genetically related to the child), it appears that the commissioning couple would have to adopt the child under the *Adoption and Children Act 2002* (UK).²⁰³

200 *Human Fertilisation and Embryology Act 1990* (UK) s 28(1).

201 *Human Fertilisation and Embryology Act 1990* (UK) s 28(3).

202 Noting that the HFEA does not make it clear whether it is legal for commissioning parents to use donor gametes or donated embryos, unrelated to them or the surrogate.

203 See para 4.18.

AUSTRALIAN LEGISLATION

3.43 Five Australian jurisdictions—Victoria, South Australia, Tasmania, Queensland, and the ACT—have legislation regulating surrogacy arrangements. In the remaining states and territories surrogacy is regulated by ethical guidelines and the general law.²⁰⁴

QUEENSLAND

3.44 The purpose of the *Surrogate Parenthood Act 1988* (Qld) is ‘to make all arrangements relating to surrogacy illegal in Queensland’.²⁰⁵ The Act imposes criminal penalties on all parties involved in both altruistic and commercial surrogacy arrangements.²⁰⁶ It is an offence to publish any advertisement to induce a person to agree to act as a surrogate or that indicates a willingness to act in this capacity. It is also an offence to give or receive any payment for entering into a ‘prescribed contract’.²⁰⁷ A prescribed contract is void.²⁰⁸ The parentage of a child born to a surrogate as a result of ART is determined under the *Status of Children Act 1988* (Qld).²⁰⁹

TASMANIA

3.45 Under the *Surrogacy Contracts Act 1993* (Tas), a surrogacy contract is defined as a contract or arrangement, with or without payment or reward, under which a person agrees to become, or is already, pregnant. The surrogate agrees to surrender to another person the custody or guardianship, or rights in relation to, a child born as a result of the pregnancy and the other person agrees to accept the custody or guardianship of the child.²¹⁰ The Act provides that all surrogacy contracts are void and unenforceable.²¹¹

204 At the time of writing the Assisted Reproductive Technology Bill 2003 (NSW) was before the NSW Parliament. Part 4 of that Bill deals with surrogacy.

205 *Parliamentary Debates* 308, 1987–88, 5546—per Mr McKechnie (then Minister for Family Services and Welfare Housing).

206 *Surrogate Parenthood Act 1988* (Qld) s 3.

207 A ‘prescribed contract’ is defined as a contract or arrangement, whether or not for payment or reward, under which it is agreed that a person shall become or seek to become the bearer of a child who will later be treated as the child of another person. Alternatively, it means any such contract or arrangement entered into by a woman who is then pregnant: s 2.

208 *Surrogate Parenthood Act 1988* (Qld) s 4.

209 This aspect has been discussed in para 2.64.

210 *Surrogacy Contracts Act 1993* (Tas) s 3.

211 *Surrogacy Contracts Act 1993* (Tas) s 7.

3.46 It is an offence to make or receive a payment or reward in relation to a surrogacy contract,²¹² as it is to publish any advertisement indicating a willingness to enter into a surrogacy contract or a willingness to negotiate such a contract.²¹³ It is also an offence to provide technical or professional services in relation to a pregnancy that is known to be the subject of a surrogacy contract.²¹⁴ This provision appears to prevent any surrogacy arrangement involving the use of ART. The parentage of a child born to a surrogate as a result of ART is determined under the *Status of Children Act 1974* (Tas).²¹⁵

SOUTH AUSTRALIA

3.47 Part IIB of the *Family Relationships Act 1975* (SA) deals with surrogacy contracts. Under this Act, a distinction is made between a ‘procuration contract’ and a ‘surrogacy contract’. Section 10f defines a ‘procuration contract’ as a contract under which a person agrees to negotiate, arrange, or obtain the benefit of, a surrogacy contract on behalf of another, or agrees to introduce prospective parties to a surrogate contract. A ‘surrogacy contract’ means a contract under which a person agrees to become pregnant or to seek to become pregnant and to surrender custody of, or rights in relation to, the child. Alternatively, it is defined as a contract under which a person who is already pregnant agrees to surrender custody of, or rights in relation to, the child.

3.48 It is an offence to receive valuable consideration under a procuracy contract, or to enter into such a contract in the expectation of receiving valuable consideration. It is also an offence to induce another to enter into a surrogacy contract for valuable consideration, or to advertise in relation to such contracts.²¹⁶ Both procuracy contracts and surrogacy contracts are illegal and void.²¹⁷

3.49 A surrogate mother who gives birth to a child is the mother of the child, notwithstanding that the child was conceived by the fertilisation of an ovum taken from some other woman.²¹⁸ Where a surrogate mother is married and has undergone

212 *Surrogacy Contracts Act 1993* (Tas) s 4(4).

213 *Surrogacy Contracts Act 1993* (Tas) s 6.

214 *Surrogacy Contracts Act 1993* (Tas) s 5.

215 This aspect has been discussed in Chapter 2 para 2.64.

216 *Family Relationships Act 1975* (SA) s 10h. Valuable consideration is defined as ‘consideration consisting of money or any other kind of property that has a monetary value’: s 10f.

217 *Family Relationships Act 1975* (SA) s 10g (1), (2).

218 *Family Relationships Act 1975* (SA) s 10c.

