SURROGATE MOTHERHOOD IN NEW ZEALAND: A SURVEY OF EXISTING LAW AND AN EXAMINATION OF OPTIONS FOR REFORM

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I INTRODUCTION

1 Overview

Surrogate motherhood is a practice which provokes markedly different reactions from those evaluating it.[1] To some it represents a valid solution to an important social problem, while to others it is a grave threat to society's moral fabric. There are some for whom surrogacy is characterised by love and self-sacrifice, while for others it is synonymous with depersonalisation and exploitation.

Surrogacy has been the subject of legislation in a number of jurisdictions.[2] However, the New Zealand Parliament has yet to deal specifically with the practice. At present surrogacy is governed by a disparate collection of statutory provisions and common law principles, which were not developed with surrogacy in mind and affect the activity in uncertain and arbitrary ways.

The merits of surrogacy cannot be ignored in an examination of the law relating to the practice. Ultimately the response of New Zealand courts in the current legal environment depends to a large degree on judicial evaluation of the public interest in this context. Additionally any legislative response is likely to be guided by similar factors along with considerations of political expedience.

In this article I will suggest how surrogacy arrangements are likely to be dealt with under existing New Zealand law. The questions of the enforcement of morality through the law, paternalism, and the social utility of the activity will also be examined as issues which must inevitably be considered in relation to any judicial or legislative response to surrogacy. Finally various options for reform and the attitude of our Parliament to them will be evaluated.

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1 For an example of contrasting views among the judiciary towards the practice compare the judgment of Sorkow J in *Re Baby M* 525 A 2d 1128 (1987) (called *"Baby M 1"* below) with those of Wilentz CJ on appeal in *Re Baby M* 537 A 2d 1227 (1988) (called *"Baby M 2"* below). For marked contrasts in attitudes among academic commentators see eg Warnock "Legal Surrogacy – not for love or money?" *The Listener* [UK] (January 1984) 24 and Downie, *Baby Making: the Technology and Ethics* (1988) 217.

2 In the United Kingdom the area is governed by the Surrogacy Arrangements Act 1985, as amended by the Human Fertilisation and Embryology Act 1990, s 36. Several Australian states have also legislated: Infertility (Medical Procedures) Act 1984 (Vic); Surrogate Parenthood Act 1988 (Qld); Family Relationships Act (Amendment) Act 1988 (SA). For an account of enacted and proposed state legislation in the United States see Field, *Surrogate Motherhood* (1988) 155.

2 The practice of surrogate motherhood

Surrogate motherhood is a term used to refer to the practice of a woman's agreeing to conceive a child with the intention of carrying it to term to give to someone else. Normally those arranging to receive the child conceived as a result of such an agreement are a couple who are unable to have a child together because of the woman's infertility. In this situation the surrogate is inseminated with semen from the male partner, either by natural or artificial means.[3] Accordingly the couple arranging to receive the child is able to rear a child that is biologically related to one of them.

II Dealing With Surrogacy: Some Considerations

This section deals with issues faced by those formulating a policy approach in order to solve or mitigate problems posed by surrogacy.

1 Surrogacy and the enforcement of morals

The ethical issues involved in the surrogacy debate raise the question of the law's relation to morality. In particular, it must be asked whether the law should reflect the popular morality of a society. That is to say if a majority of New Zealanders thought that surrogacy was morally wrong should the legislature and the judiciary act to restrict or prohibit the practice?

In England the Warnock Committee was apparently heavily influenced by arguments that surrogacy is immoral.[4] Mary Warnock subsequently explained the committee's decision on the basis that:[5]

> There is a sentiment here that is virtually impossible to eradicate, whether among men or women. And this is why surrogacy is thought wrong. The moral repugnance stems from the thought of a woman deliberately becoming pregnant for money, knowing that she will give up her child, and from the thought of other people, however great their longing to have children, offering her money to do this, for their own ends. It is for this reason that even in-vitro surrogacy[6] was condemned.

3 Artificial insemination by donor (AID) has a success rate, in terms of conception, comparable to natural intercourse and is easily administered. Generally AID is likely to be preferred as having fewer emotional and moral repercussions. However, at present under New Zealand law there are real advantages in conceiving through natural intercourse: infra nn 35-40 and accompanying text.

4 Warnock, "A Question of Life: The Warnock Report on Human Fertilisation and Embryology" (1985) 46 ("the Warnock Report" below).

5 Warnock, supra n 1, 25.

6 I.e. surrogacy arrangements where a child is conceived *in vitro*. Generally this will involve implanting the surrogate with an embryo which is genetically unrelated to her. The embryo may be created using an egg from the commissioning mother either because she cannot safely bear a child or, more controversially, because she does not want to do so. Alternatively the embryo may have been created by fertilising the egg of a third party. This may be done for one or more of several reasons. The surrogate may be infertile though capable of carrying a child. The commissioning parents may want the child to be genetically related to a specific person or have specific genetic characteristics. Thus the egg used might be from the dead wife of the commissioning father, or from a particularly gifted donor, or from a woman of the same ethnic background as the commissioners in a situation when the surrogate is from a different one. The procedure may also be used to provide legal advantages. The fact that the child does not have any of the birth mother's genetic material may be thought by a court to be

Was the committee unduly influenced by its perception of popular moral sentiment? This question brings to mind the Hart-Devlin debate of just over thirty years ago following the Wolfenden Committee Report on Homosexual Offences and Prostitution in 1957. The Committee concluded that the law should not attempt to regulate what was termed "private morality".[7]

Devlin argued that it was not possible to set limits on the law's proper sphere since the state had the right to protect itself from any activity endangering it. He argued that deviations from the common morality could threaten the state just as treason could.[8] Hart and Devlin, it seemed, agreed that the law should ensure the highest level of individual freedom consistent with the integrity of society. However, their views differed markedly on the extent to which the law should require conformity with a society's common morality to prevent that society disintegrating. Essentially the question asked was where the limits of state tolerance of individual freedom lay.

Devlin thought the law should act to prohibit an activity when it provoked feelings of moral reprobation among right-minded people.[9] Hart, on the other hand, considered that a society's law only needed a minimum moral content to survive and provided that individuals' acts did not harm others they should be left to regulate their own conduct.[10] Devlin's view is consistent with a conservative philosophy favouring the utilisation of the law to ensure individual conformity with the common morality, thereby entrenching that morality and limiting social change. Hart's theory is derived from positivist theories concerning the proper limits of state interference which favour a liberal and tolerant state, facilitating social change.[11]

Those who oppose the use of law as a vehicle to enforce morality claim that a better approach involves an evaluation of the social utility of the practice.[12] According to this approach if any activity offers benefits to the community which exceed its drawbacks it should be permitted. However, a utilitarian test cannot exclude moral values, as it will involve the decision maker evaluating factors of psychic or moral harm and benefit which will no doubt reflect personal views. For this reason it has been argued that we can do little else but enforce morality in making legislative and judicial decisions.[13] Perhaps in reality the matter is one of degree and all that can

a factor worthy of consideration when deciding on the placement of a child. This was certainly the case in the recent first instance American decision of *Calvert* v *Johnson* (unreported, Orange County Superior Court, California, 23 October 1990) where genetics were a factor in determining the placement of the child. The surrogate was a black American while the genetic mother was Indian and the father white. The case is on appeal.

7 *Report of the Committee on Homosexual Offences and Prostitution* (1957; Cmnd 247) para 62.

8 Lord Devlin, "Morals and Criminal Law", Wasserstrom (ed), *Morality and the Law* (1971) 24, 36.

9 Ibid, 39.

10 Hart, "Positivism and the Separation of Morals" (1958) 71 Harv L Rev 593, 621-624.

11 Thus d'Entreves in *Natural Law* (1970) 93-103 concludes that, despite the positivists' belief that their analysis of the law was scientific, rather than being a formal science positivism is little more than a "proposition of natural law, a pronouncement on justice".

12 For example, Sartorious, "The Enforcement of Morality" (1972) 81 Yale LJ 891.

13 Rostow, "The Enforcement of Morals" [1960] CLJ 175, 197.

be said is that it is desirable that we be able to justify our viewpoint rationally before acting on it.[14]

Our legislators also have to give regard to the fact that they are democratically elected. If a majority of the electorate demand that a policy which is morally derived be enacted it could be argued that the legislators have an ethical duty to give heed to the majority's view or are obliged to do so as a matter of practical reality. Even if this view was to be accepted, it is not clear that the public attitude requires our Parliament to legislate to discourage surrogacy. The Warnock Committee claimed that public opinion in England at the time of the report was against surrogacy.[15] However, it may have been that those who considered the practice to be immoral felt more compelled to make submissions to the Committee than those who favoured the practice. A comprehensive Australian survey of public opinion suggested that less than half of Australians object to surrogacy.[16] If the same is true in New Zealand it could not be said that public opinion provides Parliament with a mandate to suppress surrogacy.

Moreover, a positive conclusion on the issue of whether surrogacy is immoral does not mean that the practice ought to be prohibited. It is possible for an individual to conclude that, while an activity is immoral, competing considerations favour its toleration. Thus while Hart might consider surrogacy immoral he probably would not favour its prohibition. Such a view might be based on some conception of individual rights to free choice or alternatively on more practical reasons. For instance, one might consider that abortion is immoral but that people should have the right to choose for themselves according to their own moral code. Alternatively one might argue that, while abortion is immoral and ought to be prevented, attempting to ban it would simply force the practice underground and cause greater damage to society. Thus competing factors of practical expedience and the values of individual freedom and tolerance might in some cases be thought to outweigh moral considerations.

The question of religious beliefs is a thorny one which must be dealt with in this context. Australian experience suggests that Christians are twice as likely to object to surrogacy compared with atheists and that approval among denominations varies.[17] Indeed many of the objections made when the New Zealand Justice Department called for submissions on the issue were from religious groups objecting to surrogacy.[18] It is not clear how religiously derived views can be accommodated within utilitarian tests.[19] It must be asked to what extent individuals should be subject to laws imposed on the basis of others' religious beliefs.

14 R Dworkin, "Lord Devlin and the Enforcement of Morals" (1966) 75 Yale LJ 986: see especially 990-996 on the concept of a moral position.

15 Supra n 4, 44.

16 New South Wales Law Reform Commission, *Public Opinion* (1987) 10.

17 Ibid, 15.

18 Law Reform Division of the Justice Department, "New Birth Technologies: A Summary of Submissions Received on the Issues Paper" (December 1986) 31.

19 Consider for example R Dworkin supra n 14, 997: in requiring that a person be able to justify a moral position he denies the citing of the beliefs of others as a means of doing so. He notes that belief in a deity may be a "possible (though complex) exception".

Surrogacy is an issue which may require us to re-evaluate our most basic assumptions. For instance, Stumpf argues that the perception of the sanctity of the mother and child relationship, one that pervades the Warnock report,[20] is outdated and sexist, involving the presumption that it is a woman's role to rear children and, consequently, that a woman bearing a child without keeping it is unnatural.[21]

Whatever approach to decision making is taken in the surrogacy context any conclusion is going to be influenced by personal opinion. The most carefully calculated utilitarian evaluation will reflect the views of the person making it. However, a decision based solely on the morality of the practice will be even more inherently subjective and undisciplined.

Clearly there is a difficulty in this context which Spann refers to as the "Cassandra problem".[22] He likens the position of judges in surrogacy cases to that of a figure in Greek mythology given the gift of prophesying the truth but cursed never to be believed. Thus, according to the analogy, even if the courts are correct in their evaluations of the merits of cases there will be many who remain unconvinced.

2 *Paternalism*

A consideration of the judicial and legislative responses to surrogacy raises the issue of paternalism: state interference with an individual's freedom in order to promote that person's own interests.

John Stuart Mill was one of the strongest opponents of paternalism. Mill argued that a state should only interfere with an individual's liberty to prevent that person's actions adversely affecting others.[23] This stance was justified on two grounds. First, Mill claimed that liberty, in itself, was a valuable thing necessary to individual growth.[24] Additionally he argued that, as a matter of practicability, the individual was the only person who could decide his or her own best interests and for this reason attempts by the state to force individuals to act in a certain way for their own good are doomed to fail.[25] Consequently Mill believed that paternalism could never be justified on the basis of social utility; the harm resulting from the removal of free choice would always exceed any benefit. This latter claim is now accepted by few commentators.[26] Most would now accept that in some cases the state can promote the interests of the individual by limiting that individual's choices or imposing a course of conduct upon him or her. Thus it is now widely thought that paternalism may sometimes be justified for utilitarian reasons.

