SURROGACY DURING COVID-19 TIMES: THE NEW ZEALAND EXPERIENCE

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Abstract

On 28 February 2020 the first case of Covid-19 was reported in New Zealand. Within a month, the New Zealand borders were closed to non-citizens and residents. Other jurisdictions also took this step, making international travel difficult, if not impossible. For intended parents who had entered into international surrogacy arrangements, this presented a significant problem: they needed to travel overseas for the birth of their child and to bring the child home. As lockdowns and work-from-home orders became more common, intended parents found that they could not complete the required administrative tasks to bring their child back home to New Zealand. This article considers the unforeseen consequences of engaging in either international or domestic surrogacy during the global pandemic. Focussing on the legal issues arising from border closures and lockdowns, it discusses the results of empirical research carried out on family lawyers working on surrogacy cases during this time, as well as relevant Family Court decisions. As New Zealand is currently in the process of considering surrogacy law reform (following a Law Commission project and the drawing of a Private Member's Bill from the ballot), it is important to learn from the Covid-19 experience in order to future-proof our new law.

I. Introduction

On 28 February 2020, the first case of Covid-19 was reported in New Zealand. By 14 March 2020, the Government had imposed a requirement of 14 days self-isolation for any person entering the country (except for those arriving from the Pacific) and by 19 March 2020, borders were closed to all but New Zealand citizens and Permanent Residents. This border closure occurred mere days after other countries had taken this step, and the EU had closed its borders to all non-essential travel.[1]

It was not long before reports emerged of Covid-19-related problems for those engaging in international surrogacy. News stories highlighted increasing difficulties

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1 For a timeline on Covid-19 restrictions and alert levels in New Zealand, see: Caroline Kantis, Samantha Kiernan and Jason Socrates Bardi "UPDATED: Timeline of the Coronavirus" (29 November 2021) Think Global Health <www.thinkglobalhealth.org>.

for intended parents, both in travelling for the birth of their child and in carrying out the administrative steps required before they could return to New Zealand with their child.

This article will identify and consider some of the issues arising in both international and domestic surrogacy due to the effects of Covid-19. Relevant information will be sourced from reported judgments, applications to ECART and from a survey of New Zealand family lawyers reporting their experiences working with intended parents. The lessons that can be taken from this challenging period of time may be of use in shaping the future law as New Zealand begins a process of considering surrogacy law reform.

II. A Brief Introduction to Surrogacy

A surrogacy arrangement involves a woman (the surrogate) agreeing to gestate and give birth to a child, who will then be raised by another person(s) (the intended parent(s)). In a gestational surrogacy, the surrogate has no genetic relationship to the child, with the eggs coming from an intended parent or a donor. In a traditional surrogacy, the surrogate's eggs are used, and she is therefore genetically related to the child. Under New Zealand law, the surrogate (and her partner if they consented to the surrogacy) are the legal parents of the child, and the intended parents must adopt the child to have legal parentage transferred to them.

In an international surrogacy arrangement, the surrogate and intended parents live in different countries. The agreement might be facilitated by a third party (surrogacy agency or broker) or the intended parents might have a pre-existing relationship with the surrogate and simply live in different jurisdictions. This can be contrasted with a domestic surrogacy arrangement, where both the intended parents and surrogate live in New Zealand.

Domestic commercial surrogacy, where the surrogate is paid for acting as a surrogate (or potentially is reimbursed for expenses) is a criminal offence in New Zealand under the Human Assisted Reproductive Technology Act 2004 (HART Act). Since the Act does not have extra-territorial effect, this prohibition on payment does not extend to international arrangements.

A domestic gestational surrogacy arrangement requires the assistance of a fertility clinic (since the surrogate's eggs are not used, the embryo must be created in vitro and then transferred into the surrogate through IVF), and it is a criminal offence for the fertility clinic to act without prior approval of the Ethics Committee on Assisted Reproductive Technology (ECART). A traditional surrogacy

arrangement (which can be carried out by artificial insemination) is not subject to this requirement.

III. International Surrogacy in Times of Covid-19

Prior to Covid-19 lockdowns, the process for intended parents who have engaged in international surrogacy to return to New Zealand with their child and to be recognised as the legal parents of the child can be described as follows:[2]

- The intended parents travel to the country of the child's birth;
- the child is born;
- DNA testing is carried out;
- a New Zealand visitor visa is applied for and issued by the Ministry of Immigration in accordance with the non-binding Guidelines agreed by Cabinet in 2020;
- the intended parents and baby return to New Zealand;
- an adoption application is filed in the Family Court;
- a Social Worker's Report is completed; and
- when a final adoption order is granted (usually 6-9 months after arrival in New Zealand) legal parentage is transferred to the intended parents and the baby is eligible for New Zealand citizenship (provided an intended parent is a citizen or is entitled to remain in New Zealand indefinitely).

As Covid-19 spread worldwide, it soon became clear that this process would be disrupted, if not almost impossible to achieve. Border closures and flight cancellations had a clear impact on the process, and lockdowns/work from home orders also affected the ability to complete the administrative requirements for obtaining passports and visas. This section will first identify some of these impacts. It will then discuss the New Zealand Family Court's attempt to respond to these through the application of a Protocol, using the results of a survey carried out with family lawyers, and through an analysis of reported international surrogacy cases from 2020.

2 This is adapted from: Jacquelyn Moran "Family Court Covid-19 Protocol for the Adoption of New Zealand Surrogate Babies born overseas" (21 September 2021) The District Court of New Zealand <districtcourts.govt.nz>.