ART treatment with the consent of her husband, he is the father of the child.²¹⁹ Where a woman becomes pregnant as a result of an IVF procedure neither the donor of sperm or eggs is a parent of the child.²²⁰

AUSTRALIAN CAPITAL TERRITORY

3.50 The *Parentage Act 2004* (ACT) defines a ‘substitute parent agreement’ as a contract or arrangement under which a woman agrees she will become, or attempt to become, pregnant and that the resulting child will be taken to be (whether by adoption, agreement or otherwise) the child of someone else. Alternatively, it is a contract or arrangement under which a woman who is pregnant agrees that the resulting child will similarly be taken to be the child of someone else.²²¹

3.51 It is an offence to intentionally enter into a ‘commercial substitute parent agreement’.²²² A ‘commercial substitute parent agreement’ is defined as a substitute parent agreement under which a person agrees to make or give to another a payment or reward, other than for expenses, connected with a pregnancy that is the subject of the agreement or the birth or care of the resulting child.²²³ It is illegal to intentionally provide technical or professional services to a person known to be a party to a *commercial* agreement.²²⁴

3.52 It is an offence to procure a substitute parent agreement.²²⁵ It is also an offence to publish any advertisement to induce a person to enter into such an agreement or to publish an advertisement seeking someone willing to do so.²²⁶ The Act does not prohibit non-commercial surrogacy, provided no advertising or intermediaries are involved, and payments to cover expenses are allowed.²²⁷

3.53 The Act provides for establishing the parentage of a child born following a surrogacy arrangement. If the child was conceived as a result of ART, neither birth parent²²⁸ is a genetic parent, there is a [non-commercial] substitute parent agreement, and at least one of the substitute parents is a genetic parent, then an application may

219 *Family Relationships Act 1975* (SA) s 10d.

220 *Family Relationships Act 1975* (SA) s 10e.

221 *Parentage Act 2004* (ACT) s 23.

222 *Parentage Act 2004* (ACT) s 41.

223 *Parentage Act 2004* (ACT) s 40.

224 *Parentage Act 2004* (ACT) s 44.

225 *Parentage Act 2004* (ACT) s 42.

226 *Parentage Act 2004* (ACT) s 43.

227 *Parentage Act 2004* (ACT) s 40.

228 Defined as the woman who gave birth and the other person presumed to be the parent of the child: s 23.

be made to the Supreme Court for a parentage order in respect of the child.²²⁹ The court must make the order if it is satisfied it is in the child's best interests and both birth parents fully understand what is involved.²³⁰ The court must take the following factors into consideration:

- whether the child's home is with both substitute parents;
- whether both substitute parents are at least 18 years old;
- when only one of the substitute parents has made the application, whether the other agrees to the making of the order;
- whether payment or reward (other than for expenses reasonably incurred) has been given or received by either of the child's substitute parents pursuant to the agreement; and
- whether both birth parents and both substitute parents have received appropriate counselling and assessment.²³¹

The ACT law differs from that in the other states and territories as it enables the *commissioning* parents to become the legal parents of a child, and to be registered as such.

COMPARING THE VARIOUS MODELS

3.54 A comparison of the legislative models reviewed in this chapter must, under the Victorian Law Reform Commission's Terms of Reference, focus on:

- the eligibility criteria a surrogate mother, her partner and the commissioning parents must meet to access ART;
- whether any form of payment should be made to a surrogate mother; and
- the determination of the legal parentage of a child born following a surrogacy agreement.

3.55 These issues cannot be examined individually. To appreciate the way they are dealt with, it is necessary to understand the attitudes and policies reflected in the various statutes. A spectrum of approaches can be identified in the legislation. At one end of the spectrum are the Acts prohibiting all types of surrogacy arrangements; the prohibition may be reinforced by provisions imposing criminal penalties on those entering into such an arrangement. Alternatively, the prohibition may apply only to

229 *Parentage Act 2004* (ACT) s 24.

230 *Parentage Act 2004* (ACT) s 26(1).

231 *Parentage Act 2004* (ACT) s 26(3).

arrangements of a commercial character. Midway along the spectrum are the Acts which, while not prohibiting surrogacy contracts, declare them to be void and unenforceable. At the other end of the spectrum are laws which recognise the legitimacy of altruistic surrogacy contracts. These statutes accept the parties' intentions should be realised, provided certain conditions are fulfilled.

3.56 The majority of the Acts discussed in this chapter occupy the middle of the spectrum. These statutes reflect ambivalence about surrogacy. It is clear that many legislators have reservations about the practice. In consequence, the laws they have made combine an unwillingness to give effect to surrogacy arrangements with a recognition that these arrangements will continue to be made. The resulting laws, while refusing to sanction surrogacy agreements, acknowledge that answers must be given to the question of the parentage of a child born following such an agreement.

3.57 One feature common to virtually all the statutes reviewed here is a disapproval of commercial arrangements. While there may be disagreement as to whether a surrogate mother should receive payment to cover the reasonable medical and other expenses associated with the pregnancy and birth, it is widely accepted that neither she nor those who assist her should gain a financial advantage from participating in a surrogacy arrangement.

3.58 The statutes in some states in the United States have adopted a positive stance and are designed to facilitate surrogacy arrangements. A feature of a number of these laws—such as those enacted in Virginia, Florida and Texas—is the close regulation of the terms of a surrogacy contract. In Virginia and Texas this is reinforced by the requirement of court oversight. Such laws define the circumstances in which the law will recognise an agreement between a surrogate and the commissioning parents and so acknowledge the latter as the child's parents. Acts of this kind specify the matters—such as payment—to be included in a surrogacy contract. In some instances, they also seek to ensure that the fitness of the commissioning parents is assessed and that account is taken of the surrogate mother's situation and obstetric history. In addition to dealing with eligibility, payment and parenthood, the legislation may cover a range of other matters, such as the outcome if the child is impaired, consent to clinical intervention and management of the pregnancy, and the need for the surrogate to submit to reasonable medical evaluation and treatment during the pregnancy.