20 Supra n 4, 45.
21 Stumpf, "Redefining Mother" (1986) 96 Yale LJ 187, 197.
22 Spann, "Baby M and the Cassandra Problem" (1988) 76 Georgetown LJ 1719.
23 Mill, "On Liberty" reproduced in Wasserstrom, supra n 8, 10.
24 Ibid, eg 17: "If society lets any considerable number of its members grow up mere children, incapable of being acted on by rational consideration of distant motives, society has itself to blame for the consequences."
25 Ibid, 18. Mill refers to this as the strongest argument against paternalism.
26 Eg Hart cited by G Dworkin in "Paternalism" published in Wasserstrom, supra n 8, 115. Hart suggested that "Mill carried his protests against paternalism to lengths which now appear to us to be fantastic".

The regulation or prohibition of surrogacy may be justified for reasons which are not paternalistic (eg the interests of the child or to save other members of society from moral harm). However, one of the more popular arguments against the practice is that it involves the exploitation of surrogate mothers.[27] Thus, the argument may be made that whilst women have a choice of whether to become surrogates, deciding to do so will not be in their best interests and the state should intervene to protect them by removing their right to be a surrogate. Such an approach might be justified by an argument that, because of the harm involved, women would not choose to become surrogates if they were fully informed and rational. This is a form of the real will concept which is used to justify paternalistic interference in relation to the young and mentally defective.[28] An argument of this nature may be comparatively easy to justify in relation to a relatively simple issue such as requiring an individual to wear a seat-belt when driving. In that case the adverse consequences of the interference are obvious and minor and the benefits equally clear and substantial.

However, in relation to an activity, such as surrogacy, with intrinsic ethical issues and risks, the nature and extent of which are uncertain, interference will inevitably be harder to justify. Morality is a very personal issue and it will be difficult for a state to further an individual's interests through interference designed to prevent moral harm. It may be that only an individual woman is capable of judging whether being a surrogate mother would be damaging psychologically. For this reason it is likely that any attempt to regulate decisions in this regard will not further the interests of potential surrogate mothers.

Why is it considered that surrogates are being exploited and that women are in danger of making decisions which are not in their own interests? Apparently it is considered that economically disadvantaged women may be in such a situation that they are motivated by their need for money to do something they would not otherwise do. It must first be shown that surrogacy is indeed exploitive. Exploitation involves one party being detrimentally affected. This could be determined by balancing the relative harms and benefits of the practice on a surrogate. Perhaps the test would involve weighing the hardship of pregnancy and childbirth and the psychological trauma of giving away the child against the benefits of receiving monetary compensation and helping others. Any conclusion in this regard will be largely dependent on the decision maker's own views. Anyone advocating state intervention should ask whether he or she is doing so to promote individuals' welfare or to compel others to behave in a way which does not offend his or her moral code.

The concept of exploitation is a highly subjective one. Someone who needs to work for a living to earn a wage in order to survive could be said

27 Eg the Warnock Report, supra n 4, 46: "Even in compelling medical circumstances the danger of exploitation of one human being by another appears to the majority of us to far outweigh the potential benefits, in almost every case . . . . It is therefore with the commercial exploitation of surrogacy that we have been primarily, but by no means exclusively, concerned."

28 G Dworkin, supra n 26, 115.

to be exploited by an employer. Yet such a relationship is usually characterised as being mutually beneficial. Is surrogacy really different? In a surrogacy arrangement both parties stand to benefit. Both ask as consideration something they want or need. It could be argued that the commissioners are in as great a danger of being exploited as the surrogate mother. Fertility may be a stronger currency than money in this context. Exploitation is an emotive concept reflecting the moral perception of the person asserting it. In a capitalist society the proposition that money is an improper motivation for surrogacy may be difficult to sustain.

From a utilitarian standpoint prohibiting a practice as exploitive can only be justified if the good achieved by the interference outweighs the harm. In relation to surrogacy this may be very difficult to establish. The woman depicted as being exploited may be making a perfectly logical decision, given her circumstances. It is difficult to apprehend how a woman, whose position influences her in making a choice that might be rejected by a woman in a more advantageous position, would have her welfare promoted simply by having her freedom of choice removed. If paternalistic intervention is appropriate in this situation it may be that what is needed is regulation designed to minimise the risks faced by surrogates rather than prohibition. The fact that someone is economically disadvantaged is not a good rationale for paternalistic intervention in decisions involving money. In fact the person's economic status may mean that they are better able to judge what is in their own interests than is the state.[29]

Paternalistic intervention is only warranted if surrogates suffer psychologically from the practice. This may be so. The nature of the decision means that it is difficult for women to make the choice rationally, as they cannot be completely sure of how the experience will affect them. However it has yet to be shown that the practice is generally harmful to surrogate mothers.

Thus the argument that surrogacy is exploitive and therefore that its prohibition is desirable for the protection of women may be unrealistic. The first premise, while subjective, may be correct. However, the conclusion that intervention is consequently justified does not necessarily follow. Those who are characterising surrogates as victims may well be proposing intervention that will cause them greater harm.[30] The exploitation argument may merely be a rationalisation for those who would legislate to give effect to their own moral outrage.

29 However, a very real difference between justifying a real will argument based on youth compared with one based largely on poverty (ie surrogacy) is that the very practice that the people would seek to prohibit would to some extent alleviate the condition supposedly justifying the special treatment. Moreover, while it is clear that the young shall grow up to become adults the poor have no such guarantees. Thus, it is probably more realistic to regard their poverty-influenced decisions as an exercise of real will.

30 By removing their opportunity to make money which they may need and possibly by criminalising those who continue to be involved in the practice. The criminalising of surrogate mothers, if the premise that surrogates are exploited is accepted, would seem to involve an example of victim liability similar to the criminalising of prostitutes and be best explicable as an example of the enforcement of morality.

3 The social utility of surrogacy

A social utility analysis of an activity might reasonably be expected to dominate any consideration of a legislative response to that activity. However, so little is known of the consequences of surrogacy that any discussion of the effect of the practice on society will principally consist of conjecture.

The state's interest in ensuring children are well cared for so that they may develop into healthy and productive citizens probably requires that surrogacy contracts be made unenforceable. Society would be likely to benefit more (or suffer less) from an approach by which decisions concerning the well-being of children were determined not by contract but according to the children's best interests.

However, it is less clear whether surrogacy should be prohibited altogether as harming society. If it could be demonstrated that surrogacy produced children with behavioural problems which meant that they made society a less pleasant place to live, prohibition might be a valid response. Alternatively if it could be established that surrogate mothers suffered so much from their experiences that paternalistic intervention was desirable, prohibition would have to be considered. If it could be proven that surrogacy had the effect of devaluing individual perceptions of human life so that it encouraged anti-social behaviour among society at large it is also likely that the state could regard itself as justified in banning the practice. However, if surrogacy is shown to be a successful practice with benefits which exceed its problems it would be difficult to argue that prohibition is appropriate.

It is impossible to draw a valid conclusion about the social utility of surrogacy in the absence of more empirical evidence on its effects. There are dangers apparent. In particular there is an obvious risk that the practice could have detrimental effects on surrogates and the children born as a result of these arrangements. It is also postulated that the practice could depersonalise human life and lead to a less caring society.

Surrogacy also has potential benefits for society. In particular, the practice may provide the infertile with the opportunity to have children. However, it is unlikely that surrogacy is the optimum answer to childlessness. It could be that surrogacy is a response symptomatic of a materialistic, uncooperative society. It has been suggested that a more positive response would be through the development of a shared parenting ethic and healthier societal attitudes towards childlessness.[31] There is an unfortunate emphasis on people "having their own" children, as if they were possessions. It would perhaps be more desirable for people to want and be allowed to form ongoing relationships with the children of others rather than resorting to surrogacy. A discouraging picture of society emerges when it is observed that there are many parents paying for their children to be professionally cared for while at the same time there are people wanting to be parents who are paying others to bear children for them. In a more caring society individuals might resolve these problems through a mutually

31 Rosier, "Who is My Mother", Broadsheet, March 1989, 23, 25-26.

beneficial cooperative response rather than by paying others to solve them. If we can overcome our discomfort at the idea of involving others in the procreative process, why can we not adjust to sharing our children? However there is little to suggest that even without surrogacy our society is likely to deal with problems associated with infertility in a cooperative fashion. Surrogacy is arguably as good a solution as a competitive capitalistic society is going to find.

It is essential to our understanding of the effects on society that research is conducted to enable us to understand better the consequences of the activity on those involved. Without further empirical research it is impossible to make a realistic evaluation of the utility of surrogacy.

A difficult question is whether the offence which a practice causes people, regardless of its utility in other respects, should be taken into account in a utilitarian assessment of its merits. It may be that an otherwise socially beneficial practice may be legitimately prohibited, following a utilitarian approach, if the practice offends people so much that the detriment they suffer exceeds the benefits of the activity (even if the reaction is illogical). Hart was of the view that such a justification is never valid.[32] However, this seems to be a moral rather than utilitarian stance. Sartorious suggests that such irrational suffering has to be weighed against the attitudes of future generations.[33] It may be that if future generations are likely to recognise the merits of a practice lawmakers should be slow to prohibit it.

III The Status of Surrogacy Arrangements Under New Zealand Law

At present there is no legislation specifically dealing with surrogacy. Nor is it clear how common law principles apply to the practice.[34] However, it is obvious that there are statutory provisions and common law rules which may significantly affect the position of parties to surrogacy arrangements. These are discussed in this section.

1 The status of the parties

The Status of Children Amendment Act 1987 was implemented to deal with anomalies in the law resulting from the use of "new birth technologies". However the Act did not specifically deal with surrogacy arrangements.[35] In fact, in some respects the new provisions confused the legal position

32 Cited Sartorious, supra n 12, 909.

33 Ibid, 910.

34 There has yet to be an attempt in a Commonwealth jurisdiction to enforce a surrogacy contract. Instead cases have involved wardship, custody or adoption applications.

35 This state of affairs came to pass despite the fact that the Justice Department invited submissions on surrogacy and considered the practice in *New Birth Technologies: an Issues Paper on AID, IVF and Surrogate Motherhood* (1985), which preceded the Status of Children Amendment Act 1987. Ministerial and legislative handling of surrogacy is discussed by Henaghan, "Law Reform and Human Reproduction in New Zealand – Implications for Parent and Child", a paper presented at the 7th World Conference of the International Society on Family Law, 9-11 May 1991.

of parties to surrogacy arrangements which involve the use of new birth technologies.[36]

Section 5 of the Act governs the status, and thereby the rights and responsibilities, of parties to an arrangement involving AID, in relation to the child resulting from the procedure. However, the situation apparently envisaged by those drafting the Act involves the AID technique being used to deal with problems relating to male infertility. The unmistakable effect of the Act is to disadvantage those making surrogacy arrangements involving AID. The legal position would better reflect the intentions of parties to surrogacy arrangements if conception is through natural intercourse instead.

When used to deal with male infertility, semen from a donor is implanted in the fertile female partner. The intention of the parties is for the woman and her infertile partner to raise the child as their own, with the donor having no social relationship with the child.

Section 5 provides that if a woman, who conceives a child through AID, is married, and her husband consents to the procedure, he becomes for all purposes the legal father of the child while the donor has no parental responsibilities.[37] If the woman is married, but her husband does not consent to an arrangement in which AID is utilised, he will not be the legal father of a child thus conceived and nor will the donor except in the unlikely event that he marries the woman.[38] Similarly, if an unmarried woman conceives by AID, the donor will not be her child's father unless he marries the mother.

Section 5 provides a satisfactory framework of rules for the usual AID case. However, in relation to surrogacy arrangements section 5 may result in legal consequences not envisaged by the parties. Generally, parties to a surrogacy arrangement involving conception through AID intend the commissioners to become the child's social parents and the surrogate to have no rights or responsibilities in relation to the child. However, the rules in section 5 have the reverse effect, resulting in a number of complications. The effect of the Act is such that a commissioning male donor, despite being the biological father of the child, must adopt the child to become, in law, its father. The husband of a surrogate is also placed in an unusual position. Section 5 of the Status of Children Amendment Act only requires that he consent to his wife undergoing the AID procedure for him to legally become for all purposes the father of the child. The reason for his wife's insemination does not appear to be relevant under section 5. Yet in the surrogacy context the husband will have given his consent only to his wife's

36 The Act deals principally with problems associated with AID as it is these that will be most frequently encountered. However, the Act will also affect parties to a surrogacy arrangement where the surrogate is made pregnant through *in vitro* fertilisation (IVF – this technique might be used, for example, if the commissioning mother is fertile but unable to deliver without endangering her health). Through IVF the surrogate may bear a child which is biologically related to both commissioning parents.

37 S5(1) of the Act.

38 S5(2) of the Act.

carrying the child for the commissioning parents. He will not have consented to assuming full responsibility for the child.