A. Available statistics on international surrogacy

The exact numbers of New Zealanders engaging in international surrogacy has always been difficult to determine. While numbers of intended parents applying for visas to bring their child back to New Zealand can be recorded, as can the number of adoption applications involving a surrogate-born child, not all intended parents take these steps. In some countries legal parentage is defined by genetics. As a result, if one or both intended parents are the genetic parents of the child, the birth certificate will list them as the legal parent and the intended parents can simply apply for a New Zealand passport for the child. In other countries, like the United States, a child born in the United States is entitled to United States' citizenship and therefore is eligible for a United States' passport and can enter New Zealand in that way.[3]

Despite these issues with obtaining accurate numbers, the information that we are able to obtain does suggest that Covid-19 has not had an overall impact on those engaging in international surrogacy. One of the steps required in the international surrogacy process is that a social work report is to be written. Oranga Tamariki has noted that the number of reports it has written does not appear to have changed in the last few years. It wrote 17 reports in 2017, and 19 reports in both 2018 and 2019. In 2020, it wrote 20 reports. It then appeared to change the way it records this information, but records show that in the year ending 30 June 2021, Oranga Tamariki had written 19 reports.[4] This suggests that numbers are reasonably stable, despite the challenges of Covid-19.

B. Experiences of family lawyers from March-August 2020

In mid-2021, the author carried out empirical research to understand the experiences of family lawyers involved in surrogacy arrangements from the beginning of the 2020 Covid-19-lockdown. Members of the Family Law Section of the New Zealand Law Society were emailed a link to an anonymous online questionnaire and were asked to share their experiences in relation to international and domestic surrogacy.[5] Seventeen lawyers responded, with the majority of respondents being

3 Note that New Zealand law does not consider this intended parent to be the legal parent of the child despite the fact that the name is on the birth certificate. The intended parent is still required to go through the adoption process in New Zealand in order to be recognised as the legal parent under New Zealand law. This step does not always happen, however.

4 Te Aka Matua o te Ture | Law Commission *Te Kōpū Whāngai: He Arotake | Review of Surrogacy* (NZLC IP47, 2021) at [2.10].

5 The survey was administered using online survey software Qualtrics. Ethics Approval was received from the University of Canterbury Human Ethics Committee for this research (HEC 2021/11/LR-PS).

from Canterbury/Westland (seven respondents) and Auckland (five respondents). One response was received from a lawyer in each of Waikato/Bay of Plenty, Gisborne, Hawkes Bay, Wellington and Marlborough. While this might seem like a low response rate given the number of lawyers practicing in the area of family law, it could be noted that several of the respondents had advised on multiple surrogacy cases. Overall, available statistics do suggest that the respondents represent the majority of family lawyers advising on surrogacy cases in New Zealand during this time. The first set of questions in the survey considered the experience of family lawyers with surrogacy cases from the initial border closures in March 2020 to August 2020 when the Family Court introduced a Protocol for international surrogacy cases.

Five respondents reported that they had been involved in international surrogacy cases during this period, with one of these noting that they had advised on 10 cases, and the others on one each. Locations mentioned were Georgia, the Ukraine and the United States.

When asked "what were the particular issues (if any) faced by your clients during this time?" one respondent noted simply that "all issues were Covid-19 related". The specific issues mentioned by other respondents included:

1. Travel to the country of birth

Travel-related concerns appeared to depend on the destination country. One respondent noted that travel was the "greatest" issue. Another noted that "there was no problem" flying into the United States during the early stages of 2020, but that this became more challenging as Air New Zealand stopped flying into some United States' airports.

2. Birth plans

It is normal practice for intended parents and surrogates to agree on a birth plan, which covers where the birth will take place, who will be present, and many other important details. Respondents noted that Covid-19 disrupted many of these arrangements. Examples given included: the intended parents might have planned to spend time with the surrogate before birth and this was no longer possible; access to the hospital and presence during delivery were heavily restricted, and therefore plans to support the surrogate during labour and witness the birth were disrupted; and plans for the provision of birth milk were not able to be carried out.

3. The post-birth period

After the birth, the intended parents and child remain in the country of birth while relevant documentation to allow the child to travel back to New Zealand

is obtained. Often during this period, the intended parents spend time with the surrogate and her family, and perhaps even with their own family who have travelled to meet the newest member. Lockdown restrictions meant that other people could not travel, and the intended parents were either required to remain in their accommodation during this period or chose to do so out of concern for the health of their new-born child.

4. The administrative requirements

In order to travel to New Zealand with their child, the intended parents need to undertake certain administrative tasks. The child needs to be issued with a passport (if entitled to one from the country of birth) or an exit visa will need to be obtained. A visitor visa for New Zealand is also needed, which requires a DNA test. Issues were reported at every stage of this process. For example, notary publics were hard to find, and DNA testing was either not able to be carried out or was limited. Photographs of the baby for passports could not be taken as shops were shut.

The United States is currently the most popular international surrogacy destination. A child born in the United States is considered to be a United States' citizen and therefore entitled to a United States' passport. Standard practice is therefore for intended parents to obtain a United States' passport for the child for the purpose of travel to New Zealand. One respondent noted that the United States began to decline to issue passports during this period as it considered that the child was a United States' citizen and was therefore safe to remain there. The intended parents, however, had usually entered the United States on temporary visas and were required to leave when their visa expired.

5. Travel to New Zealand

As the pandemic continued, finding return flights home to New Zealand became increasingly difficult. One respondent noted that, due to Air New Zealand's reduced flight schedule, the return trip often involved multiple flights and "consequent long delays at airports where parents felt very nervous about the exposure of their new-born babies to the virus". There was also increased stress reported in booking flights and making connections, and with booking Managed Isolation and Quarantine on arrival in New Zealand.

6. The overall increase in stress

One respondent summed up the overall experience of intended parents well:

> Overriding anxiety and uncertainty of being in another country that did not seem to have managed the virus as

> effectively as New Zealand, so [intended parents] left the relatively normal life at home and travelled to an entirely different society. There were high numbers of Covid-19 related deaths, demonstrations, civil unrest and parents just wanted to get home ASAP. In pre-Covid-19 times many of the new parents enjoyed their time post birth in the States – spending time with their surrogate families, bonding with their new babies, and making the most of their time away. They all knew under the previous system they had to spend about 5–6 weeks post-birth [in the birth country] before they could get their child's passport and New Zealand visa before they could head home so mostly people just enjoyed the time away. In the pandemic world it wasn't like that. The post birth euphoria was muted by high levels of anxiety and stress caused by the uncertain times and every single case reported feeling absolute relief when they boarded the plane home. After all that MIQ was a breeze.