3.59 In the United States and the United Kingdom, the statutes recognising surrogacy arrangements require that the commissioning parents be married and at least one of them be a genetic parent of the child.

3.60 The United Kingdom and ACT Acts, which allow a court to scrutinise a surrogacy agreement after the child's birth, contrast with the United States statutes, which closely regulate the procedures for making, and the terms of, a surrogacy

contract. These Acts allow decisions to be made on a case-by-case basis as to whether the commissioning parents will be treated as the child's parents.

3.61 Finally, none of the laws reviewed in this chapter assists in resolving the problem—arising from section 8 and section 20 of the Victorian Act—of a prospective surrogate mother's access to ART. This is because, while the various statutes regulate access by requiring medical supervision or by creating a licensing system, they do not expressly state that a woman seeking ART must be unable to have a child or to do so safely. The absence of statutory references to this criterion avoids the problem produced by the Victorian provisions. When any of the overseas surrogacy statutes refer to infertility, they refer, predictably, to the infertility of the commissioning couple.

Chapter 4

Adoption

INTRODUCTION

4.1 Among other topics, Chapter 2 discussed the way the laws in the United States, Canada, the United Kingdom and other parts of Australia have responded to the problem of determining the parentage of a child born as a result of ART. The discussion of parentage in that chapter is equally relevant to the situation of a child born to a surrogate mother—as was noted in Chapter 3, surrogacy may not require the use of ART, but it frequently does so. The statutes reviewed offer clear rules regarding parentage in a number of circumstances. In the case of a child born to a married couple following the use of artificial insemination, for example, it is widely accepted that the couple should be treated as the parents and the donor has no rights and responsibilities with regard to the child. Some jurisdictions also provide clear guidelines regarding parentage when a single woman or a same-sex couple undergo ART.

4.2 In some circumstances, however, the laws examined in Chapters 2 and 3 fail to provide answers to questions as to the parentage of artificially conceived children. When this is the case, one way of resolving doubts about parentage is to allow persons with an interest in a child's welfare to adopt the child.

4.3 Adoption orders generally sever the legal relationship between a child and his/her natural parent[s] and enable another person or couple to become the legal parent or parents of a child. Other forms of adoption may leave the parental rights of the legally recognised parent intact, while establishing the parental rights of a second adoptive parent (ie a 'step-parent').

4.4 This chapter will focus on three situations in which adoption might be thought to be appropriate when ART has been employed. These situations are:

- when the female partner of a birth mother wishes to assume a parental role in respect of a child;
- when a same-sex couple wishes to be recognised as the parents of the child; and
- when, in a case involving surrogacy, the commissioning parents wish to be recognised as the parents of the child.

IDENTIFYING THE PROBLEMS

ADOPTION BY A BIRTH MOTHER'S FEMALE PARTNER

4.5 In Victoria, the female partner of a woman who has given birth to an artificially conceived child is unable to adopt the child. There are several reasons for this. Under the *Adoption Act 1984* (Vic), persons who wish to adopt must normally be married or in a de facto relationship, and to have been married or in the relationship for at least two years.²³² The Act does not recognise same-sex relationships. Single persons may adopt only if the court is satisfied that 'special circumstances' make adoption of the child by one person desirable.²³³

4.6 Secondly, the Act contains special provisions relating to an adoption by a spouse or de facto spouse of a parent of the child and to adoption by a relative of the child. In the case of a spouse or de facto spouse, an adoption order may not be made unless the court is satisfied that an order under the *Family Law Act 1975* (Cth)—such as guardianship or parenting orders—would not make adequate provision for the welfare and interests of the child and that an adoption order would better provide for the child.²³⁴ In addition, there must be exceptional circumstances before the making of an adoption order is justified.²³⁵ The same requirements must be satisfied if the person wishing to adopt is a relative of the child.²³⁶ Since the birth mother's partner is neither a spouse of the birth mother nor a relative of the child, these special provisions do not apply to her. Even if the law were changed to permit her to be recognised as a spouse for adoption purposes, she would still have to overcome the barrier created by the Act's preference for proceedings to be taken under the Family Law Act.

4.7 The third barrier to the use of adoption to create a parental relationship between the child and the birth mother's partner is that the Adoption Act does not allow the birth mother to maintain her relationship with the child if the child is adopted by someone else.²³⁷ Under the current law, adoption by the partner would require the mother to relinquish her status as a parent. One feature of the provision dealing with adoption by a spouse or de facto spouse of a parent of the child should be

232 *Adoption Act 1984* (Vic) s 11(1).

233 *Adoption Act 1984* (Vic) s 11(3).

234 This reflects the position that it is not acceptable to sever the relationship a child may have with its biological parent, or prevent such a child from having access to his or her genetic information or heritage.

235 Section 11(5) and (6).

236 Section 12. 'Relative' is defined as a grandparent, brother, sister, uncle or aunt: s 4.

237 *Adoption Act 1984* (Vic) s 53(1)(b) provides that an adopted child is treated as if he or she were not a child of any person who was a parent, and such a person is treated in law as if the person is not a parent.

noted. If a joint adoption order is made in favour of the spouse and the parent, the relationship between the child and the parent is *not* terminated.²³⁸ If the law were to be changed to permit the female partner of the birth mother to be recognised as a spouse, she could claim the benefit of this provision.

ADOPTION BY A SAME-SEX COUPLE

4.8 The legal barriers faced by a same-sex couple wishing to apply as a couple to adopt an artificially conceived child are apparent—persons who wish to adopt as a couple must have been married, or in a *de facto* relationship, for at least two years. The Victorian Adoption Act does not recognise same-sex relationships.