The surrogate's husband could be placed in an unfortunate position if the arrangement is not complied with. If the surrogate mother keeps the child, even if she does so against his wishes and even if they separate as a result, it would seem that the husband is liable to maintain the child.[39] On the other hand, if the commissioning parents reneged on the arrangement, and left the child with the surrogate, they would not be liable to maintain the child. This is despite the fact that the commissioning parents were primarily responsible for the child's conception and the child is biologically related to one of them.

Confusion regarding inheritance could also result from the legal status assigned to a child who is the subject of a surrogacy arrangement involving AID. A misunderstanding of the nature of their relationship to the child could result in the commissioning parents failing to provide for the child by will.[40] Similarly a child could be held to be a beneficiary under a will made by the surrogate (and/or her husband if she was married at the time of the conception) which was intended to provide only for the children which she/they raised.

It was once the case that commissioning parents who kept a child conceived through AID without taking legal steps giving them the right to do so would have been in breach of section 73 of the Children and Young Persons Act 1974.[41] The Act made it an offence for anyone to retain an infant in his or her care for longer than 28 days if he or she was not the parent or guardian of that infant and did not have legal authorisation to do so.[42] This placed the commissioning parents at risk of breaching the statutory prohibition against payments for adoption. If the commissioning parents wished to avoid this risk by bringing custody or wardship proceedings they would have faced difficulties as in this situation the biological father would have no automatic right to do so, needing the Court's leave to make an application.[43] However the situation is no longer so clear cut. Under the Children, Young Persons, and Their Families Act 1989 there is no offence equivalent to that provided for in section 73 of the old legislation. The fact that a couple has in their custody a child that is not in

39 Family Proceedings Act 1980, s72.

40 For example, if the commissioning parents had custody only and had previously drawn up a will providing for their "children". Due to the Status of Children Amendment Act 1987, s5, the child does not become their son/daughter legally until adopted.

41 That provision effectively replaced the even stricter Infants Act 1957, s41(1) (as amended by the Infants Amendment Act 1957, s2) which provided that it was unlawful for anyone not the parent or guardian to keep a child for longer than seven consecutive days.

42 The commissioning parents would not have fallen under the "near relatives" exemption of s73(1)(a) because of the s72 definition of the term. However, an offence would only have been committed if the breach was wilful (s83). It could be argued that it would have been enough that the commissioners intended to keep the child in their custody. However, it is more likely that it would have required the commissioners to know that they were not entitled to custody (for example, if they thought that they were the child's parents at law they would probably not have been guilty of an offence).

43 The Guardianship Act 1968, s9 (governing wardship applications) and s11 (regulating custody applications).

law theirs, in circumstances where they have taken no steps to secure legal entitlement to the child, may be grounds for removing the child from their care under section 14(1)(a)(i). However to justify the removal of a child in these circumstances the officers involved would have to be satisfied that the child was in danger: evidence of a surrogacy arrangement alone is unlikely to satisfy this requirement.

The Guardianship Act 1968 also affects parties to a surrogacy arrangement. Section 3 states that, subject to a custody order, guardianship confers the right to control over the upbringing of the child. Section 6 of the Act provides that if the mother is not married to or living with the father of her child at the time of conception she will be the child's sole guardian. Thus, despite the intention of the parties to a surrogacy arrangement, a surrogate would have sole legal right to control the upbringing of a child born as a result of such an arrangement. The biological father would have to apply to the court to be made a guardian.

2 *Adoption*

(a) The prohibition against payments for adoption

Section 25 of the Adoption Act 1955 provides that:

> Except with the consent of the Court, it shall not be lawful for any person to give or receive or agree to give or receive any payment or reward in consideration of the adoption or proposed adoption of a child or in consideration of the making of arrangements for an adoption or proposed adoption.

An important issue is whether a commercial surrogacy arrangement in which the placement of the child is secured by an adoption will be in breach of section 25. It may be argued that the consideration involved in a surrogacy contract is not for the adoption of the child, but for the surrogate's services. Thus, it is said that the fee is not for the child but for the surrogate's undergoing the hardship of pregnancy and childbirth. As, according to this view, commercial surrogacy cannot be equated with baby selling, any payment made is not for an adoption. Sorkow J inclined to this view in *Baby M I.*[44] The case concerned an attempt by commissioning parents to gain custody of the child after the surrogate mother had decided she

44 Supra n 1, 1157. However, if this view is taken the common law presumption against ordering specific performance in respect of contracts for services would suggest that surrogacy contracts cannot be specifically enforced. Among other things this presumption is based on the belief that to order one person to perform a contract of service against his or her will would amount to a form of slavery: *De Francesco* v *Barnum* (1890) 45 Ch D 430. The presumption might have some relevance in situations where the child has not yet been conceived. In these situations the presumption against specific performance could be invoked to prevent the surrogate being forced to carry a child against her will. If the surrogate mother has conceived but during pregnancy decides that she will not complete the contract, deciding that she will bring the child up as her own, she will inevitably physically complete the service she has been commissioned to do. In this situation the presumption against specific performance might be justified on the basis that the surrogate mother is being psychologically enslaved in that she is being forced to carry the child for another, rather than herself. However, in circumstances where the surrogate mother changes her mind after birth the situation obviously

wanted to keep her. The commissioning parents sought an order of specific performance to compel the surrogate mother to give up the child as agreed. The court had to consider whether the surrogacy contract breached state law forbidding payments for adoption.[45]

Sorkow J's argument relies to a large extent on the premise that because the biological father has equal rights to the child, regardless of any contract, he cannot "purchase the child".[46] However, this premise fails with regard to arrangements involving conception by AID in New Zealand. The biological father in such an arrangement will, by virtue of the Status of Children Amendment Act 1987, have no parental rights or responsibilities in relation to the child.[47] Furthermore, regardless of the manner of conception, a biological father who is a party to a surrogacy arrangement will, in the absence of a court order, not be the guardian of the child.[48] Even if the biological father did have parental status equal to that of the surrogate, in an arrangement which results in an adoption a payment will generally be in consideration of the surrogate's consent to the adoption, either expressly or implicitly. Furthermore, because the biological father's wife has no parental rights in relation to the child, a surrogacy contract made in contemplation of an adoption would appear to involve the purchasing of rights to the child on her behalf.

Regardless of how unfair comparisons of surrogacy with baby selling may be, it is difficult to avoid the conclusion that, in cases where payments are made by commissioning parents who intend to adopt subsequently, at least part of the payment is made in consideration of the adoption. This was the conclusion of Wilentz CJ in the New Jersey Supreme Court in *Baby M 2* where he said:[49]

> It strains credulity to claim that these arrangements, touted by those in the surrogacy business as an attractive alternative to the usual route leading to an adoption, really amount to anything other than a private placement adoption for money.

English legislation prohibiting payments in consideration of adoptions was considered by Latey J in the English Family Division in *Re an Adoption (Surrogacy)*.[50] Under English law section 50(1) of the Adoption Act

> differs from a normal contract for service in that the surrogate mother, by the time the dispute has arisen, will often already have completed the service for which she is allegedly paid. Yet it is clear that she has not yet completed the contract. This emphasises the fact that it is artificial to regard the contract as one purely for services. The contract will only be complete once the surrogate mother gives up the child. That act would appear to be part of the consideration for the contract,

45 NJSA 9:3-54 (reproduced in *Baby M 2* supra n 1, 1240) which provided: "No person, firm, partnership, corporation, association or agency shall make, offer to make or assist or participate in any placement for adoption and in connection therewith
(1) Pay, give or agree to give any money or any valuable consideration, or assume or discharge any financial obligation; or
(2) Take, receive, accept or agree to accept any money or any valuable consideration."

46 Supra n 1, 1157.

47 Supra n 37 and accompanying text.

48 Guardianship Act 1968, s6.

49 Supra n 1, 1241.

50 [1987] 2 All ER 826.

1958 makes it an offence to give or receive "any payment or reward for or in consideration of" an adoption.[51] Additionally section 22(5) of the Children Act 1975 provides that an adoption order shall not be made unless the court is satisfied that the applicants have not breached section 50 of the Adoption Act. The Court concluded that the £5000 given to the surrogate was not a prohibited payment within section 50(1).[52] However, the Court's reasoning is not entirely clear. Latey J considered that whether a payment was within section 50(1) was "a question of fact to be decided on the evidence".[53] He concluded that:[54]

> It was only after the payments had been made and the baby was born that any of them [the parties to the surrogacy agreement] began to turn their minds in any real sense to adoption and the legalities.

Latey J apparently concluded that, because the parties had their minds on the child when the agreement was made and did not directly contemplate adoption at that stage, any payment made could not be said to be "in consideration of" the adoption within the meaning of section 50(1).

Given the wording of the section this conclusion was not unreasonable. However, such a literal interpretation could serve to frustrate the purpose of the provision, which is primarily aimed at the prevention of baby selling. The approach taken by the Court in *Re an Adoption (Surrogacy)* would logically apply in a case where the child was bought outright,[55] provided the purchasers had not considered the possibility of legally adopting the child at the time they bought it, despite their intention to bring the child up as their own. Latey J's reasoning would suggest that a payment made in this situation is not prohibited. This would leave the purchasers free to adopt the child if they subsequently became so inclined. That such a blatant case of baby selling could fall outside section 50(1) suggests that Latey J's interpretation could have unfortunate consequences. Perhaps the only way of avoiding such problems is a purposive interpretation pursuant to which "adoption" includes de facto as well as de jure adoptions. Whether such a conclusion is supportable is debatable given that in the Act the term appears to be used to refer to legal adoptions. Thus, legislative reform may be required to ensure that all types of baby selling are criminalised.

However, in the surrogacy context instances where no thought has been given to adoption may be relatively rare. Indeed this is only likely to happen in cases where, because one of the applicants to an adoption has parental rights, adoption is not needed to give them the legal right to have custody of the child. In such a case adoption may be an afterthought aimed at securing the biological father's spouse's legal relationship with the child

51 Subject to s50(3) which provides that no offence has been committed if the payment is authorised by the Court.

52 Supra n 50, 830.

53 Idem.

54 Idem.

55 As opposed to the position involved in a common surrogacy arrangement when the child is the offspring of the commissioning father.

as mother.[56] However, in such cases the commissioning parents may be eager to adopt the child to sever the surrogate's legal links with the child.

The conclusion that the parties had not considered the legalities of the situation was the only ground on which Latey J relied upon to hold that the surrogacy arrangement was not unlawful. There seems little doubt that had Latey J in *Re an Adoption (Surrogacy)* found that the parties were contemplating adoption at the time the agreement was made they would have been considered to be in breach of the prohibition against payments for adoption.

(b) Payments for adoption and payments of maintenance

However, attempts have been made to explain Latey J's decision on a basis different to that outlined above. It has been suggested that special considerations apply to altruistic surrogacy. In *Re an Adoption (Surrogacy)* the surrogate mother had agreed to bear a child for an infertile couple for £10,000. The Court accepted that the surrogate was motivated by higher ideals than profit and also her claim that the money was by way of compensation rather than profit. In any event she had declined the final payment of £5000.[57] Consequently it has been suggested that the case is authority for the proposition that money given for expenses is compensation, as opposed to remuneration, and is not a "payment or reward" under section 50(1) of the English Adoption Act.[58]

This was apparently the view of Judge McAloon in *Re P (adoption: surrogacy),*[59] the first case of an adoption following surrogacy in New Zealand. In that case the Court concluded that weekly payments totalling $15,000 were "maintenance properly so called".[60] The judgment fails to explain why "maintenance" instalments are not "payments in consideration of an adoption" in terms of section 25 of the Adoption Act. The Court said that it had particular regard to Latey J's decision in *Re an Adoption (Surrogacy).*[61] The logical conclusion to be drawn from this is that Judge McAloon considered that non commercial surrogacy arrangements did not involve "payment or reward in consideration" of the adoption and that he believed that Latey J's judgment supported this view. It may have been that Judge

56 This may have been so in *Re P (Adoption: Surrogacy)* [1990] NZFLR 385 where apparently the applicants did not seek to adopt the child for some time (the interim adoption order was not made until the child was 19 months). Certainly Judge McAloon placed some emphasis on the fact that the agreement in question did not mention adoption and this might have been evidence that the commissioning parents were content to rely on the husband's rights (conception had been through natural intercourse which meant that the commissioning husband was the child's legal as well as biological father). Given these circumstances, the Court could perhaps have based its decision on the same ground relied upon by Latey J in *Re an Adoption (Surrogacy),* instead of the more contentious reasoning Judge McAloon chose.

57 Supra n 50, 828.

58 See the headnote to the All England Report of the decision, supra n 50.

59 [1990] NZFLR 385 (hereafter referred to as *Re P*). See Rotherham, "Baby C: an Adoption Following a Surrogacy Arrangement" [1991] NZLJ 17; Stewart, "Adoption and Surrogacy in New Zealand" (1991) 21 VUWLR 131.