In addition to intended parents reporting a stressful experience, several lawyers also reported finding their job more challenging. One respondent noted that they "spent many days negotiating with various governments to develop policies to allow my clients access to the country of birth." Another added:

> As a lawyer these cases were and remain very, very challenging. I had to constantly come up with solutions to problems I had not anticipated. There was always urgency because of the inflexibility around the return flights and then when MIQ vouchers became so hard to secure there was absolutely no give on the return date. The passport HAD to be in the USA by the return flight. And that issue just got worse [in 2021].

C. The Family Court Covid-19 protocol for the adoption of New Zealand surrogate babies born overseas (the "Protocol")

On 20 August 2020, the Principal Family Court Judge released a Protocol to be applied in the Family Court in recognition of the difficulties being reported

with international surrogacy.[6] The Protocol was initially planned to be in effect from 20 August 2020 to 1 March 2021, when the Epidemic Notice issued under the Epidemic Preparedness Act 2006 was due to expire. When the Epidemic Notice was then renewed for two further 3-month periods, the duration of the Protocol was also extended. The Protocol finally expired on 23 September 2021. The Protocol was expressly not intended as a long-term approach to international surrogacy, but instead to "provide a temporary, targeted response to the specific issue of the inability to obtain a passport in the country of the baby's birth" due to Covid-19.

For the Protocol to apply, four criteria must have been met.

- First, there must have been an overseas surrogacy arrangement, entered into "before the start of the pandemic". This criterion recognised that intended parents entering into these arrangements after this point have made an informed decision to do so knowing that there would likely be difficulties in travel and obtaining documentation. The overseas surrogacy arrangement must also be "legitimate", or not "illegal" in the country of the surrogate or the child's birth to fulfil this criterion.
- Second, the intended parents must not have been able to obtain passports in the country of birth in a timely manner due to the effects of Covid-19. The language of this criterion was altered in March 2021 to require that "there are confirmed difficulties in obtaining a passport overseas within a reasonable timeframe due to the effects of Covid-19".
- Third, this inability to obtain a passport in a timely manner must directly impact on the return of the baby and the intended parents to New Zealand. This language was altered in March 2021 to require that "this directly and seriously impacts the ability for the baby and commissioning parents to travel to New Zealand".
- Finally, (inserted from March 2021) the delays must be such that they result in the intended parents becoming in need of assistance offshore.

If the criteria were met, the following steps were to occur:

6 Moran, above n 2.

- Oranga Tamariki were to vet the intended parents before the birth of the child. This could occur via Audio Visual Link (AVL) if it was not possible to do so in person. An AVL interview would also occur after the birth. The social work report would then be written for the Court. This would require proof of consent to adoption by the surrogate and her partner (if applicable), evidence of a genetic link between at least one intended parent and the baby, and information as to how the child will have access to information about their identity.
- Applications for adoption were to be filed in either Waitakere (for applications from Northern and Central regions) to be heard by Judge Pidwell, or in Wellington (for applicants from the Lower North and Southern regions) to be heard by Judge O'Dwyer. Filing could be electronic, provided there was an undertaking to file originals when these were reasonably available.
- A priority 30-minute AVL hearing would be scheduled within six weeks.

D. Experiences of Family Lawyers from August 2020–April/May 2021

The second set of questions in the author's empirical research considered the experience of family lawyers with surrogacy cases from the introduction of the Surrogacy Protocol in August 2020 until the survey was conducted in April/May 2021.

Five respondents reported that they had been involved in surrogacy cases during this period, with three respondents providing additional information. One mentioned involvement in three cases (one involving the United States and two involving Georgia). A second respondent mentioned nine cases (three involving the United States, two each involving Ukraine and Thailand, and one each involving Mexico and Colombia). The third mentioned 11 cases, with one involving South Africa and the rest involving the United States.

When asked "what were the particular issues (if any) faced by your clients during this time?" one respondent described difficulties in obtaining consents:

> Significant difficulties complying with the requirement for consents to be taken by Notary Publics. In Georgia for example, this was simply impossible. Various strategies were employed to deal with this which then had to be argued as complying in the Court. This of course increased cost to clients.

Respondents were then asked specifically about their experiences with the Protocol. Two respondents noted that the Protocol was apparently designed with the United States in mind, and did not work as well for other countries, although a third mentioned that it worked for South Africa as well. One noted: "I worked really hard to negotiate travel routes for clients and their children such that we didn't need to use the Protocol formally unless it was with the United States".

One respondent provided a substantial description of a hearing held under the Protocol, describing it as "very, very effective":

> The judge had exactly the same information before her when dealing with the adoption application as she would have in a pre-Covid-19 case – that's important to remember. What was different was this – the hearing happened while the parents were out of the country, not back in New Zealand with their foreign born child who had travelled to New Zealand on a foreign passport and a special visitor visa. The [Oranga Tamariki] checks and assessment had still taken place during the pregnancy, while the parents were in New Zealand, but the follow up post-birth was an AV meeting not a face-to-face meeting. The parents still had to show consent to exit the country from their surrogate, a genetic connection if there was one, show consent to adoption, satisfy the court they had not breached the laws of the other country (in other words, it was a regulated surrogacy) and have a plan to discuss the birth story or share identity information with their child. All of that remained the same - it all just happened within three weeks of the birth not 6–8 months after they got back to New Zealand.
>
> AVL hearings were really effective, the technology mostly worked really well. Being able to file everything electronically was a major timesaver. Having designated judges and staff was another huge timesaver and enabled key players to build up

> knowledge and expertise as they became rapidly accustomed to the issues.