ADOPTION FOLLOWING A SURROGACY ARRANGEMENT

4.9 In the absence of laws ensuring that the intention of the parties to a surrogacy contract will be realised (and that the commissioning parents will therefore automatically become the parents of a child born of a surrogate), adoption offers one means by which the commissioning parents can become the legal parents of the child. Typically, surrogacy laws require that the commissioning parents be married or in a *de facto* relationship. Should such parents wish to adopt the child born of a surrogate, they would not face barriers of the kind encountered by the female partner of a birth mother or by the members of a same-sex couple. However, Victoria does not permit private adoption,²³⁹ that is the birth parent of a child cannot directly place a child with an adoptive family. As a result, adoption under a surrogacy arrangement can not occur in Victoria.

4.10 The problem in Victoria is therefore two-fold. First, the question is whether the Adoption Act should contain provisions to allow the private adoption of a child born to a surrogate mother. Secondly, there is the question whether commissioning parents should be obliged to satisfy the requirements of the Act before they will be recognised as the parents of the child.

LESSONS FROM OTHER JURISDICTIONS

4.11 The primary purpose of this chapter is to determine what lessons can be learnt from the way in which adoption laws in the United States, the United Kingdom and

238 *Adoption Act 1984* (Vic) s 11(7)(c).

239 *Adoption Act 1984* (Vic) s 12.

other parts of Australia deal with the three aspects of parentage identified above.²⁴⁰ In addition, some noteworthy features of the adoption Acts in force in the three countries will be discussed. No attempt will be made to provide a comprehensive analysis of these complex and lengthy statutes.

UNITED STATES

4.12 In the United States, all 50 states and the District of Columbia have adoption laws. Many of the statutes specify in some detail the factors that courts should take into account when making determinations as to what is in the best interests of the child. Others are more general and leave the courts freer to exercise their discretion. Most of the states and the District of Columbia have laws that designate which persons or entities have the authority to make adoptive placements. Generally, these are state agencies and/or private individuals. Private placements include the direct placement of a child by the birth parent with an adoptive family. Court approval is necessary in all states for both agency and private adoptions. Many states also require that the adoptive parents be approved by a social service agency. In all cases, the child must have resided for a minimum period of time in the home of the prospective adoptive parents.

4.13 All Acts specify the persons who are eligible to adopt. In most states, adoption by any adult person or a married couple is permitted. If a couple is married, they must adopt jointly. ‘Second parent’ or step-parent adoption is expressly recognised in a number of jurisdictions.²⁴¹

4.14 Same-sex couples and gay and lesbian individuals are permitted to adopt in a large number of states²⁴² and the District of Columbia. In the case of gay and lesbian

240 For the purposes of this chapter, the models provided by the laws in these three countries are the most relevant. No discussion of adoption law in Canada is included.

241 For example, Conn (Public Act) § 00-228; DC Code Ann § 16-302; Hawaii Rev Stat § 578.1; Ill Comp Stat § 750.50.2; MGL § 210.1 (Massachusetts); Mont Code Ann § 42.1.106; NH Rev Stat § 170.B:4; NJS § 9:3-43 (New Jersey); NY (Domestic Relations) law § 110; Pa (Domestic Relations) Title 23 § 2312; VT Stat Ann 15A § 1-102; VA Code Ann § 63.1.219.444; Utah Code Ann § 78.30.1; W VA Code § 48.82, WYO Stat Ann § 1.22.103.

242 Up to 22 states permit gay and lesbian individuals and same-sex-couples to adopt in at least some counties. However, only eight states (California, Connecticut, Illinois, Massachusetts, New Jersey, New York, Pennsylvania, and Vermont) and the District of Columbia allow second-parent adoption by a member of a same-sex couple state-wide. See: California Family Code § 8600; Conn (Public Act) § 00-228; DC Code Ann § 16-302; Ill Comp Stat § 750.50/2 MGL § 210.1 (Massachusetts); NJS § 9:3-43 (New Jersey); New York Domestic Relations Statute § 110; Pennsylvania Domestic Relations Title 23 § 2312; Vermont Title 15A § 1-102.

individuals, statutes that simply provide that a ‘person or adult’ may adopt a child permit this type of adoption.

4.15 Further, in New York it is provided that ‘[a]pplicants shall not be rejected solely on the basis of homosexuality’.²⁴³ The Connecticut Act, which emphasises the best interests of the child, states that ‘such interests are promoted when the child is part of a loving, supportive family, whether that family is a nuclear, extended, split, blended, single parent, adoptive or foster family.’²⁴⁴ Only three states expressly restrict who may adopt. The Florida statute provides that ‘no person eligible to adopt...may adopt if that person is a homosexual’.²⁴⁵ In Mississippi, the Act explicitly prevents same-sex couples from adopting.²⁴⁶ Utah does not directly discriminate against same-sex couples, but forbids adoption by any unmarried cohabiting couple.²⁴⁷

UNITED KINGDOM

4.16 In England and Wales, the adoption of children is governed by the *Adoption and Children Act 2002* (UK). The Act emphasises the importance of promoting the best interest of the child. Under sections 50 and 51, applications for adoption orders may be made by a couple or by an individual. An adoption order may be made on the application of a couple where both have attained the age of 21,²⁴⁸ or where one is the natural parent of the child and has attained the age of 18 and the partner is over 21.²⁴⁹ A single person who has attained the age of 21 years and is not married may adopt.²⁵⁰ Section 144(4) of the Act extends the definition of a couple to include two persons (whether of different sexes or the same sex) living as partners in an enduring family relationship. The effect of this is to make same-sex couples eligible to adopt, provided they meet the criteria set out in the Act.