60 Ibid, 387.

61 Idem.

McAloon concluded that the payment went only as far as compensating the surrogate mother for losses incurred and consequently ought only to be regarded as being for the services and not for the adoption. However, as has already been noted, if the parties contemplated that an adoption was to take place it is difficult to accept that the payment was not made in part in consideration of the adoption.

Alternatively, a conclusion that payments which represent maintenance do not breach section 25 could perhaps be justified on the basis of the *noscitur a sociis* principle of statutory construction whereby ambiguous words derive their meaning from surrounding words.[62] Thus, it could be that only payments in the nature of a reward are prohibited.[63]

In the usual adoption situation applicants to adopt generally could not claim that any payment made to the mother was simply for compensation, as they have nothing for which to compensate the mother; she did not get pregnant for them. If the mother was going to have the child anyway any money paid is only explicable as consideration for the child. Thus, normally any payment made will be a reward in consideration of an adoption.[64] However, this need not be so in the surrogacy context where the surrogate mother makes sacrifices for the adoption applicants. Here a claim that a payment is merely compensation and not reward may be valid. However, Parliament did not have surrogacy in mind when formulating the Adoption Act 1955, and therefore payments not in the nature of a reward were probably not contemplated,[65] which suggests that any payment was probably considered objectionable.

Moreover, it is questionable whether there is any doubt as to the meaning of the word "payment". In any event the use of the term "reward" can be explained on the basis that those drafting the provision intended it as a catchall, wishing to prohibit recompense of any form whether it could be easily termed "payment", which is most commonly used with reference to money. Thus "reward" was probably intended to be an alternative to

62 See eg Cross, *Statutory Interpretation* (1976) 118-119.

63 The principle is explained in Langan (ed), *Maxwell on the Interpretation of Statutes* (12th ed 1969) 289: "Where two or more words which are susceptible of analogous meaning are coupled together, *noscitur a sociis*. They are understood to be used in their cognate sense. They take, as it were, their colour from each other, that is, the more general is restricted to a sense analogous to the less general." An example of this type of reasoning may be found in *Reade* v *Smith* [1959] NZLR 996, 1005. In that case the Court considered the Education Amendment Act 1915 (No 2), s 6, which gave the Governor-General the power to make regulations "necessary or expedient for avoiding any doubt or difficulty" regarding the administration of the principal Act. A regulation was passed giving school boards the power to cancel the enrolment of students at the school of their choice and to compel those students to attend another school. The regulation was made to solve difficulties arising from overcrowding. In the Supreme Court, Turner J (applying the *noscitur a sociis* rule) held that s6 was only intended to apply to difficulties in the nature of a doubt.

64 Though this might not be so in a situation where a person agrees to pay medical expenses for a pregnant woman on the condition that she carries her baby to term and gives it to that person rather than having an abortion.

65 For the object of the 1955 Act see Campbell, *The Law of Adoption in New Zealand* (1957) 12-14 and 54-55.

"payment", rather than a synonym clarifying the meaning of "payment" for the purposes of the Act.

In any event Latey J in *Re an Adoption (Surrogacy)* did not attempt to argue that the money that changed hands in that case did not represent a payment. Indeed it is submitted that the decision was wrongly used as authority in *Re P*.[66] While Latey J commented in the course of his judgment that ". . . there was nothing commercial in what happened", this was prefaced with the qualifying remark "If the word 'commercial' has any bearing on what has to be decided in this case . . .".[67] His comments appear to have been simply in the nature of a background account of the facts. His Lordship never concluded that the fact that the transaction involved was not commercial in nature was relevant to the question of whether a payment in consideration of an adoption had been made. Rather his focus fell upon the question of whether the money paid could be said to have been "in consideration of" an adoption.[68] As noted above, he concluded that it could not.

A conclusion that the prohibition of payments for adoption only applies to payments in the nature of a reward is an inviting one in some respects. The prohibition is, among other things, directed at the mischief of baby selling and surrogacy arrangements which merely provide for the mother to be compensated for her efforts cannot be equated with this evil. However there are practical difficulties inherent in such an interpretation. In particular, this approach is liable to make the Act less certain than one which prohibits all forms of payment. The question of when a payment becomes a reward instead of mere compensation would be a difficult one of fact and degree for the court to answer. While in *Re an Adoption (Surrogacy)* Latey J accepted that the fee was in the nature of compensation, the sum was quite substantial. Similarly in *Re P* Judge McAloon did not explain why a $15,000 payment ought to be regarded as "maintenance". In neither case was it made clear whether the surrogate gave up employment in order to bear the child.

Difficulties arise if payments are claimed to be compensation for lost earnings. A mother need not necessarily work for the entire or indeed even a substantial period of her pregnancy. If a surrogate takes time off work unnecessarily, especially if she entered into the arrangement partly out of the desire to be released from normal work responsibilities while receiving payments in lieu of work, this should be taken into account in considering whether the payment to her of the equivalent of her normal wage could be considered compensatory only.

If the payment in question is claimed to be compensation for the pain and discomfort of pregnancy, courts face an even more difficult question. They ought logically to go through a process of quantifying the worth of the surrogate's suffering and decide whether the payment exceeded this, an unenviable task to say the least. However, in *Re P* Judge McAloon

66 Supra n 59, 387. See Rotherham, supra n 59, 18.
67 Supra n 50, 829.
68 Ibid, 830.

apparently did not attempt this, which makes it difficult to know how he reached his conclusion that the payment was "maintenance properly so called".

In England, under section 50(3) of the Adoption Act 1958, an applicant can seek to have a payment for adoption "authorised by the Court". Similarly section 25 of the New Zealand Adoption Act 1955 excludes from the prohibition of payments for adoption those made with "the consent of the Court". This would tend to militate against concluding that compensatory payments are outside the prohibition of payments for adoption. The objectives of the law would seem to be best fulfilled if applicants were encouraged to get payments for adoptions authorised so that the courts could decide whether a proposed payment was legitimate or against the objects of the Act.

Another reason for doubting the theory that compensatory payments do not breach the Adoption Act is that section 25 specifically exempts from the prohibited payments medical expenses approved by the Director-General of Health or in accordance with a scale approved by him and paid directly to the hospital caring for the mother.[69] The fact that such a provision was thought necessary to make it clear that certain payments of medical expenses were not unlawful suggests that virtually any payment for an adoption is likely to fall within section 25.

(c) Retrospective authorisation of payments

The provision for authorisation of payments raises another interesting issue. In *Re an Adoption (Surrogacy)* Latey J interpreted the relevant provision to permit the court to authorise a payment retrospectively.[70] In *Re P* Judge McAloon did not consider the point, but it is conceivable that the same conclusion could be reached by a New Zealand court in relation to section 25. Certainly there are some considerations favouring this interpretation. In particular, a different interpretation of the section would mean that a person making an innocent payment, which could not be equated with baby selling, would be liable to up to three months imprisonment.[71] However, one might expect a reference to consent to require prior permission. Furthermore, allowing for retrospective consent would cause the application of the Act to payments for adoption to be uncertain. Whether a criminal offence was committed would depend on the willingness of the court to exercise its discretion. In addition there are reasons favouring Latey J's interpretation in *Re an Adoption (Surrogacy)* which will not necessarily be relevant in New Zealand. In England section 22(5) of the Children Act 1975 prohibits adoption if the prohibition against payments has been breached by the applicants. This encouraged a finding that payments could be authorised retrospectively, allowing the court to give regard to the best interests of the child by making an adoption order if the circumstances merit it.

69 Pursuant to the proviso added by the Adoption Amendment Act 1957, s2.
70 Supra n 50, 831.
71 Pursuant to s27(2).

However, in New Zealand there is no provision preventing the court permitting an adoption if section 25 is breached. In *Re P* the Court concluded that a breach of section 26, which makes it an offence for a person to advertise indicating a desire to adopt a child or to make arrangements to do so, did not prevent the Court from making an order in favour of the applicants.[72] There seems no logical reason why the same approach could not be taken in regard to breaches of section 25. Thus, it would seem that applicants may commit an offence by making a payment in consideration of an adoption and still succeed in their application.

Additionally there may be less chance of a payment being found to breach the prohibition against payments for adoption in New Zealand because the proviso to section 25 provides that medical expenses paid directly to the hospital caring for the mother in accordance with an approved scale fall outside the section. The English legislation makes no such allowance, perhaps making a breach of the prohibition more likely, and hence, the need for a discretion to waive such breaches more apparent.

All things considered, it is unlikely that a New Zealand court would interpret section 25 to permit retrospective consent being given to payments which would otherwise contravene the section.

(d) Prohibited advertisements

Section 26 of the Adoption Act 1955 prohibits advertisements indicating:

> (a) That the parent or guardian of a child desires to cause the child to be adopted; or
> (b) That any person desires to adopt a child; or
> (c) That any person or body of persons is willing to make arrangements for the adoption of a child.

In some cases an advertisement by prospective parents wishing to organise a surrogacy arrangement or an advertisement from a woman willing to be a surrogate mother may be regarded as being in breach of section 26. This might be the case if the person or persons advertising contemplated that an adoption would take place. However, it may sometimes be that those advertising will not at this stage have specifically addressed the legalities of the situation and consequently cannot be said to be advertising for an adoption.[73] In *Re P* the applicants had placed an advertisement reading "Adoption. Nelson couple desperate for a child. Can you help."[74] The court did not clearly indicate whether it was of the view that a breach had occurred.[75]

(e) Section 6 of the Adoption Act 1955

Section 6 of the Adoption Act provides that it is unlawful for a person to place or receive a child under the age of fifteen into a home for the

72 Supra n 59, 388.
73 This would be an approach similar to that taken by Latey J in *Re an Adoption (Surrogacy)* supra n 50.
74 Supra n 59, 386.
75 Ibid, 387; infra n 81 and accompanying text.

purpose of adoption without the prior approval of a social worker. Commissioning parents risk breaching this section if they intend to adopt the child but take him or her into their home without the prior permission of a social worker. However, proving a breach may be difficult as it will have to be shown that the parties intended that the child be adopted when he or she was placed in the home of the commissioners.

(f) The consequences of committing an offence against the Adoption Act

A breach of any of sections 6, 25 and 26 constitutes an offence against section 27 of the Act. An infringement of that provision is punishable by up to three months imprisonment and a fine of not more than $100. Apart from possible criminal liability, the consequences of a breach of the Adoption Act are not clear, especially in regard to surrogacy arrangements. Section 27(3) of the Act provides that if an offence has been committed, regardless of whether anyone has been convicted:

> . . . the Court may order the child to be removed to a place of safety until he can be restored to his parents or guardian or until other arrangements can be made for him.

Clearly the procedure is permissive, which presumably means that the court may leave the child with adoptive parents who have committed an offence under section 27. Because the subsection provides for the child "to be removed to a place of safety", it is arguable that Parliament only intended that orders be made to remove children from prospective adopters when their remaining would be injurious to their welfare. The provision for restoration of children to their parents suggests the subsection has limited application in the surrogacy context. In the case of surrogacy arrangements involving conception through natural intercourse, the adoptive father will also be the child's legal parent.[76]

In *Re P* the interests of the child were said to be paramount.[77] This view is consistent with the Court of Appeal decision regarding section 8 of the Adoption Act in *Director-General of Social Welfare* v *L.*[78] If this view is accepted as appropriate in other cases involving the provisions of the Adoption Act the court is unlikely to make an order under section 27(3) removing the child from the home.

Given that an adoption may still be approved by the court even if an offence has been committed under section 27 and that the court is likely to take the view that it is primarily concerned with the welfare of the child in question, it may well be that our courts will not be inclined to take any action pursuant to section 27 to punish offenders. This is particularly likely to be the case if the court approves the adoption, as convicting the adopters would hardly seem to be in the child's best interests. If the commissioning parents were not punished, to convict the surrogate of receiving

76 Though of course if conception was through AID the biological father would not be the child's legal parent (supra n 35 and accompanying text) and therefore the subsection might be regarded as being more applicable.

77 Supra n 59, 389.

78 [1990] NZFLR 125.

a payment would seem unfair, particularly given that surrogates tend to be viewed as the victims of such arrangements.