Some respondents commented on the criteria to be met before the Protocol could be utilised. One noted that where the criteria was not met: "Issues mainly included for those that could obtain passports (thus not meeting the protocol) were the long delays in obtaining transit visas for other countries to travel to New Zealand."

Another, however, noted that where the Protocol did not apply, there were other options available:

> In those situations, the lawyers had other options to obtain directions from the court in terms of how the adoption case could be prioritised and expedited. It was and is possible to ask for similar or the same kind of directions to the standard EP case management directions. Counsel just have to file the appropriate application and memorandum.

When asked about the effectiveness of the Protocol, two respondents thought it should have been extended to cover all international surrogacy cases. One noted that while intended parents and children could still return to New Zealand under the normal pre-Covid-19 method of using Certificates of Identity, being able to obtain a passport for the child under the Protocol "open[ed] up safer and easier routes" home. Another commented that those unable to use the Protocol were being "stranded for long periods of time". A third noted that, even when the Protocol was applied, other issues had arisen in relation to signing affirmations and consents, but noted that "the court [was] very receptive when I have found these issues and have had to seek special directions."

E. International surrogacy cases during Covid-19

While it is becoming increasingly less common for surrogacy adoption decisions to be made publicly available, it is interesting to examine the reported cases in 2020 and 2021 for any Covid-19-related effects.

The first international surrogacy case reported in 2020 was heard on 1 May.[7] The child, Christian, was born at the end of 2019, in Colorado, United States. It does not appear that there were any Covid-19-related issues in this case. The second was

7 *Re Spiegler* [2020] NZFC 2872.

heard on 27 October.[8] The child, Lei, was born in California in 2019, and returned to New Zealand in March 2020, "just before lockdown".[9]

The first reported case that appeared to be affected by Covid-19 was *Re Weber*.[10] It was heard on 24 August 2020, just three days after the Protocol came into effect (and was, in fact, the impetus for the drafting of the Protocol). The child, Natalie, and her parents appeared via AVL from Hawaii. The social worker and counsel for Oranga Tamariki also appeared via AVL. Judge Pidwell noted that while Natalie had been issued a birth certificate and the Minister of Immigration had provisionally confirmed her eligibility for a visitor's visa, there was a "lengthy delay" in obtaining a passport for her.[11] The Judge noted that the "Covid-19 International Surrogacy Protocol" had been developed to address this issue, and that this was the first case heard under this Protocol.[12] The case then proceeded like any other international surrogacy adoption application, with consideration of jurisdictional requirements, the applicability of the Adoption (Intercountry) Act, and the standard Adoption Act requirements. The only factor that distinguished this decision from others (apart from the initial acknowledgement of the use of the Protocol) was the final sentence: "I wish you all a safe journey home."[13]

The second reported case was heard four days later, on 28 August 2020. *Re Ponte* concerned a girl, Erica, born in Oregon, United States.[14] Erica and her parents appeared via AVL from Oregon, and their lawyer and the social worker also appeared via AVL. Judge O'Dwyer began by commenting:[15]

> This hearing has been convened urgently under the COVID-19 International Surrogacy Protocol. This Protocol has been developed to address the needs of newborn children who have been born overseas through approved surrogacy arrangements and who are unable to obtain passports and suitable visas to return to New Zealand speedily for adoption applications to be heard. This COVID-19 pandemic has caused significant delays overseas for children in circumstances like this and, of course, delays with flights.

8 *Re Lo and Zhou* [2020] NZFC 9548.
9 At [7].
10 *Re Weber* [2020] NZFC 7259.
11 At [7].
12 At [7].
13 At [19]
14 *Re Ponte* [2020] NZFC 7481.
15 At [5].

The judgment again then proceeded like any other international surrogacy case, with only a few differences. The first was a mention that the applicant's visa was to expire in October 2020, and they had booked flights for 12 September 2020. To make this flight, assuming this order was made, they would need to register the birth and then apply for an urgent New Zealand passport for Erica. Second, it was pointed out that it was in Erica's best interests to return to New Zealand as soon as possible "particularly because of the COVID-19 health risks".[16] Third, while the social worker had known the applicants for five years and had therefore carried out the pre-birth vetting in person, the post-birth vetting required observation "by WhatsApp".[17]

The third reported case was heard on 25 September 2020. In *Re Moss and Shui,*[18] a boy, Dylan, was born in the United States. Dylan's parents appeared via AVL (Dylan being asleep due to the late hour), as did their lawyer and the social worker. Judge O'Dwyer began by noting the existence of the Covid-19 Protocol in language similar to that used by her in *Re Ponte*, adding that the ability to arrange for this hearing using AVL "… so quickly and so efficiently shows what can be done in difficult COVID-19 times".[19] The hearing once again proceeded as usual, with a couple of final comments: the first being a request for a photo, since the Judge had not had an opportunity to see Dylan,[20] and the second being the hope that they will be able to make their flight home in October, noting that "[it] will be a very, very happy day when they touch down on New Zealand soil".[21]

No international surrogacy cases have been reported between January–October 2021.

IV. Domestic Surrogacy in Covid-19 Times

The closing of international borders on 19 March 2020 had no direct impact on domestic surrogacy cases. The introduction of Alert Levels, and their subsequent restrictions, did however have the potential to be problematic in relation to travel (if the intended parents and surrogate lived in different locations), birth plans (due to limits on who could be present in hospitals) and the post-birth plans (issues with transfer of the child and the wider family meeting the child). Issues around the ability of Oranga Tamariki to visit the house to write the social worker reports, and access to the courts would also delay adoption proceedings.

16 At [21].
17 At [25].
18 *Re Moss and Shui* [2020] NZFC 8443.
19 At [5].
20 At [20].
21 At [22].

This section considers the impact of Covid-19 on domestic surrogacy. It begins by describing the results of the empirical work carried out with family lawyers, and then analyses ECART applications and relevant reported domestic surrogacy cases.