4.17 In step-parent applications, a condition for adoption is that the child must have had his or her home with the applicant continually for six months prior to the

243 18 NYCRR § 421.16(h)(2).

244 CGA § 45a.727a.

245 Fla Stat § 63.042.

246 Mississippi Code § 93.17.3.

247 Utah Code § 78.30.2.

248 *Adoption and Children Act 2002* (UK) s 50(1).

249 *Adoption and Children Act 2002* (UK) s 50(2).

250 *Adoption and Children Act 2002* (UK) s 51.

adoption.²⁵¹ In all other cases, the child must have lived with the applicant or applicants for at least 10 weeks prior to an adoption order being made.²⁵²

ADOPTION FOLLOWING A SURROGACY ARRANGEMENT

4.18 As discussed in paragraph 3.42, where the commissioning couple have not met the criteria required for parenting orders (for example they are not married, or neither of them is genetically related to the child) it might be possible for them to have their parental status recognised by adopting the child. Section 19(1) of the Adoption and Children Act provides that:

Where an adoption agency is satisfied that each parent or guardian of a child has consented to the child...being placed for adoption with prospective adopters identified in the consent...and has not withdrawn the consent, the agency is authorised to place the child for adoption accordingly.

This section allows a surrogate to give consent to the adoption of her child by the intending parent[s].²⁵³ Section 95 of the Act prohibits any payment (other than an excepted payment)²⁵⁴ made in consideration of the adoption of a child. This would be equally applicable to an adoption under a surrogacy agreement.

OTHER AUSTRALIAN JURISDICTIONS

4.19 The Australian Government has the power to legislate on international adoption arrangements. Other adoptions are governed by state or territory statutes. All statutes provide that the welfare and interests of the child are the paramount consideration.²⁵⁵

4.20 In NSW, a heterosexual couple²⁵⁶ who have been living together for a continuous period of not less than three years may apply to adopt a child.²⁵⁷ An

251 *Adoption and Children Act 2002* (UK) s 42(3).

252 *Adoption and Children Act 2002* (UK) s 42(2).

253 *Adoption and Children Act 2002* (UK) s 20, permits a person who has given advanced consent to the adoption of his or her child to withdraw that consent.

254 Excepted payments are defined in s 96 of the *Adoption and Children Act 2002* (UK).

255 *Adoption Act 1994* (WA) s 3; *Adoption of Children Act 1964* (Qld) s 10; *Adoption Act 2000* (NSW) s 8; *Adoption Act 1984* (Vic) s 9; *Adoption Act 1988* (SA) s 7; *Adoption Act 1988* (Tas) s 8; *Adoption Act 1993* (ACT) s 6; and *Adoption of Children Act 1994* (NT) s 8.

256 A couple means a man and a woman who are married or are in a de facto relationship: *Adoption Act 2000* (NSW), Dictionary.

257 *Adoption Act 2000* (NSW) ss 23(1), 26, 28(4).

application may also be made by one person.²⁵⁸ The applicant or applicants must normally be at least 21 years old and at least 18 years older than the child.²⁵⁹ If one member of a couple is a step-parent, an adoption order may not be made unless section 30 of the Act is complied with.²⁶⁰ Section 30 provides that no such order may be made unless the required consents are obtained, the child is aged at least five, the step-parent has lived with the child and the child's parent for a continuous period of not less than three years, and the court is satisfied that the making of the order is clearly preferable in the best interests of the child to any other action that could be taken by law in relation to the child.²⁶¹ Similar restrictions apply to the making of an adoption order in favour of a relative.²⁶²

4.21 In South Australia, only married or de facto heterosexual couples who have been cohabiting for a continuous period of at least five years may adopt.²⁶³ Single persons may adopt only in special circumstances.²⁶⁴ Under Northern Territory law, adoption may be by a husband and wife jointly, or by one person in exceptional circumstances.²⁶⁵ In Queensland, persons who wish to adopt must normally be married. A single person may adopt only in special circumstances.²⁶⁶

4.22 In the ACT, an adoption order must normally be made jointly in favour of a man and woman who, whether married or not, have lived together in a heterosexual relationship for not less than three years.²⁶⁷ An adoption order may, however, be made in favour of one person 'having regard to the wishes of the birth parents of the child'.²⁶⁸ An adoption order may not be made in favour of a relative unless the court considers there are circumstances why the relationships within the family should be re-defined and it would not be preferable to make an order relating to the guardianship or custody of the child.²⁶⁹

258 *Adoption Act 2000* (NSW) ss 23(1), 26.

259 *Adoption Act 2000* (NSW) ss 27(2), 28(3).

260 *Adoption Act 2000* (NSW) s 28(2).

261 The section's reference to other action is a reference to actions that could be taken under legislation such as the *Children and Young Persons (Care and Protection) Act 1998* or the *Family Law Act 1975* (Cth).

262 *Adoption Act 2000* (NSW) s 29.

263 *Adoption Act 1988* (SA) s 12(1). In special circumstances a lesser period will suffice: s 12(2).

264 *Adoption Act 1988* (SA) s 12(3).

265 *Adoption of Children Act* (NT) s 12(1), (2).

266 *Adoption of Children Act 1964* (Qld) s 12(1), (3).

267 *Adoption Act 1993* (ACT) s 18(1).

268 *Adoption Act 1993* (ACT) s 18(3).

269 *Adoption Act 1993* (ACT) s 18(5).