This approach was taken in *Re P.* The Court indicated that it did not disagree with a submission that for the purposes of the adoption application sections 25 and 26 were only relevant to the ". . . determination of whether the applicants are fit and proper persons to have custody . . .".[79] The Court subsequently found that the arrangement did not contravene section 25.[80] However the Court's finding in relation to section 26 is less clear. It would seem that Judge McAloon declined to make a finding on the matter on the basis that while "the appropriate authorities" might prosecute the applicants, that was not a matter which was of immediate concern to a court hearing an adoption application.[81]

(g) The liability of third parties

While at present in New Zealand there is no law which specifically forbids third party involvement in surrogacy arrangements, nevertheless there are dangers for those persons. It is not entirely clear how third parties are affected by the provisions of the Adoption Act 1955. Section 25 of the Adoption Act 1955 inter alia forbids any person from receiving a payment or reward ". . . in consideration of the making of arrangements for an adoption or a proposed adoption . . .". It is possible that this applies to third parties involved in arranging surrogacy contracts in situations where an adoption is contemplated. However, read widely the section would appear to prevent solicitors acting for prospective adopters from collecting a fee. The legal services performed in this situation might properly be said to be "arrangements for an adoption". It is not usual for solicitors acting for adopting parents to seek the consent of the court for their fees. But one interpretation of the provision would indicate that solicitors in these circumstances were committing an offence. Such a result would seem surprising. Payments made to lawyers for performing necessary legal services were not the type of practice which the section was intended to prohibit.[82]

A purposive approach designed to interpret the provision in a way which reflects its intended function demands a restrictive reading of the phrase "arrangements for an adoption" whereby it relates only to what might be regarded as the substance of adoptions rather than the legal formalities. The application of the section would then be more limited. Third parties who actually find a child or prospective adopters for their clients and receive

79 Supra n 59, 387.

80 Supra nn 59-61 and accompanying text.

81 Supra n 59, 388.

82 The prohibition on payments for arranging adoptions was added by the 1955 Act. This is consistent with the aim of the Act, which was to bring the adoption process under the control of the Department of Social Welfare and to discourage the involvement of those motivated by profit. The prohibition of payments for arranging adoptions (coupled with the prohibition of advertisements – s26) would have discouraged the involvement of such persons. However the Act did not remove the need for legal assistance, and consequently cannot have intended that solicitors be precluded from ensuring that legal formalities were complied with. For a discussion of the object of the Act in this regard see Campbell, supra n 65.

a fee for doing so would be in breach of section 25. So too would officials of the Social Welfare Department who accepted payments from participants in the adoption process. If this approach was taken, solicitors who simply assisted people by providing legal advice, the necessary documentation and representation would not be in breach of section 25. Nor would solicitors who limited their role in surrogacy arrangements to giving advice and preparing contracts be directly affected by the provision. However, a third party whose role goes beyond this might well be regarded as having breached the prohibition against payments.

Apart from direct liability for being in breach of section 25, third parties who are involved in surrogacy arrangements may be liable as parties to offences under the Adoption Act 1955 committed by the contracting parties. Solicitors arranging surrogacy contracts are particularly vulnerable. Those who facilitate or assist in the provision or receipt of payments in consideration of adoption risk criminal liability.

In *Re P* the issue of the liability of third parties was not considered, presumably because it was not relevant to the adoption itself. However, it is interesting to reflect on the possible liability of the person who drew up the contract in that case. The contract did not refer to adoption. This may have been because an adoption was not originally contemplated. Alternatively it may have been a careful attempt to avoid a breach of section 25 by drafting a contract which suggested that the parties never planned to adopt the child.[83] In any event, it is perhaps a little surprising that Judge McAloon accepted at face value the fact that the contract never mentioned adoption while referring to the arguably more complex concept of guardianship. The fact that the agreement referred to the payments which were to be made as "maintenance" also suggests that the contract was carefully drafted to avoid liability under the Act.

As a matter of logic the courts ought to look realistically at such agreements to gauge the true state of mind of the parties. If it is clear that an adoption was always intended, despite no mention of it being made, then the court ought not pretend otherwise. Of course this conclusion is only likely to be relevant so far as it reflects on the applicants' parental capacity.

(h) Disclosure of information

Lawyers in this situation may find themselves in a dilemma as they attempt to give effect to the duty they owe to their client while acting consistently with their obligations to the court. Information provided by the client is privileged and cannot be revealed to the court without the client's consent. Moreover, the lawyer's responsibility to advance the interests of the client may tempt solicitors making an adoption application following a surrogacy to avoid disclosing the nature of the arrangement to the court.

83 It seems that the contract was not made in contemplation of the decision in *Re an Adoption (Surrogacy)* supra n 50 and accompanying text. The English decision was delivered after the child in *Re P* was conceived. Moreover, the reason for the decisions was somewhat different. While in *Re an Adoption (Surrogacy)* the parties were excused because it was found they had not considered the legalities of the situation, in *Re P* the parties appeared to have considered legalities other than adoption.

In situations where the mother is unmarried, the Adoption Act requires the consent of the father of a child to a proposed adoption only if expedient.[84] Furthermore, the name of the father will not appear on an unmarried mother's child's birth certificate.[85] If the surrogate mother is married and the child was conceived through AID her husband will be the legal father of the child, provided he consented to the procedure.[86] The husband must consent to the adoption[87] and solicitors involved may be inclined to lead the authorities to believe that he is also the child's natural father. Alternatively a solicitor might be tempted to suggest that, while the adoptive father is the child's father, no payment was made. It may be suggested that the child was the result of an extra-marital affair and the adoption is an attempt to discharge the father's responsibilities towards the child and its mother. A solicitor may believe that the court will view the application more favourably if it is presented as if it is an ordinary adoption with the adopting parents being strangers. This approach might be taken in order to alleviate the risk of those involved being prosecuted for breaches of the Adoption Act 1955.

However, such behaviour may be contrary to the lawyer's overriding responsibility to the court.[88] This duty demands that the lawyer not mislead or deceive the court.[89] Clearly if the lawyer knowingly puts before the court false information this will constitute a breach of his or her professional duty. The applicants are required to state in an affidavit that no payment in consideration of adoption has been made or received.[90] If an affidavit presented to the court following a surrogacy arrangement claims that no such payment was made it might well be that the counsel would be in breach of his or her duty to the court. However, even if the particular circumstances were such that it could be said that the payments made were not "in consideration of an adoption", failure to inform the court of the background to the adoption might still amount to a breach of this duty.

It might be argued that fulfilment of the duty to the court merely requires that counsel does not give false information and that he or she is under no obligation to give information which might be detrimental to the client. This approach would be consistent with that taken in criminal proceedings by defence lawyers who are aware of their client's guilt. In this situation the defence counsel is obliged to require the prosecution to prove its case. Despite this the defence may not mislead the court by putting forward a case inconsistent with the client's admissions. However, the analogy is probably not a sound one. The rules of professional conduct

84 Adoption Act 1955, s7(3)(b).

85 Unless the mother consents, and even then only if the father is prepared to give his signed consent to inclusion of his name on the birth certificate at the office of the Registrar: Births and Deaths Registration Act 1951, s18(1).

86 Status of Children Amendment Act 1987, s7(1)(a).

87 Adoption Act 1955, s7(3)(a).

88 New Zealand Law Society, *Rules of Professional Conduct for Barristers and Solicitors* (1990) Rule 8.01.

89 Ibid, commentary.

90 The Adoption Regulations 1959, reg 8(1)(g).

specifically provide for a defence counsel to act in this way.[91] Furthermore, criminal trials involve an adversarial procedure with the court acting as a neutral arbiter. In this situation it may be argued that the interests of the state may be sufficiently advanced by the prosecutor without requiring the defence to disclose all relevant information.

However, adoption applications are generally uncontested and seldom involve a hearing.[92] As a consequence the court is relying on the applicants to provide information which is thought necessary to ensure the interests of the child and the state are served. This would seem to place a heavy onus on the applicant's counsel to assist and be frank with the court. In an adoption application, when the court must make a decision based on its perception of the appropriateness of the parents, any information relating to the application ought to be put before the court. It is no answer for counsel to argue that in a particular case the fact that a surrogacy arrangement had taken place was not relevant because it would not have or ought not to have changed the court's decision. The relevance of a particular matter is for the court to decide. Certainly any judge is likely to feel misled if he or she consented to an adoption without knowing that the adopting father was the child's biological parent.

Parties to a surrogacy arrangement who try to conceal the fact when seeking to have the commissioning parents adopt the child will inevitably also mislead the Social Welfare Department, an unfortunate circumstance given that the Department is responsible for safeguarding the welfare of the child in question. It is not entirely clear what approach the Department is likely to take towards such situations. While presumably each case would be dealt with according to its own facts, it would not be surprising if the Department had some reservations about concealment. On occasion the commissioning parents are likely to be persons who have been rejected by the Department as prospective adoptive parents and who have turned to surrogacy as an alternative. Moreover, there is some concern over the adoption concept itself, as it is viewed as secretive and potentially damaging to the children involved.[93] Such fears may be even greater when an adoption follows a surrogacy which will often be doubly secret, concealing not only the child's parentage but the circumstances surrounding conception as well.

Approval by the Department is generally required before a child may be placed with prospective adopters prior to an adoption order being granted.[94] In addition the Department provides the court with a report on the proposed adoption. The court will rely heavily upon the Department in deciding whether the applicants are fit and proper parents and whether adoption would promote the welfare of the child. If the court makes its decision on the basis of a misleading report and the applicant's lawyer is

91 Supra n 88, Rule 10.04.
92 Ludbrook, *Adoption* (1990) 28.
93 See eg Johnston, "Is Adoption Outmoded?" (1985) 6 Otago LR 15, 20.
94 Adoption Act 1955, s6.

aware of this fact[95] failure to inform the court might also amount to a breach of the code of professional conduct.

It would seem likely that a solicitor handling an adoption application with knowledge of a surrogacy agreement cannot, without breaching his or her duty to the court, make that application without disclosing the fact of the arrangement. If a solicitor cannot persuade his or her clients to allow this information to be disclosed he or she ought to refuse to represent the clients in this matter.

(i) Ways of avoiding a breach of the Adoption Act 1955

It is presumed that section 25 would not be contravened if the commissioning parents did not attempt to adopt the child legally. This conclusion is made on the basis that it is unlikely the "adoption" as used in the section refers to de facto adoptions. This might suggest that reform is in order to prevent the mischief that the section is aimed at, which may be present in cases where no legal steps are taken to secure rights to a child. However, it is arguable that most surrogacy arrangements bear little resemblance to conventional adoptions. The child's biological and legal father may well be one of the "adopters". Moreover, it is always the intention of the parties to surrogacy arrangements that the child will be brought up by the commissioners.

If conception was through natural intercourse the biological father would have parental rights and, provided the surrogate willingly relinquished the child, would not have to take legal steps to secure the child's placement. For that matter, following the enactment of the Children, Young Persons, and Their Families Act 1989, there is nothing preventing commissioning parents keeping a child without a court order, even if neither is the child's legal parent. A commissioning couple, in a case where one is the legal father of the child, might seek to consolidate the position of the other in relation to the child by having her made guardian. Instead, or in addition, such a couple might apply for a custody order entrusting the child to both of them. In a situation where neither is the legal parent both might seek to be made guardians and/or to have a custody order made in their favour.

3 The enforceability of a commercial surrogacy contract

If everything does not go as planned in a surrogacy arrangement the question of whether the agreement may be enforced will arise. The issue may be relevant in circumstances where a surrogate reconsiders her decision to give up the child. Enforceability may also be important in a situation where the commissioners refuse to take custody of the child as agreed. Indeed the enforceability of surrogacy agreements raises a number of potential legal issues.

(a) Are surrogacy contracts illegal?

A contract the performance of which will necessarily breach a statute

95 Neither the lawyer nor the applicants will actually see the report, which is confidential.

may be illegal.[96] As already noted, surrogacy contracts providing for payment or reward in consideration of an adoption probably contravene section 25 of the Adoption Act 1955.[97] Section 5 of the Illegal Contracts Act 1970 provides that contracts shall not be illegal by reason of the fact that their performance breaches any enactment unless the enactment in question expressly so provides or its object "clearly so requires". The fact that section 25 of the Adoption Act makes payments in consideration of adoption unlawful suggests that the object of the provision requires contracts providing for such payments to be illegal.

Even if a contract does not provide for payment for an adoption it may be illegal at common law for being in conflict with public policy. Contracts illegal at common law have been categorised under various heads of public policy. It was suggested obiter in *Fender* v *St John Mildmay*[98] by the House of Lords that the heads covered such a wide range of activities that further extension was unlikely.