A. Experiences of family lawyers with domestic surrogacy cases

The third set of questions in the survey considered the experience of family lawyers with domestic surrogacy cases.

Thirteen of the 17 survey respondents reported that they had been involved in domestic surrogacy cases during this period. One noted that they had been involved with 10 cases, a second noted "approximately 10" and a third noted six cases. The other 10 respondents had one case each.

The respondents were asked about "the particular issues (if any) faced by clients during this time". The following themes emerged:

1. No specific issues

One respondent noted that the problems were "just the usual of having to adopt a child which is totally genetically theirs already". Another agreed that there were no additional issues due to Covid-19.

2. Travel and geographic distance

Two respondents noted issues with lockdowns and distance between the intended parents and surrogate. One described this as "concerning" for the parties and another added that "anxiety was heightened" due to different alert levels in different regions, and the concern that "they would miss the birth of their child". A third noted that as lawyers they needed to use AVL to communicate with their clients.

3. Birth plans

One respondent noted that the intended parents faced issues like not being able to share in medical appointments with the surrogate, "limited time in hospital because of lockdown" and their inability to attend the birth as the "surrogate chose partner and one other parent to attend birth". Post-birth, the provision of breast milk was not possible, nor could the families get together to celebrate the birth.

4. The administrative requirements

It was noted by one respondent that the requirement of obtaining a Social Worker's report was delayed "especially home visits because of lock down and then work load after [coming] out of lockdown".

5. Delays in court proceedings

One respondent noted that there was an issue with the "failure of the Court to deal with matters promptly". Another described several delays in filing applications for adoption for their clients, with one child "not adopted in a Final Order until he was 11 months old". A third described how some hearings were held by phone or AVL, and that even if a case was held "in person", no one else was present in the court. One respondent noted that the delay in scheduling a court date meant that in some cases "social work reports expired resulting in the parents having to undergo medical tests and interviews."

B. ECART Applications during Covid-19 times

As described above, domestic gestational surrogacy arrangements must go through the ECART approval process. Covid-19 did not appear to have a noticeable impact on applications to ECART in 2020.[22] Looking at the trend in numbers of applications over the past five years, ECART's minutes record 26 applications for surrogacy in 2015, 21 in 2016, then 29 in both 2017 and 2018. There was a substantial increase to 38 in 2019.

In 2020, there were 42 applications, heard over six meetings. While this is an increase in numbers from previous years, it is consistent with an increasing trend towards domestic surrogacy as shown by the 2017–2019 numbers. One point worth noting, however, is that while the overall number of applications in 2020 might not be considered to be a significant increase, when these are broken down into applications heard in individual meetings, there is a hint of some change in behaviour. The number of applications heard in the first four meetings in 2020[23] were reasonably consistent with the number of applications received at those times in the previous two years.[24] On the other hand, the number of applications heard in the last two meetings of 2020, in October and December, show an increase compared to

22 The minutes from ECART meetings can be found here: Ethics Committee on Assisted Reproductive Technology (ECART) "Meetings" <https://ecart.health.govt.nz>.

23 These meetings were held in February, April, June and September.

24 Applications heard in the first meeting of the year number as follows: 2018: 6; 2019: 5; 2020: 7. Applications heard in the second meeting of the year number as follows: 2018: 4; 2019: 11; 2020: 8. Applications heard in the third meeting of the year number as follows: 2018: 6; 2019: 8; 2020: 6. Applications heard in the fourth meeting of the year number as follows: 2018: 5; 2019: 5; 2020: 4.

previous years. In 2018, the last two meetings considered one and seven applications respectively. In 2019, the last two meetings considered four and five applications respectively. In 2020, the numbers were nine and eight. These numbers are probably too small to draw any real conclusion, and in fact, the numbers could well be influenced by other factors like delays in being able to meet the administrative requirements in the application (scheduling counselling or legal advice sessions) or processing the applications at ECART level. They may, however, hint at an increasing interest in domestic surrogacy.

In the first three meetings of 2021, there have been 20 applications.[25] While this might not be too different compared to the same stage in the last two years, one of the main fertility clinics in New Zealand has suggested that application numbers might experience a surge in the coming months. Fertility Associates reported that it had submitted 27 applications to ECART on behalf of intended parents in the whole of 2020, but that by March of 2021 they had 29 applications ready for submission.[26]

The effects of Covid-19 were discussed in one application in 2020 and in four applications in 2021, all of which contained an international element due to either the intended parents or surrogate living offshore.[27]

The first was Application E20/039, which involved a same-sex couple living in Australia, and a surrogate living in New Zealand. This was first considered in April 2020, and there is a brief concern mentioned about the effects of Covid-19, specifically:

> … what might happen if either the intending parents could not travel to New Zealand at the time of any resulting child's birth or there was a delay in making the necessary arrangements to allow the intending parents to take the child to Australia.

The application was declined due to concerns about the surrogate's health status. It was then reconsidered in June 2020, where it was noted that the health concerns had been satisfactorily addressed. In relation to the travel concern, additional information had been given "clarifying the proposed approach for the potential child to be looked after following birth if the intending parents were not able to

25 There were five applications in February (including one non-binding), six in April, and nine in June.

26 Quoted in Te Aka Matua o te Ture | Law Commission, above n 4, at [5.21]. Dr Mary Birdsall, group director of Fertility Associates, has also noted an increase in interest in people wanting to "ship eggs, sperm, embryos all over the world … and into New Zealand", noting that they had had "many, many more requests" for this: quoted in Alanah Eriksen "Surrogacy: Demand for overseas embryos, eggs, sperm increases in New Zealand" *The New Zealand Herald* (online ed, Auckland, 27 February 2021) <nzherald.co.nz>.

27 These applications are discussed in the minutes of the meetings, see ECART, above n 22.

be present in New Zealand" and in relation to "the proposed plan for the potential child to travel from New Zealand to Australia after birth." ECART approved the application "subject to the condition that the intending parents will be present in person and take over care of the child immediately at birth" although how this could be enforced is unclear.