4.23 Tasmania and Western Australia are distinctive, as the Acts allow same-sex couples to adopt a child.

4.24 In Tasmania, an order for the adoption of a child may be made in favour of two persons who, for a period of not less than three years before the order is made, have been married to each other or have been the parties to a significant relationship which is the subject of a deed of relationship registered under Part 2 of the *Relationships Act 2003* (Tas).²⁷⁰ The court may not make an adoption order in favour of a person who is in a significant relationship within the meaning of the Relationships Act unless the other party to the relationship is the parent of the child to be adopted, or either party to the relationship is a relative of the child.²⁷¹ In exceptional circumstances, an adoption order may be made in favour of one person.²⁷²

4.25 An adoption order may be made in favour of the spouse²⁷³ of a parent of the child, provided the making of some other order with respect to the custody or guardianship of the child would not make adequate provision for the welfare and interests of the child, and the adoption order would better serve those interests. Further, special circumstances must exist to warrant the making of an adoption order.²⁷⁴ Broadly similar restrictions apply to the making of an adoption order in favour of a person who is a relative of the child, or in favour of a couple, when both are relatives or one is a relative.²⁷⁵ When an adoption order is made in favour of the spouse, the spouse is deemed to be a parent of the child jointly with the natural parent.²⁷⁶

4.26 In Western Australia, a couple who have been married or in a de facto relationship for at least three years may jointly adopt.²⁷⁷ A de facto relationship is not limited to a heterosexual relationship, and thus a same-sex couple may jointly adopt.²⁷⁸

270 *Adoption Act 1988* (Tas) s 20(1).

271 *Adoption Act 1988* (Tas) s 20(2A).

272 *Adoption Act 1988* (Tas) s 20(4).

273 'Spouse' includes the other party to a significant relationship which is the subject of a deed of relationship registered under Part 2 of the *Relationships Act 2003* (Tas) s 3(1).

274 *Adoption Act 1988* (Tas) s 20(6), (7).

275 *Adoption Act 1988* (Tas) s 21.

276 Notwithstanding the *Adoption Act 1988* (Tas) s 50—which provides that the adoptive parents will be treated in law as the parents of the adopted child, and any person who was a parent of the child before the making of the adoption order will be treated in law as if that person were not a parent of the child—the relationship between the child and the birth parent is not terminated in this situation. See s 20(8).

277 *Adoption Act 1994* (WA) s 39(1)(d), (e).

278 See n 92.

One person may also adopt.²⁷⁹ Further, a person may adopt a child if he or she is a step-parent²⁸⁰ and has been married or in a de facto relationship with a parent of the child for at least three years.²⁸¹ When a step-parent adopts, the child's relationship with the birth mother is not terminated.²⁸²

ADOPTION BY A BIRTH MOTHER'S FEMALE PARTNER

4.27 Several aspects of the legislation discussed in this chapter and in Chapter 2 are relevant to whether the female partner of a birth mother can be recognised as a parent of a child born as a result of ART. As noted in paragraph 2.50, the legislation in Western Australia embodies a presumption that, where a woman who is in a de facto relationship with another woman undergoes, with the consent of her de facto partner, an artificial fertilisation procedure, the de facto partner of the pregnant woman is conclusively presumed to be a parent of the unborn child and is a parent of any child born as a result of the pregnancy. Similarly, in the ACT, if a woman, with the consent of her domestic partner, undergoes a procedure as a result of which she become pregnant, the partner is conclusively presumed to be a parent of the child. A domestic partner includes a woman in a same-sex relationship.²⁸³

4.28 The enactment of legislation of this kind resolves the question of parentage in the case of an artificially conceived child born to a member of a same-sex couple. The birth mother's female partner is presumed to be a parent. In the absence of legislation creating such a presumption, the possibility of allowing the partner to adopt the child must be considered. Two aspects of adoption law are relevant. First, the law may indicate that a homosexual person is ineligible to adopt. Secondly, if this restriction is removed, the partner may be permitted to adopt the child if the law on second parent or step-parent adoption is extended to include such a partner.

4.29 As has been seen earlier in this chapter, adoption by a single person is permitted in most United States jurisdictions, in the United Kingdom and, in special circumstances, in all states and territories in Australia. In numerous United States jurisdictions, the law does not prevent a person who is gay or lesbian from adopting a child. As noted in paragraph 4.15 only three states expressly restrict who may adopt,

279 *Adoption Act 1994* (WA) s 38(2).

280 A 'step-parent' is defined as a person who is not a birth parent or an adoptive parent and is married to, or the de facto partner of, the birth or adoptive parent: *Adoption Act 1994* (WA) s 4(1).

281 *Adoption Act 1994* (WA) s 67(1).

282 *Adoption Act 1994* (WA) s 75(2) indicates that the usual rule that adoption severs the child's relationship with the birth parent does not apply when the birth parent is married to, or in a de facto relationship with, the adoptive parent who adopts in the capacity of step-parent.

283 See paras 2.50, 2.59.

and only two prohibit adoption by gay or lesbian individuals or same-sex couples. In Australia, the question of whether such prohibition would be inconsistent with anti-discrimination law has not been tested.

4.30 The second issue is the applicability of the laws governing adoptions by step-parents. A noteworthy feature of the Australian laws outlined above is the way in which they limit adoptions by the spouses of birth parents. In some jurisdictions it is accepted that step-parent adoptions should be carefully controlled. Under the NSW and Victorian statutes, for example, before permitting a spouse to adopt a partner's child, a court must be satisfied that an order under another Act (in particular, one under the *Family Law Act 1975* (Cth)) would not be a more appropriate means of promoting the child's welfare. Further, there must be special circumstances before a partner's spouse is allowed to adopt.