Surrogacy contracts involving payments for adoption may be illegal as contracts to commit a crime. Section 27(1)(d) of the Adoption Act 1955 makes it an offence to give or receive a payment breaching section 25. Such a payment would be illegal whether or not the parties were aware of the illegality of their actions.[99]

Surrogacy contracts which do not breach section 25 do not readily fall within any of the established heads of common law illegality. It is possible that some surrogacy contracts could be illegal for promoting sexual immorality. Contracts which involve conception through natural intercourse could perhaps fall into this category. However, such arrangements are not readily analogous to contracts for sexual gratification, which is how most contracts held to be illegal on this ground can be characterised. There might be an argument for holding contracts which require conception through natural intercourse to be against public policy on the ground that they are unnecessary, given the ease with which artificial insemination can be performed.[100] However, this argument is probably not valid in New Zealand because of the state of the law in this country.[101] Arrangements would not be illegal on this ground simply because they involved AID as the practice is now well established and widely accepted.

The other public policy head which might be of relevance is that of contracts affecting the freedom and security of marriage. However, there is no evidence to suggest that surrogacy contracts prejudice the marriages of commissioners in any way. The Warnock Committee was of the view that surrogacy undermines traditional notions of family.[102] Thus it might be said that the practice jeopardises the security of marriage generally. How-

96 Illegal Contracts Act 1970, s 5; see Burrows et al, *Cheshire and Fifoot's Law of Contract* (7th NZ ed 1988) 306-307.
97 Supra p 437 et seq.
98 [1958] AC 1, 23, per Lord Thankerton.
99 *Belvoir Finance Co* v *Skipelton* [1971] 1 QB 210.
100 See eg Downie, supra n 1, 127.
101 Supra n 37 and accompanying text.
102 The Warnock Report, 44.

ever, it is unlikely that such an assertion, even if proven, would be sufficient as contracts which have been held to fall into this category involved prejudice to a particular marriage.[103]

If a surrogate is married it might be argued that the contract is prejudicial to her marriage. However, such a claim is only likely to succeed in rare cases where it can be shown an arrangement actually puts the surrogate's marriage at risk, for example, if the surrogate entered into the contract without her husband's support or knowledge or where the contract involved conception through natural intercourse. Each case would depend on its own facts.

Thus surrogacy contracts, if not in breach of section 25 of the Adoption Act 1955, do not fall neatly into what are said to be the established categories of public policy illegality. However, case law concerning custody contracts might offer some guidance. An analogy may be drawn between custody contracts and surrogacy agreements as both involve a natural parent negotiating to give up rights he or she has to a child. There is a line of authority from last century which holds that contractual custody arrangements are generally illegal.[104] In *Hope* v *Hope* specific performance of a separation agreement, providing for a child to remain in the mother's care, was refused.[105] The contract was held to be illegal as contrary to "settled law and policy". However, Turner J suggested that the rule making contracts transferring parental rights void was not absolute.[106] Courts would on occasion uphold agreements if to do otherwise would threaten the child's welfare.[107] In *Swift* v *Swift* it was said while the general rule was that contracts by which a father gave up the right to his children were illegal, this rule was formed on the basis of an assumption that it was in the best interests of children to remain in the control of their father. If it could be shown that this was not the case then the court would give effect to the contract. It was concluded that ". . . this policy of the law is derived from what is most for the benefit of the child".[108]

It is likely that agreements which are contrary to the best interests of the child will be held to be illegal. This would be consistent with case law and with the modern concerns of family law which emphasise the welfare of the child. However, it is less certain how the courts will deal with contracts which are consistent with the child's welfare. Certainly the cases referred to above provide support for an approach whereby such contracts may be enforced. Similarly, in *Baby M 1* Sorkow J held that surrogacy contracts were enforceable provided that they were in the best interests of the child.[109] By contrast in *Baby M 2* Wilentz CJ held that surrogacy con-

103 Eg *H* v *W* (1857) 3 K & J 382; *Brodie* v *Brodie* [1917] P 271; *Fender* v *St John Mildmay,* supra n 98; see also *Cheshire and Fifoot,* supra n 96, 316-317.

104 See generally the Ontario Law Reform Commission, *Human Artificial Reproduction and Related Matters* (1985) 92-94.

105 (1857) 44 ER 572.

106 Ibid, 577.

107 Eg *Swift* v *Swift* (1865) 55 ER 637 and *Hamilton* v *Hector* (1871) LR 6 Ch App 701; both cited in the Ontario Law Reform Commission Report, supra n 104, 93.

108 (1865) 55 ER 637, 639.

109 Supra n 1, 1166-1171.

tracts conflicted with state public policy, and consequently were unenforceable.[110] If the Family Court in New Zealand decided it had the jurisdiction to enforce a surrogacy contract and it decided that the contract was not void it would probably take an approach similar to Sorkow J because of legislative provisions requiring it to ensure that a child's welfare is furthered by its orders.[111] Thus, it might be that the courts would be prepared to give effect to surrogacy contracts in situations in which those contracts are in the best interests of the child. Of course such an approach would have precisely the same effect on the placement of the child as the court determining the matter on the best interests of the child alone. While the ruling in *Baby M I* was of importance in the context of United States law,[112] in New Zealand such an approach would make little difference as regards custody when compared with a policy which involved the courts holding all such contracts to be unenforceable.

Such an approach may have been appropriate at a time before a specialist Family Court dealt with matters relating to the placement and general welfare of children pursuant to comprehensive legislation. However, it is almost inconceivable that an ordinary court would contemplate granting specific performance of a contract concerning the custody of a child today. Generally matters relating to the placement of children and the rights of parents in relation to children are considered to be the province of the Family Courts alone. An ordinary court is unlikely to specifically enforce a contract which would have the effect of determining the placement of a child. Family Courts, in comparison, are governed by detailed legislation in their determination of matters relating to children's welfare.[113]

Section 18 of the Guardianship Act 1968 contemplates custody agreements being valid for the purposes of the Act when they are in the interests of the child.[114] However that provision appears to contemplate the agreement being enforced through a court order and not by way of specific performance as a matter of contract law. It is likely that a court would conclude that the Act's provision of a means of enforcing custody and access agreements impliedly excludes enforcement outside the Act.

When a surrogacy arrangement contemplates an adoption and requires the surrogate mother to consent to the adoption the courts are unlikely

110 Supra n 1, 1247.

111 The Family Courts Act 1980, s11, does not make it clear whether the Family Court would have the jurisdiction to take a surrogacy contract into account. The Family Court has the right to hear proceedings under the provisions of various Acts. If the contract is raised as a matter in such a proceeding and the governing Act does not expressly rule out its relevance it is possible, though unlikely, that it could be taken into account. It is more probable that the Acts implicitly indicate that the contract may not be taken into account.

112 The decision was important for constitutional reasons. Sorkow J went as far as suggesting that state prohibition of surrogacy might be unconstitutional: supra n 1, 1163-1165. Thus the Court appeared to be forestalling possible legislative action.

113 Eg the Family Courts Act 1980, the Family Proceedings Act 1980, the Guardianship Act 1968, the Adoption Act 1955, and the Children, Young Persons, and Their Families Act 1989.

114 See infra nn 123-124 and accompanying text.

to order specific enforcement of the contract. The Adoption Act 1955 provides the procedures by which an adoption is to take place and those procedures are designed to protect the interests of the child and the natual mother.[115] The Act contemplates that consent will be given after birth if at all.[116] In addition the Act provides reasons for which the mother's consent may be dispensed and these do not include a prior contractual arrangement.[117]

Given the legislative framework in place to deal with matters relating to the future of children, the Family Court will almost certainly consider that a private contract is not a factor which it is able to or should take into account in making a decision in this regard. Certainly courts in other jurisdictions have taken this view.

In *A* v *C*[118] the Family Division considered an application for access to a child, born following a surrogacy agreement, brought by the child's biological father after the surrogate had refused to comply with the arrangement. Comyn J equated the arrangement with baby selling and concluded, obiter, that the agreement was void as against public policy.

In *Re C (a minor) (wardship: surrogacy)*[119] the Court considered a wardship application brought by commissioning parents after the child had been taken into care by a local authority. Latey J stated:[120] "First and foremost, and at the heart of the prerogative jurisdiction in wardship, is what is best for the child or children concerned. That and nothing else." Thus the Court was not prepared to consider the contract except so far as the fact that it was entered into was relevant to the child's interests. In *Re P (minors) (wardship: surrogacy)*[121] the Court considered a dispute between the commissioner, a single male, and the recalcitrant surrogate. Sir John Arnold P said that the wardship jurisdiction could not be "regulated by contract": the existence of an agreement was relevant only to the extent that willingness to enter into it might reflect so adversely on parties as to disqualify them as potential custodians.[122]

(b) Enforcing contracts under section 18 of the Guardianship Act 1968

Section 18 of the Guardianship Act 1968 provides that:

> An agreement between the father and mother of a child with respect to the custody or upbringing of or access to the child shall be valid, . . . but shall not be enforced if the Court is of the opinion that it is not for the welfare of the child to give effect to it.

There is little case law concerning this section. While it gives the court the power to enforce certain agreements relating to the upbringing of a child, it may only do so if it would be consistent with the welfare of the

115 Primarily ss7-11.
116 S7(7).
117 S8.
118 [1985] FLR 445.
119 [1985] FLR 846.
120 Ibid, 847.
121 [1987] 2 FLR 421.
122 Ibid, 424-425.

child. The section could be of application in cases which involve agreements as to custody and access and do not involve adoption. In cases in which the parties remain in agreement over the placement of a child or children a consent order is likely to be made on the same terms as the agreement.[123] Where matters relating to a child's or children's future are in dispute the court will probably treat the agreement as a statement of past intent only and have little regard to it in deciding the terms of any order.

Section 18 is probably of no real importance as the courts will only be prepared to give effect to the agreements if they are in the child's best interests.[124] If more satisfactory arrangements for the child's future could be made a court will not enforce the contract. By section 23 of the Act any order for custody or access is also supposed to give effect to the best interests of the child. Consequently an agreement will only be enforced if its terms are the same as the provisions a court would have inserted in an order made without reference to the contract.

(c) Relief for illegal surrogacy contracts

As indicated, there are several bases on which a surrogacy contract might be found illegal for the purposes of the Illegal Contracts Act 1970. The possibility of relief then arises. Section 7 of the Act gives the court a wide power to order relief.[125] However, the court cannot grant relief if it considers that to do so would not be in the public interest.[126]

Where a contract is illegal for breaching a statute, in considering the provision of relief, regard must be had to the object of the enactment.[127] In *Lower Hutt City Council* v *Martin*[128] it was held that the court would not grant relief if to do so would frustrate the policy of the Act in question. When section 25 of the Adoption Act has been infringed, the availability of relief would depend on court's interpretation of the policy of that provision. In considering relief in the case of a breach of an enactment regard must also be had to the gravity of the penalty provided for any breach.[129] The fact that section 27(1)(d) of the Adoption Act 1955 pro-

123 *C* v *E* (Family Court, Palmerston North, 11 May 1987 (054/53/83)), Butterworths Family Law Service 6.103.

124 Ibid. There might be some doubt about whether the requirement that to be enforced the agreement must be for the welfare of the child will mean that the courts will insist that it be in a child's best interests. There has been some judicial debate as to whether the expressions "the welfare of the child" and "the best interests of the child" are synonymous. Bisson J in *Director-General of Social Welfare* v *L* (supra n 78, 136) thought that the former referred to the child's primary needs and did not include all the child's interests. Richardson J, however, suggested that the phrase was concerned with all aspects of the child's wellbeing (ibid, 130). The latter view appears to be consistent with contemporary usage of the phrase. "Welfare" and "best interests" are generally used interchangeably. In any event the modern approach to family law would suggest that the courts would demand that the agreement be in the child's best interests.

125 Pursuant to s7(1) the court may grant relief by way of restitution, compensation, validation of the contract in whole or part or for any particular purpose, or otherwise howsoever as the court in its discretion thinks just.

126 S7(3).

127 Ss 5 and 7(3)(b).

128 [1987] 1 NZLR 321.

129 S7(3)(b).

vides for a penalty of imprisonment for up to three months for a breach of section 25 must militate against relief being granted in respect of a surrogacy contract contravening the prohibition against payments for adoption.

In deciding whether relief should be given in regard to a contract which is illegal for conflicting with public policy the court is likely to ascertain what aspect of the public interest it is that requires that the contract be unlawful. The court will not grant relief if to do so would be at odds with the very reason for which the contract was held to be illegal. In *Baby M* 2 Wilentz CJ characterised the public policy in question as twofold. At issue was the fact that surrogacy agreements contravened the principle that parents have equal rights in respect of their children and that such agreements are not necessarily in the best interests of their children.[130] Given this, the courts are unlikely to give any relief which would have the effect of altering the rights of parents and/or the status of the child, as the policy which dictates that surrogacy contracts should be illegal is that these matters should not be determined by private contract.