The second application, Application E21/046, was heard in April 2021, and also had an international element. While the facts are unclear, it was noted that the embryos would be created in New Zealand and then exported offshore. The surrogate (the intended mother's sister) and her partner lived offshore. The intended parents planned to travel to be present for appointments throughout the pregnancy and for the delivery. It was noted that:

> The intending parents plan to travel to be with the birth parents closer to the time of the birth so that they are able to take care of the child as soon as they're able to do so and if possible subject to COVID-19 restrictions. The intending mother also plans to travel if possible, at significant points during the pregnancy. The parties have spoken at length about what they would do if the intending parents are not with the birth parents at time of the birth and, there has been agreement that the birth parents would look after baby until the intending parents able to do so.

The third was Application E21/064, heard in June 2021. In this case, the intended parents and the egg donor were living offshore, while the surrogate (the sister of one of the intended parents) lived in New Zealand. Initially, the plan was for the embryo transfer to take place in the intended parents' country of residence, and counselling for the intended parents, surrogate and egg donor was carried out in that location. Due to Covid-19 travel restrictions, these plans changed. Embryo transfer, pregnancy and birth were now planned to take place in New Zealand, and counselling had taken place in New Zealand. The adoption would also take place in New Zealand, although it appeared that the intended parents would remain offshore until closer to the time of birth.

Application E21/067, heard in June 2021, also involved intended parents living offshore. As the surrogacy arrangement was a traditional one, ECART had no jurisdiction to approve or decline this application but were asked to provide a non-binding recommendation. The birth plan involved the surrogate (a New Zealand resident) to travel to the country of the intended parents (of which she is a citizen) to give birth. It was noted by ECART that there is "a degree of risk that [the surrogate]

might not be able to travel given the uncertainty the Covid-19 pandemic brings". Should travel not be possible, the plan would be for the surrogate to give birth in New Zealand, register the baby at the Consulate and care for the baby until they could travel to the country of the intended parents where the adoption would take place. It was noted that there was no legal barrier to this plan, however in its non-binding recommendation ECART noted:

> … concerns about the possibility of the birth mother being away from her family for a considerable length of time because she would have to travel to the country of the intending parents' residence before she is 32 weeks pregnant (a requirement imposed by airlines). There are other factors that might intervene such as if there is another COVID-19 outbreak that would significantly impact on her ability to travel (either to the intending parents' country of residence, or back to New Zealand). If she does give birth in New Zealand, she may be in the position of having to care for the baby for quite some time, which may make relinquishment more challenging.

Finally, in Application E21/073, also heard in June 2021, the intended parents again lived offshore (as did the egg donor). The surrogate, who was the sister-in-law of one intended father, lived in New Zealand. The counselling reports mentioned a discussion of Covid-19, but the minutes recorded only that both intended parents planned to be in New Zealand for the birth, with one travelling "well in advance" of this time to provide support to the surrogate.

ECART's authority ends once approval of the application is given. While ECART can raise concerns about, and ask intended parents to consider, issues after the pregnancy has occurred, it has not authority or responsibility for this. It can therefore be seen as significant that ECART has chosen to note its Covid-19-related concerns in these applications.

C. Domestic Surrogacy Cases During Covid-19

There has been only one domestic surrogacy case reported since the beginning of 2020. In *Re Timoko*,[28] the boy, William, was born at the end of 2019. The adoption application was heard on 17 March 2020, just over two weeks after the first confirmed New Zealand case of Covid-19. The only noticeable impact on the hearing

28 *Re Timoko* [2020] NZFC 2070.

was that William and his parents were not present. They had been excused from the hearing on the basis that "in these extraordinary times given the existence of the coronavirus epidemic" the applicants and "this very young child" could be excused from attending.[29]

V. Looking Forward: Surrogacy Reform in New Zealand

In October 2019, a Petition signed by over 32,000 New Zealanders was presented to Parliament by Christian Newman seeking reform of the Adoption Act 1955 in relation to surrogacy.[30] Following this, in 2020, the Law Commission announced that it would be adding Reform of Surrogacy Laws to its work schedule for 2021. An Issues Paper was released on 29 July 2021 and a call for submissions ran from July–October 2021. It is planned that the project will report to the Government in the first half of 2022. Unrelated to the Law Commission project, on 23 September 2021, MP Tamati Coffey's Improving Arrangements for Surrogacy Bill was drawn from the Members Ballot and is currently awaiting its First Reading. The regulation of surrogacy in New Zealand is, therefore, likely to change significantly in the next couple of years. This section will briefly mention the proposed reforms in the Law Commission Issues Paper and the Bill, before considering the lessons that can be taken from the experiences of lawyers and intended parents with Covid-19 during the last two years.

A. The Law Commission Report

The Law Commission Issues Paper begins by discussing the practice of surrogacy in New Zealand and establishing guiding principles for surrogacy law reform.[31] It then devotes a chapter to understanding surrogacy from a Māori perspective before moving on to consider specific issues that arise with surrogacy. Some of the suggested reforms are as follows:

1. Prior approval of surrogacy arrangements

The Law Commission supports the continued use of the ECART process, although it acknowledges that this can be considered slow, complex, expensive and invasive.

29 *Re Timoko* [2020] NZFC 2070, at [11].
30 Christian John Newman "Update the Adoption Act 1955 to simplify and speed up the process for adoption" (Petition to New Zealand Parliament, 3 October 2019) <www.parliament.nz>.
31 Te Aka Matua o te Ture | Law Commission, above n 4.

2. Financial support for surrogates

The Law Commission recognises that the position in relation to reimbursement for expenses and other payments to surrogates is confusing and recommends clarification. It supports reimbursement of reasonable expenses, but not the payment of a surrogacy "fee".