The Tasmanian and Western Australian Acts include provisions permitting a member of a same-sex couple to adopt. In Tasmania, a female partner of a birth mother is a 'spouse', provided the necessary deed has been registered under the *Relationships Act 2003* (Tas), and therefore can take advantage of the Adoption Act's provisions for adoption by a step-parent. Similarly, in Western Australia, the female partner is regarded as a step-parent by virtue of her de facto relationship with the birth mother. The result is that in both states the female partner may adopt the child and the legal relationship between the child and the birth mother is not extinguished.

ADOPTION BY A SAME-SEX COUPLE

4.31 Same-sex couples are able to adopt in numerous jurisdictions in the United States, in the United Kingdom, and in Tasmania and Western Australia. The clearest statutory provision allowing such adoptions is found in the United Kingdom. It provides that any two persons (whether of different sexes or the same-sex) living as partners in an enduring family relationship are eligible to adopt.²⁸⁴ In Tasmania and Western Australia, provided the couple meets the respective state's criteria regarding relationship status, they are able to adopt in the same way as any other couple. Some other jurisdictions limit adoption to married couples.

ADOPTION FOLLOWING A SURROGACY ARRANGEMENT

4.32 When considering adoption in relation to surrogacy arrangements, the question is whether adoption is the most appropriate method of allowing commissioning parents to be recognised as the parents of the resulting child. As was

284 *Adoption of Children Act 2002* (UK) s 144(4).

seen in Chapter 3, in a small number of jurisdictions in the United States (Florida, New Hampshire, Texas and Virginia) the problem does not arise as the legislation has established procedures to regulate the making of surrogacy contracts. If these procedures are followed, the parties' intentions will be realised and the commissioning parents will be acknowledged as the parents of a child born of a surrogate.

4.33 It is when the law does not expressly authorise and regulate surrogacy that questions as to the parentage of the child must be confronted. In the absence of such laws, the child's parentage will normally be determined on the basis of the rules applying to artificially conceived children. These rules have been explained in Chapters 2 and 3.

4.34 There is, however, a third model. Under this model—introduced in the United Kingdom and in the Australian Capital Territory—a special procedure can be employed to enable a court to make a parental order in favour of the commissioning parents. The details of this procedure are set out in Chapter 3. For the purposes of this chapter, the important feature of the model is that it allows independent scrutiny of a surrogacy arrangement. The arrangement and the suitability of the commissioning parents will be examined by a judge and in this way some protection can be given to the contracting parties and attention can be paid to the welfare of the child. At the same time, however, the parties' intentions can be acknowledged and the commissioning parents will not be treated as other potential adoptive parents are treated. In particular, they will not be required to satisfy the demanding requirements of adoption legislation. On one hand, this is a desirable compromise, appropriate in jurisdictions in which the legislators are unwilling to encourage surrogacy arrangements. On the other hand, the model can be criticised as allowing something resembling private adoption (a practice that is not accepted in Australia).

4.35 Nonetheless, if a commissioning couple does not meet eligibility criteria for parenting orders, they may have to pursue legal adoption. The United Kingdom's Adoption and Children Act provides an example of provisions applicable in this situation.

Chapter 5

Conclusion: Some Options for Victoria

5.1 This paper's review of United States, Canadian, United Kingdom and Australian laws on ART, surrogacy and adoption has identified a number of options to be considered, should amendment of the *Infertility Treatment Act 1995* or the *Adoption Act 1984* be thought desirable.

ASSISTED REPRODUCTIVE TECHNOLOGY

5.2 Chapter 2 examined the ways the various laws have addressed the issues of criteria for determining eligibility for ART and how the parentage of artificially conceived children should be decided. With regard to eligibility criteria, the principal question to be addressed is whether specific legislative controls are appropriate or whether the law should adopt a less prescriptive approach. With regard to questions about the parentage of artificially conceived children, there is less doubt about the task that the law should fulfil—wherever possible, legislation should provide clear answers to these questions.

5.3 The debate about eligibility criteria has been primarily focused on two questions. The first is whether access to ART should be limited to heterosexual couples who are married or in a de facto relationship. The second is whether eligibility should be restricted to those who are 'infertile', 'unlikely to become pregnant' or, if they can conceive, 'likely to pass on a genetic abnormality or disease to the child'. A third, and most important, consideration is the wellbeing of the child who may be born as a result of ART. This may be identified as a separate criterion, expressed as a requirement that no woman should be eligible for treatment unless account has been taken of the welfare of the child.

5.4 Whatever view is adopted on the appropriateness of these criteria, there is a range of options for lawmakers. A policy of minimal intervention can be pursued; under this policy, there is no need for legislation specifying when ART may or may not be accessed. To adopt this policy is to leave doctors free to exercise the power to control access on a case-by-case basis. At the other extreme is the enactment of legislation that closely regulates access; this may define eligibility by reference to criteria such as marital status, sexual orientation, infertility, genetic risks and the welfare of the unborn child. With regard to marital status and sexual orientation, such

legislation may be restrictive or it may expressly state that persons other than those in established heterosexual relationships are digible to benefit from ART. The former position has widely been found to breach anti-discrimination laws.

5.5 Midway between these two options is the utilisation of a combination of techniques. These involve the creation of a licensing system and a regulatory body. Provision may also be made for the formulation of a code containing guidelines on eligibility. An alternative to close regulation by means of a code is the inclusion in legislation of broad principles to which a regulatory body must adhere.