However, the question of monetary relief for either party may be a different issue. The provision of such relief may depend on whether a court considers the financial aspects of the contract to be inextricably linked with the policy in issue. If the court was willing to validate in part or vary the contract in question so that it did not terminate the surrogate's parental rights, the varied contract would still dictate the placement of the child and consequently would be against public policy. Thus the courts are likely to be slow to provide any financial relief to parties to surrogacy contracts. In particular the courts would be loath to provide commissioners with restitution for money already paid to a surrogate. Such orders against a surrogate would be likely to pressure her to relinquish her rights to the child.

However there might be less objection to relief being given to surrogates who have fulfilled their responsibilities under an agreement, particularly if surrogacy is characterised as exploiting surrogates.[131] In considering whether to grant relief under the Illegal Contracts Act 1970, the court is directed to have regard to the conduct of the parties.[132] This may influence a court to grant relief against a party seen to be unscrupulous and exploitive.

4 Proceedings to secure rights in relation to the child

It seems clear that a court will not allow the future of a child who is the subject of a surrogacy agreement to be determined by any contract. Instead parties to a surrogacy agreement, seeking a legal determination on their rights in relation to a child, will have to make applications to the Family Court to decide the matter in the normal way. Regardless of whether the application is for adoption, wardship, guardianship or custody, and whether or not the application is opposed, the most important considera-

130 Supra n 1, 1247 and 1248.
131 As it was in the Warnock Report, supra n 4, 46.
132 S7(3)(a).

tion will be the welfare of the child.[133] The success of a custody, guardianship or wardship application will depend entirely on the court's conclusion as to where the child's best interests lie.

The position in relation to an adoption application is slightly different. If a parent does not consent to his or her child's adoption the court may not grant an adoption unless it considers that the parent has failed in his or her parental duties in regard to the child.[134] The fact that, before conception, the surrogate agreed to relinquish the child at birth is unlikely to be sufficient to make out this ground. What would be required would be evidence of failure in relation to the child after birth. If a surrogate was married and conception was through AID, consent would also be needed from the surrogate's spouse, provided he had consented to the AID procedure.[135] Thus a court cannot simply grant an adoption to give effect to any desire the commissioning couple might have to sever all legal links with the surrogate. In a case where a surrogate refuses to consent to an adoption the grounds for dispensing with consent are unlikely to be made out. Consequently, if a surrogate does not consent to an adoption the court will only be able to grant the commissioners custody, even if it is thought that adoption would be in the child's best interests.

In regard to conventional adoptions it is now thought that it is best if a child is informed about his or her background.[136] If the court considers that the same is true in relation to surrogacy, it is unlikely to risk helping the commissioners keep the facts of the child's conception from it by ordering an adoption which will sever the child's legal relationship with his or her mother.

Access is a difficult issue. In relation to marital separations modern expert opinion favours children having continuing relationships with both their parents.[137] However any analogy between the traditional parental separation situation where both parents have lived with the child for some time and the aftermath of a surrogacy arrangement would appear to be slight. However, it is also possible that, if the court considers that the child should know of the circumstances in which he or she was conceived and know who his or her birth mother is, it may be inclined to grant access. This seems to have been so in *Baby M 2* where the order for specific performance of the contract (leaving the commissioners free to adopt the child) made by the lower court was replaced with one for custody with the sur-

133 The welfare of the child is stated to be the paramount consideration by the Guardianship Act 1968, s23, governing custody, access, wardship and guardianship, and it has become clear that the courts will take a similar approach in relation to adoption: see *Re P,* supra n 59, 389.

134 Adoption Act 1955, s8(a). Unless the parent is considered incapable of caring for the child:s8(b).

135 Since he would be the child's legal parent pursuant to the Status of Children Amendment Act 1987, s5.

136 See for example Webb, *A Review of the Law on Adoption* (1979) 86; Benet, *The Politics of Adoption* (1979) 79; and Johnston, supra n 93.

137 Eg Wallerstein and Kelly, *Surviving the Breakup* (1980) 316-317.

rogate having the right to access.[138] However it was particularly relevant in that case that the surrogate mother had the child in her custody for the first four months of her life.

Section 11(b) of the Adoption Act 1955 provides that an adoption order may be granted only if the court is satisfied that this would further the child's welfare. It may be that, even if an adoption order is sought and the surrogate gives her consent, the court might choose to give the commissioners custody. This would allow the surrogate to retain her rights and status in relation to the child to facilitate any later attempts she might decide to make to form a relationship with the child.

Even if an adoption is viewed by the court as being in the child's best interests and parental consent is given, the Act does not require that the application must be granted. If the prohibition of payments in consideration of an adoption has been contravened the court might refuse to grant an adoption order on the ground that to do so would frustrate the object of the provision. However, in the present judicial climate the court is more likely to allow the best interests of the child to dictate its decision.

If the surrogate does not oppose an application by the commissioners for custody of the child the court is unlikely to refuse the application unless it concludes that the commissioners show such a lack of ability as parents that it would be in the best interests of the child for the state to take care and control of him/her. Such decisions will be rare.

The court is likely to be placed in a dilemma regarding the placement of a child only if the surrogate claims custody along with the commissioners. What generalisations may be made about the likely outcome of a custody dispute between a surrogate mother and commissioning parents? There is a perception that the parties to such a dispute will come from widely different socio-economic backgrounds which will make it difficult for a surrogate mother to convince the court that the child's best interests would be served by giving her custody.[139] This is related to the concept that surrogacy is a form of exploitation. However, the reality seems to be somewhat different. In America at least early research suggests that surrogate mothers tend to come from middle rather than lower class socio-economic backgrounds.[140] If there was an obvious element of exploitation in a particular surrogacy arrangement this would probably reflect badly on the character of the commissioners. This was so in *A* v *C* which involved a surrogacy arrangement made with a prostitute for only £300.[141] The child was made a ward of the court under the care and control of its natural mother. Furthermore, economic factors are not necessarily given much weight by New Zealand courts when deciding the child's best interests. In

138 Supra n 1, 1255-1264. Although the question of the nature and extent of the access Mary Whitehead (the surrogate) would be allowed was remanded to the trial Court for decision.

139 Eg Allen, "Privacy, Surrogacy and Baby M" (1988) 76 Georgetown LJ 1759, 1770.

140 Downie, supra n 1, 122-123.

141 Supra n 118.

some instances a maintenance order against the commissioning parents would be appropriate and could ensure a child's well being.[142]

In a situation involving an altruistic surrogacy arrangement if the surrogate decides not to relinquish the child the commissioners are less likely to have an inherent advantage over the surrogate than in a dispute arising from a commercial agreement. Surrogates motivated by altruism are likely to be better placed financially than those substantially influenced by a desire for profit. They may generally be in a better position to offer a child a home than are commercial surrogates. A more significant factor against the surrogate mother may be that many will be single and it may be thought to be better for a child to have two parents and role models of both sexes. However, in the United States it seems a significant proportion of surrogate mothers are married. Furthermore, they will often have already had children and have proven ability as parents. This may work in their favour when a court compares them with childless commissioners.

The surrogacy agreement will only be in issue in custody proceedings in so far as it reflects on the parties' comparative capacities as parents. As mentioned, if the agreement is seen as a sordid commercial bargain this may jeopardise the prospects of the commissioners in particular, as they are liable to be viewed as exploitive.

The surrogate's refusal to comply with the agreement is also likely to be questioned. If her change of mind was motivated to some degree by a reasonable belief that relinquishing the child would not be in the child's best interests, then her change of mind might not be regarded by the court as a factor to be weighed against her. If, in contrast, the decision was generated significantly by guilt the surrogate suffered through her participation in the agreement the court might find that this did not favour placing the child with her. The court might consider that the surrogate's change of mind reflected badly on her ability to make balanced judgments. The court might also question the true extent of the surrogate's commitment to the child at the time it was hearing the application. However, the court might be slow to place significant weight on the surrogate's revocation as she may have been motivated to change her mind by factors which she could not reasonably have been expected to comprehend at the time the agreement was made.

In custody disputes arising out of surrogacy arrangements courts are perhaps likely to find that the best interests of the child favour the commissioning parents more often than they do the surrogate or the surrogate and her partner (as the case may be). Generally the commissioners will be prepared for the child and often the surrogate's change of mind will be late and not fully considered. However, on occasion the court's assessment may favour the surrogate mother. This is particularly likely to be so when she is in a stable relationship, has already raised children and made a relatively rational decision which took account of the child's welfare.

142 However, the position is complicated if conception was through AID as the court probably has no jurisdiction to hold the biological father liable for maintenance pursuant to the Family Proceedings Act 1980, s 64, because of the effect of the Status of Children Amendment Act 1987, s5.

The court must ascertain the best interests of the child at the time it hears the case. Often delay may shift the balance in favour of the party who has physical custody of the child, usually the surrogate mother. In England in *Re P (Wardship)*[143] the court considered a case where many factors favoured the twin children being placed in the commissioning father's custody. He was married, while the surrogate mother was single. Furthermore, placement with the father would have spared the children from racial identity problems (the father was Asian). However, by the time the wardship proceedings came to be heard the surrogate mother had cared for the children for five months and they were psychologically bonded to her. Because of this the best interests of the children lay with their being in the continuing care of their biological mother.

5 *Surrogacy under the present law: the importance of moral considerations*

The examination of the law undertaken makes it abundantly clear that the existing law was not designed to deal with surrogacy and that much of it has the potential to affect the practice in quite arbitrary ways. The rules considered were not created to deal with the basic issues raised by surrogacy. A consequence of this is that a discussion of the relationship between surrogacy and the law as it stands often appears to trivialise those issues. It must be borne in mind that the judiciary do not interpret or apply legislative and common law rules in a vacuum. The approach of the courts will to a large degree be dependent on the judiciary's own conclusions of fundamental moral and ethical issues and its interpretation of legislative and societal views regarding these issues. It is not certain how the courts will respond to surrogacy. However, recent legislative and judicial history would suggest that the welfare of the children conceived as a result of surrogacy will be the courts' paramount consideration when dealing with the aftermath of such arrangements.[144]

IV LEGISLATIVE REFORM

Five broad policies can be identified as legislative options:

- A private ordering or freedom of contract approach; whereby surrogacy contracts are enforced by the courts and the practice is left to be regulated by individuals and commercial organisations.
- Making surrogacy contracts unenforceable; this would involve legislation which resulted in the contracts having no legal effect, without criminalising the practice.
- State control and the enforcement of surrogacy arrangements; which generally envisages agreements being legally enforceable after the parties have gone through a state regulated process designed to minimise the risk of non-compliance and weed out unsuitable commissioners and surrogate mothers.
- Commercial prohibition; making it an offence to be a party to commercial surrogacy agreements.
- Taking no action; leaving the law as it now stands.

143 Supra n 121.

144 Legislative indications of this may be found in legislation which emphasises the welfare of the child, especially the Guardianship Act 1968, s23.

1 Legislating to make surrogacy contracts enforceable

Despite how little is known about the utility of the practice, it is very unlikely that the freedom of contract approach would best promote the state's interests. Such a system would facilitate exploitive behaviour and provide little protection for surrogates. The state's interest in ensuring children are brought up in the best environment available strongly militates against enforcing surrogacy agreements. An approach which enforces surrogacy contracts would tend to encourage the practice by providing it with a form of official recognition. Given the uncertain merits of surrogacy such encouragement seems unwise. The writer knows of no proposals by consultative groups overseas favouring a simple freedom of contract approach.

2 Making surrogacy contracts unenforceable

Such an approach would require the courts to disregard any surrogacy agreement and determine the placement of children resulting from these arrangements pursuant to legislative rules. The rules governing placement of the child might be those already in place for custody and access disputes so that the child's future would be determined according to its best interests. While respecting the interests of the child this approach would still allow women the freedom to enter into surrogacy arrangements. This form of regulation is likely to result in greater uncertainty than the alternatives. It may be that the uncertainty resulting from this approach would outweigh the benefits that would be derived from determining the placement of children according to their best interests.

An alternative approach is one whereby the mother is recognised as the child's legal parent and the commissioning parents are not permitted to contest custody. Reform of this nature has been proposed by Professor Martha Field of Harvard.[145] In so far as this approach tends to focus on the rights of the mother rather than the child it is likely to be regarded as inconsistent with the contemporary approach to family law. However, this response would have the advantage of providing certainty. It might prove to be more beneficial to children born as the result of surrogacy arrangements than the alternative "best interests" directed approach by ensuring the child's early life is not disrupted by legal disputes.

Short of criminal prohibition, reform which provides that surrogacy contracts are unenforceable is the best way to discourage surrogacy. So long as serious doubts remain about the utility of the practice discouragement may be appropriate. There has been general support overseas for legislation which renders surrogacy contracts unenforceable. Legislation has been passed declaring surrogacy agreements unenforceable in England, South Australia, Queensland and Victoria.[146]

145 Field, "Surrogate Motherhood", a paper delivered at the 7th World Conference of the International Society of Family Law, Opatija, Yugoslavia, 14 May 1991.