3. Legal parenthood

The Law Commission acknowledges the inappropriateness of both the Adoption Act in general, and also the specific criteria for adoption, in relation to surrogacy cases. It proposes the introduction of an administrative process to streamline the transfer of parentage if two criteria are met (the surrogacy has prior approval by ECART, and the surrogate has confirmed, post-birth, her consent to the transfer of parentage). Where one or both of the criteria are not met, it recommends the use of a post-birth judicial order, obtained through the Family Court.

4. International surrogacy

The Law Commission notes the lack of current regulation of international surrogacy, and recommends that this approach continue, but that the use of the adoption process be replaced with its previously recommended "post-birth" judicial order.

B. The Private Members Bill

On 23 September 2021, a Private Member's Bill, Improving Arrangements for Surrogacy Bill by Tamati Coffey, was drawn from the ballot. At the time of writing, it awaits its first reading.[32]

The Bill proposes amendments to five Acts and two Regulations. Its most significant aspect is the introduction of a "Surrogacy Order", which:

> ... determin[es] that the custody of any child resulting from a pregnancy under the surrogacy arrangement must transfer from the surrogate to the intending parents within ten days of the birth of the child.

There are two criteria which must be met before a Surrogacy Order can be granted: both intended parents and surrogate must have agreed to this, and ECART must have approved the surrogacy arrangement. Other changes introduced in the

32 The Bill, and its progress, can be viewed here: New Zealand Parliament "Improving Arrangements for Surrogacy Bill" <www.parliament.nz>.

Bill are that reasonable expenses will be permitted to be paid to the surrogate, although valuable consideration (or a "fee") will remain prohibited, and that a Surrogacy Register will be established for the purposes of facilitating surrogacy arrangements.

C. Commentary by Family Lawyers

In 2018, the author conducted a survey asking Family Lawyers about their experiences with surrogacy generally, and their thoughts on reform.[33] The study concluded that reform was definitely needed, but that respondents were split on what this reform should look like. The 2021 Covid-19 study concluded with two questions: "Do you have any other comments on your clients' experience (or your experience as a lawyer) during this time?" and "You may be aware that surrogacy is currently on the Law Commission's work programme. Do you have any comments about surrogacy law reform in general?"

In relation to Covid-19-specific experiences, respondents spoke about the stress on the intended parents and surrogate due to the lengthy process. They also spoke of the difficulties they faced as lawyers with the legal process. One noted that the ability to engage with parents was limited, and another commented that it was hard to get guidance on how to progress applications. On a positive note, respondents spoke of surrogates "accepting" that the process would take time and that they might need to care for the child longer than they had originally intended. Respondents also noted that social workers were "adaptive" to Covid-19, finding ways to have virtual meetings where possible. The courts were also praised for finding ways around emerging issues due to Covid-19. One respondent described how intended parents had also managed to find positives:

> Mostly the New Zealand based parents were not nearly as anxious as the overseas parents. Many reported that lockdown time gave them a unique and special time as a new family – those who had an older child reported this time as being much quieter and more serene than with their first child – many said that they loved lockdown!

In relation to reform in general, respondents commented that the intended parents and surrogate were "firmly of the view that the law was outdated and in need of reform". Two respondents considered that surrogacy law reform was "long overdue and badly needed" and "well overdue". The adoption process was

33 Debra Wilson "Reflecting on surrogacy: perspectives of family lawyers" (2018) 9 NZFLJ 67.

considered inappropriate. One respondent commented that adoption "was not the right process" and that "it needs to be made easier". Another noted that: "there are too many 'what ifs?' in the current system and while the Judiciary is dealing with this on a case-by-case basis this is inadequate and messy."

One respondent added that from their own perspective:

> It is amazing that people have to prove to a social worker and the court that they have sufficient income and are good people to have their own child, when parents who conceive naturally face none of this examination.

VI. Commentary

The regulation of surrogacy is always going to require the balancing of the interests of multiple interested parties: the surrogate and her partner; the intended parents; the child; egg and sperm donors; wider family members; and New Zealand society as a whole. The legal, ethical, cultural and social issues are complex and do not suggest an obvious approach to regulation. These issues can increase in cases of international surrogacy, where concerns are rightly raised about whether surrogates are treated with appropriate respect and whether their wellbeing is prioritised. On the other hand, the benefits of surrogacy are incalculable. For many intended parents (whether a couple or a single person), this is their final, or only, pathway to family formation. How to appropriately regulate surrogacy is therefore a complex issue and, given the fact that any discussion of regulation of surrogacy also, by necessity, involves a discussion of New Zealand's adoption law, it could be understood why this issue has not received much legislative attention since the HART Act was enacted in 2004.

The two current pathways for reform: the Law Commission project and the Private Members Bill, are exciting opportunities to place the issue of surrogacy, with all its challenges and benefits, into the public spotlight. But regulation does not, and cannot, occur in a vacuum. The impact of Covid-19 on surrogacy has highlighted some real problems and solutions with surrogacy, and lessons that can be taken from the global pandemic should be considered in any future reform of the law.

The most notable lessons relate to international surrogacy. Despite the additional issues that Covid-19 has introduced into an already complicated process, numbers of intended parents engaging in international surrogacy do not appear to have changed significantly. If we accept that, logically, domestic surrogacy is the easier route to family formation during a global pandemic, the fact that intended parents are still seeking international surrogacy indicates that the needs of some intended

parents are not currently able to be fulfilled in New Zealand. When enacted, the HART Act did not contain reference to international surrogacy. In the Parliamentary Debates, the limited discussion on surrogacy indicates that this was an attempt to discourage New Zealanders from engaging in international surrogacy. While this might have been successful to some extent (and we might never be able to determine this), it is clear that international surrogacy is becoming more accepted by the New Zealand public and is being used regularly by New Zealand intended parents. The reasons for this, and the regulation of it, therefore, need consideration.