5.6 Selection of a particular model for the recognition of the parentage of a child born as a result of ART depends, in part, on the model adopted to determine eligibility. If eligibility is restricted to people within a heterosexual relationship, law-makers may confine themselves to the enactment of provisions stating that a child born to a heterosexual couple who agree to the use of ART is a child of that couple and that neither a sperm donor nor an egg donor has any rights or responsibilities in respect of that child. However, such an approach denies that ART is, and continues to be, employed by single women, and women in same-sex relationships. If law-makers recognise the use of ART by a single person or a person in a same-sex relationship, they must confront the question of the parentage of a child born to such a person as a result of an artificial conception procedure.

SURROGACY

5.7 Selection of the various options for reform of the law on surrogacy requires a policy decision as to whether the practice should be prohibited, tolerated or facilitated.

5.8 If the practice is to be prohibited, all surrogacy arrangements will be made illegal and criminal penalties imposed on the parties and those who assist them.

5.9 Alternatively, only commercial arrangements might be prohibited. The legislation analysed in Chapter 3 reflects widespread agreement on this aspect. There seems to be no basis on which to challenge the view that trade in the reproductive capacities of women and men and the exploitation of women for commercial ends is objectionable. Should this conclusion be accepted, however, it is still necessary to decide whether it is permissible for a surrogate mother to be reimbursed for the reasonable expenses associated with her pregnancy.

5.10 If commercial arrangements are prohibited, the next option to be considered is that altruistic arrangements should be tolerated, but not authorised by the law. Such a stance can be reinforced by a legislative provision declaring all surrogacy contracts to be unenforceable. A corollary of this approach would be that the commissioning parents would have no certainty that their intentions will be realised. They would be obliged to adopt the child in order to become the legally recognised parents.

5.11 Alternatively, provision could be made to recognise altruistic surrogacy arrangements after the birth of a child, in strictly limited circumstances. The essential feature of this model is that it allows recognition of the parties' intentions if, after the child's birth, a court is satisfied that it is appropriate to make a parentage order in favour of the commissioning parents.

5.12 The final option is the enactment of provisions expressly authorising and regulating surrogacy arrangements. To take this course is to allow the law to display a positive attitude to these arrangements, while at the same time ensuring that certain conditions will be met by the contracting parties. These conditions relate to such matters as the fitness of the commissioning parents and the protection of the surrogate mother's interests. By imposing requirements of this kind, the law can define and limit the circumstances in which the parties' intentions will be realised. If this approach is employed, further legal intervention is unnecessary and the commissioning parents will be acknowledged as the parents of a child born to a surrogate mother.

5.13 Any of the above options that recognise a surrogacy agreement may or may not also require one or both of the commissioning parents to be genetically related to the child.

5.14 Section 8 of the *Infertility Treatment Act 1995* provides that a woman must be 'unlikely to become pregnant', 'infertile', or unlikely to do so without risk to the child, before she may access ART. If it is decided that in some circumstances surrogacy arrangements should be sanctioned, it would be illogical to retain this requirement.

ADOPTION

5.15 The decisions that must be made regarding the reform of adoption law are more clear-cut. The choice of options depends on the conclusions reached on two issues.

5.16 First, it must be decided whether, if a woman in a same-sex relationship gives birth to an artificially conceived child, her partner can be recognised as a parent of the child. If it is desired to give her this recognition, such a result can be achieved either by creating a presumption of parentage in her favour (provided she consented to the ART procedure) or by permitting her to adopt the child as a step-parent. The latter would require amendment of Victoria's *Adoption Act 1984*.

5.17 Secondly, it might be decided that the most suitable avenue for establishing legal parenthood in surrogacy arrangements would be to require a commissioning couple to jointly adopt the child. In this case, it would be necessary to amend Victoria's *Adoption Act 1984* to allow private placement of a child, and to provide for the type of payment permitted (if any). Such amendments may or may not include provisions that permit same-sex couples to adopt, treating them the same as couples

who are married or in a heterosexual de facto relationship. In all cases the adopting couple would have to meet all other criteria under the Adoption Act.

THE BEST INTERESTS OF THE CHILD

5.18 In all jurisdictions, the central tenet is that a child's welfare and interests must remain paramount. In this context it is important to recognise that some children born as a result of ART may be curious or anxious about their biological identity, require access to genetic information, and may wish to form relationships with their biological parents where possible. Any decision on options for reform must take account of these important issues.

Glossary²⁸⁵

donor eggs

Eggs taken from one woman and donated to another.

donor sperm

Sperm produced from a man who is not the woman's partner, to be used for artificial insemination, in-vitro fertilisation, intracytoplasmic sperm injection, or gamete intra-fallopian transfer.

embryo transfer

The placement of embryos into the uterus using a fine catheter.

fertilisation

The penetration of the egg by the sperm.

gamete

The male or female reproductive cells, the sperm or the egg.

gamete intra-fallopian transfer (GIFT)

In GIFT, eggs are collected from a woman, but instead of being taken to the laboratory for fertilisation, the eggs plus the previously collected and washed sperm are placed directly into a normal fallopian tube using a fine sterile plastic tube.

insemination

The introduction of semen into a female by natural or artificial means.

in-vitro fertilisation (IVF)

IVF is the procedure by which the woman's egg and man's sperm are mixed in the laboratory and are then transferred into the uterus of the female.

285 Definitions sourced from Monash IVF, *Guide to getting started* (2003); *The New Shorter Oxford English Dictionary* (1993); and Victorian Law Reform Commission, *Assisted Reproductive Technology & Adoption: Should the Current Eligibility Criteria In Victoria be Changed?* (2004).

intracytoplasmic sperm injection (ICSI)

The direct injection of a single sperm into the substance (cytoplasm) of the egg. Generally used for the more severe forms of male infertility or after a cycle with poor fertilisation.

oocyte

The egg cell produced in the ovary, also called ovum, egg or gamete.

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