The Improving Arrangements for Surrogacy Bill does not include provisions relating to international surrogacy. Instead, its provisions focus on improving the process of domestic surrogacy. The Law Commission's Issues Paper appears to regard international surrogacy as a complex issue and has recommended the continuation of the current non-regulation approach in the HART Act. It does, however, see the replacement of the adoption process with a judicial order model to be beneficial. Neither the Bill nor the Law Commission can be fairly criticised for their focus on domestic surrogacy, where substantial changes are clearly called for, and it should be noted that many of the changes that are found in each will also be of benefit for those engaging in international surrogacy. However, the experience with international surrogacy has highlighted several points worthy of mention, particularly because Covid-19 related issues are likely to remain in our society, and globally, to some degree for the foreseeable future:

A. Flexibility and adaptability are key

The introduction of the Covid-19 Protocol in the Family Court resulted from a combination of a family lawyer identifying a potential issue and proposing a solution, and the Family Court staff being willing to be flexible and adapt to changing circumstances. Oranga Tamariki also found ways to adapt, carrying out assessments via AVL. Even in situations where the Protocol did not apply, lawyers reported that the Family Court was able to respond to issues in a flexible manner. This indicates that the system can cope well with different approaches to surrogacy.

B. AVL is an effective tool to simplify and streamline the process

The use of AVL to hold adoption hearings appeared to work well. Even in some cases where everyone involved (Judge, social worker, lawyer and intended parents and child) were in a different location, holding the hearing by video did not create any noted issues with the process. For those who met the criteria for the use of the Protocol, the complex international surrogacy process was reduced and simplified,

and the intended parents were able to return to New Zealand as not only the parents of their child, but also as the legal parents. It is understandable that the Protocol as designed was limited to certain situations where the process was disrupted by Covid-19, but the successful use of the Protocol in these limited circumstances does suggest that a widening of the criteria for its use could be introduced in the future while still maintaining the integrity of the process.

C. The use of assigned Judges

Due to the potential complexity of international surrogacy cases during Covid-19, two Judges were assigned to hear applications under the Protocol. This enabled the Judges to become familiar with the process, and this does not appear to have created any issues. The use of expert or dedicated Judges for surrogacy cases has been a part of the United Kingdom Family Court system for many years (beginning with one Judge, and then increasing to three Judges as the workload increased) and seems to have positive outcomes.

There are also some lessons that can be taken from domestic surrogacy, although the impact of Covid-19 on domestic arrangements was far more limited. The issue of delay was frequently mentioned by family lawyers. The process pre-Covid has been described as lengthy, costly and difficult to understand or accept.[34] Both the Law Commission Issues Paper and the Improving Arrangements for Surrogacy Bill attempt to address these concerns by suggesting different, more streamlined, processes for the transfer of surrogacy. While these are both potentially effective solutions, and are worthy of legislative consideration, the experience with the impact of Covid-19 on surrogacy does provide some additional points for consideration:

D. The use of AVL should be considered

The experience of international surrogacy during Covid-19 has shown that AVL can be used effectively. In relation to domestic surrogacy, family lawyers reported lengthy delays in processes, whether in scheduling Oranga Tamariki visits or Family Court adoption hearings. While both the Law Commission and the Bill suggest a more streamlined approach to transfer parentage, there will still be the need for Oranga Tamariki to observe the family to make a report and, in some cases, a Family Court hearing might still be required. The acceptance that AVL can be used to streamline whichever process is adopted is clearly beneficial.

34 The idea that the intended parents must adopt "their own child" is frequently cited by lawyers, intended parents and even judges as being unfair and difficult to understand.

E. The use of ECART

The ECART process did not appear to be greatly impacted by Covid-19, although some family lawyers did report that intended parents had difficulties in completing some of the requirements (for example, counselling and obtaining legal advice). ECART itself held the same number of meetings, although these were held remotely. The hint that numbers of surrogacy applications to ECART are increasing, however, has the potential to be problematic in terms of workload. The Law Commission Issues Paper notes that the ECART process can be seen by intended parents as lengthy. Higher numbers of applications to consider might well delay this process further. While this appears to be a workload matter, and not a legal one, it is worth noting that the number and required expertise of ECART members is proscribed under the HART Act. This might need re-evaluating in the future if ECART is to be considering a greater number of applications. The streamlined pathways to legal parentage raised by both the Law Commission and the Bill include ECART approval of the arrangement as a criterion (and in fact, the Bill adds extra considerations for ECART). While this will have no noticeable impact on gestational surrogacy arrangements (where ECART approval is already required) it might result in applications being received by intended parents engaging in traditional surrogacy (where ECART approval is not required) to then access the streamlined pathway.

VII. Conclusion

This article has traced the New Zealand narrative in relation to surrogacy in Covid-19 times. It has used empirical research with family lawyers, together with reported statistics and judgments, to understand the challenges faced by intended parents and surrogates in entering into surrogacy arrangements during (or shortly before) a global pandemic. It has also set out the increased challenges faced by professionals involved in the process (lawyers, Oranga Tamariki, the Family Court). Overall, it can be concluded that while Covid-19 did introduce some new issues into the surrogacy process, it mostly magnified existing issues and made these more apparent to those not completely familiar with the process. The ability of lawyers, the Family Court, Oranga Tamariki and other professionals to adapt to a changing world demonstrates that a more flexible approach to surrogacy made the surrogacy process more workable. It remains to be seen whether this flexibility was purely a short-term response to a global pandemic, or whether these are changes that might continue to be used post-Covid-19. In September 2020, the then-Minister of Justice, Andrew Little, hinted that policy changes like the Protocol might continue in the

post-Covid world, noting that "I'm expecting there will be changes we made in all areas that survive Covid-19 because they are sensible things to have."[35] With the Law Commission project and the new Bill both in process, the lessons from, and experiences of surrogacy in the Covid-19 world should play an important role in debates in surrogacy law reform.

35 K Lawrence "How Covid-19 has streamlined the way parents bring surrogate babies home" (13 September 2020) Stuff <www.stuff.co.nz>.