146 Supra n 2.

3 State regulated surrogacy arrangements

This approach has the advantage of the state being able to make provision for procedures which should increase the likelihood of surrogacy arrangements ending satisfactorily for all concerned. Potential surrogates could be screened to ensure their psychological and physical suitability for the role. Commissioners could similarly be assessed on their parental capacity. All parties to the agreement could be provided with counselling. A system of this type could lower the risks of exploitation of surrogates by ensuring that informed consent is obtained and that adequate remuneration and medical treatment is provided.

Arrangements which comply with state controlled procedures could be enforceable.[147] Such an approach might be in the best interests of children, bringing increased certainty to the situation and allowing children to be placed immediately with secure families. This increased certainty might more than compensate for the fact that in some cases a child might still be placed pursuant to the arrangement, although the surrogate wishes to take custody and the child's best interests favour placement with her. Alternatively, the surrogate mother might be allowed to revoke her decision within a specified period[148] or custody might depend on assessment of the child's best interests.

One real advantage of a state regulated system is that it would enable research to be conducted into the consequences of surrogacy to an extent which would not be possible if arrangements were private.[149] However, such a system has potential drawbacks. It is not clear that it would promote the state's interests. By securing the position of the commissioners, making access to surrogacy easier and giving the practice a degree of state approval, a system of state control is liable to promote a practice which is of questionable social utility.

The Ontario Law Reform Commission in a study into surrogacy and its problems favoured a regulatory approach. The Commission recomended that surrogacy contracts which were approved by a court prior to conception be enforceable. Under the proposed scheme the court's role would have involved it ensuring that the parties to the agreement were suitable and that surrogacy was the only medical option available to enable the commissioning couple to have a child.[150] It might be asked whether the

147 This was the recommendation of the 1985 Ontario Law Commission Report, supra n 104, which has yet to be implemented.

148 This is similar to the recommendation of the National Bioethics Consultative Committee, *Discussion Paper on Surrogacy 2 — Implementation* (1990) 43. The Committee recommended legislation which provides for a cooling off period following birth, during which the surrogate mother would remain the legal parent of the child. The commissioners would become legal parents of the child at the end of this period unless the mother filed a notice of "decision not to relinquish".

149 Although in time we might be able to rely on research data from other countries which adopt regulatory systems. While no country has yet adopted such a system, there are Canadian and Dutch proposals to this effect: see Feinerman, "A Comparative Look at Surrogacy" (1988) 76 Georgetown LJ 1837.

150 Ontario Law Reform Commission Report, supra n 104, 237. Discussed in the New South Wales Law Reform Discussion Paper, *Artificial Conception: Surrogate Motherhood* (1988) 78-79.

courts are really the ideal agency to regulate such a programme. It may be that an independent government agency staffed by experts in medical, psychiatric and childcare fields would be a more appropriate decision-making body. The suggestions of the Commission have yet to be implemented.

A recent Australian report recommended that surrogacy be permitted but controlled.[151] The New Zealand Department of Social Welfare in submissions to the Australian Committee indicated "qualified support" for the regulatory proposal on pragmatic grounds.[152] The Department was of the view that it was "probably impossible to prohibit surrogacy" and that "controls that curb the most blatant extremes of commercially-induced surrogacy arrangements are desirable".[153] However, the recommendations of the Australian Committee met with disfavour from both State and Federal governments and it has since been indicated that legislation discouraging the practice will be enacted.[154]

4 Criminal prohibition

Criminalisation of those involved in surrogacy arrangements is likely to be the most effective legislative means of reducing the number of surrogacy arrangements. This may be an attractive justification for this option if surrogacy is considered to be a potentially detrimental practice which should be discouraged unless and until it can be shown to be safe.[155]

(a) Criminalising the parties to surrogacy agreements

Criminal prohibition would appear to be rather inhumane. Commissioners are to an extent victims of their infertility and societal attitudes towards childlessness. Surrogates are often depicted as exploited and may be participating out of economic need. Alternatively, surrogates may be motivated by compassion. It therefore seems harsh to criminalise the parties to surrogacy arrangements. Yet if the effects of surrogacy are sufficiently damaging to the children born out of the practice and/or society in general, criminal sanctions may be necessary.

However, it is not clear that criminal prohibition is a necessary or effective response to the risks posed by surrogacy. It is doubtful that prohibition would promote the interests of potential surrogates better than other legislative approaches. It would be difficult to prove that prohibition could enhance the welfare of those surrogates who are liable to participate in the practice because of economic hardship.[156]

Criminalisation could have a serious effect on children conceived pur-

151 *Surrogacy 2,* supra n 148, 4. The Committee's earlier discussion paper *Surrogacy 1* is discussed in Graycar and Morgan, *The Hidden Gender of Law* (1990) 239.

152 Submission of the Department of Social Welfare in New Zealand on the National Bioethics Consultative Committee Report on Surrogacy (1990) 1.

153 Idem.

154 "Australia outlaws surrogate practices", *The Press,* 3 April 1991.

155 Criminal prohibition in some form has been favoured in Victoria, Queensland and South Australia, and in England: infra nn 158, 159, 163 and 166 and accompanying text.

156 Supra nn 27-30 and accompanying text.

suant to surrogacy arrangements. It certainly would not be in children's best interests to have their parents found guilty of a criminal offence, fined and possibly imprisoned.[157] If prohibition was coupled with denying the commissioners custody of the child this would be even less conducive to the child's welfare. Generally it is likely that placement in the custody of the commissioners will be the best option the child will have. It has also been argued that criminalisation would merely force the practice underground and put the children born as a result of these arrangements out of the control of the family courts. It could also make commissioners liable to be exploited by surrogates charging exorbitant prices or employing extortive tactics after agreements are made.

When the consequences of criminalising parties to surrogacy arrangements are considered it seems appropriate to require stronger evidence that surrogacy endangers society before taking this step. However, this approach has not been without its proponents. In Victoria the Infertility (Medical Procedures) Act 1984 makes it a criminal offence punishable by up to two years imprisonment to be a party to a commercial surrogacy contract.[158] Similarly in Queensland it is an offence under the Surrogate Parenthood Act 1988 to be a party to a surrogacy contract or to act as an intermediary in relation to such arrangements.[159] A breach of the provisions of the Queensland legislation is punishable by up to three years imprisonment.[160]

(b) Criminalising third parties

Easier to justify is the punishment of those who make money by setting up surrogacy arrangements. It is relatively easy to view surrogacy agencies as exploitive and prohibition of third parties profiting from the activity is less likely to endanger children conceived through surrogacy.

There is, however, a danger that those wishing to enter into surrogacy arrangements will make unwise choices and end up in greater difficulty than they would if they were able to rely on the help of professionals. Yet, particularly while the surrogacy market remains completely unregulated, there is no real evidence that such professionals do anything to make the process safer for the participants.[161] Even if this was the case, it might be

157 Indeed the Warnock Committee declined to criminalise those entering into surrogacy arrangements principally on this ground. It concluded that to do so would risk tainting the children with criminality: supra n 4, 47.

158 S30. See New South Wales Law Reform Commission, *Artificial Conception: Surrogate Motherhood* (December 1988) 17.

159 Surrogate Parenthood Act 1988, s3(1).

160 Idem.

161 In the absence of regulation it may be unrealistic to expect those arranging surrogacy agreements to endeavour to do anything other than try to make as much profit from each transaction as possible. Those organising surrogacy agreements may be tempted to select women who, because of their personal circumstances, are prepared to enter into arrangements for unrealistically low fees. Because of the secrecy involved, the surrogacy market may not be one which is sensitive to the quality of those providing services within it. This would not encourage agencies to take care in ensuring that those involved were well suited for their roles. An example of this may have occurred in relation to the *Baby M* litigation. The surrogate mother was selected by an agency despite the fact that she had a number of psychiatric problems.

that the reduction in the number of surrogacy arrangements that would result from discouraging third parties from facilitating them would be thought to outweigh any dangers resulting from forcing people to enter into such agreements without professional help.

In the United States lawyers appear to be instrumental in the surrogacy process and the same may be true in New Zealand. Certainly in *Re P* it seems that the contract in question had been drafted by a solicitor, although this was not made explicit in the judgment.[162] It may be that people will be far less prepared to enter into surrogacy arrangements if they do not have the benefit of legal advice. Thus the criminalising of third party involvement may be a relatively effective method of discouraging surrogacy without directly punishing those who might be regarded as the victims of surrogacy.

In England the Warnock Report recommended the prohibition of third party commercial involvement in surrogacy.[163] The committee's proposals have been given legislative force in the Surrogacy Arrangements Act 1985. However, the committee concluded that the criminalising of parties to surrogacy arrangements was unwarranted.[164] The New South Wales Law Reform Commission, which delivered a report on surrogacy more recently, generally took the same approach.[165] The problem is treated in a similar way in South Australia.[166]

5 *Leaving the law unchanged*

At present the law is a minefield of uncertainties and anomalies for unwary surrogates and commissioners. In particular an illogical distinction is made between arrangements utilising AID and those involving natural intercourse.[167] It is ridiculous that the law penalises those employing AID, when this procedure is likely to be considered more desirable as a means of conception in this context than natural intercourse.

It is also anomalous that, while it is likely to be an offence for commissioners to adopt a child conceived pursuant to a surrogacy arrangement,[168] no sanction is provided where commissioners do not have to take steps to attain parental status or where they secure the placement of a child through a custody order. While it is probable that in many cases those involved in surrogacy arrangements which result in adoption have committed offences under the Adoption Act 1955, no prosecutions have yet been brought despite publicity surrounding a number of surrogacy arrangements which have taken place in this country in recent years.[169] It may be that

162 Supra n 83 and accompanying text.
163 Supra n 4, 47.
164 Idem.
165 Supra n 158, 44.
166 Family Relationships Act (Amendment) Act 1988, s10.
167 Supra n 37 and accompanying text.
168 Supra nn 44-72 and accompanying text.
169 Eg Keenan, "Mum sorry she signed baby away", *The Press,* 26 March 1991; Coates, "An Immaculate Conception", More Magazine (December 1990) 10.

the existing law, so far as it has the potential to affect surrogacy, will come to be seen as largely irrelevant.

The writer has already observed that a consideration of how the law at present might affect surrogacy arrangements fails to reflect the gravity of the fundamental issues involved. Surrogacy raises questions concerning freedom and the sanctity of life. There is a need for law which is designed to deal with these moral and ethical issues.

While other areas of the family law are governed by the concept of the child's best interests, the effect of the anomalies in the surrogacy context is to disregard the welfare of children conceived pursuant to surrogacy agreements in a quite arbitrary way. Whatever approach is taken towards surrogacy it is desirable to be rational and consistent. For this reason the law relating to surrogacy in New Zealand should be reformed.

The law fails to deal with surrogacy quite simply because it was never designed to do so. This is understandable in relation to legislation such as the Adoption Act 1955. At the time the legislation against payments in consideration of adoption was passed the primary mischief was the practice of some adopters demanding premiums from natural parents at a time in which there was an excess of children available for adoption.[170] Thus the Adoption Act was intended to deal with problems very different to those we now face, at a time when commercial surrogacy simply was not an issue.

However the same cannot be said of the Status of Children Amendment Act 1987. While advisory committees heard numerous submissions on surrogacy,[171] the impetus for reform was principally from the medical profession who wished to remove existing complications in the law relating to new birth technologies.[172] While the legislative reform achieved this aim it was at the expense of those practising surrogacy relying on AID.

6 *A likely legislative response*

In 1985 the Department of Justice Law Reform Division produced an issues paper on new birth technologies, including surrogacy. However that body did not suggest a particular approach to reform and no proposals have been forthcoming in the last six years. Thus it is difficult to gauge the probable response of New Zealand's Parliament to surrogacy.

It would seem very unlikely that a New Zealand government would in the near future favour a regulatory approach. Such a solution would probably be too controversial an option to be adopted. In any event in the current economic and political climate, a regulatory scheme administered by the state and involving government expenditure would appear to be out of the question. Any attempt to recoup expenditure through a "user pays" approach or to license a private organisation operating under a legislative scheme would probably prove so costly to those requiring the

170 Campbell, supra n 65, 12 and 54.

171 Ninety-nine submissions were received, more than twice the number received on any other of the issues raised: Justice Department, "New Birth Technologies: A Summary of Submissions Received on the Issues Paper" (December 1986) 31.

172 Henaghan, supra n 35, 5-11.

service that surrogacy would be an option available only for the wealthy few. Given the "exploitive" label surrogacy has, such an outcome would be acceptable to few people. While the Department of Social Welfare has shown some interest in a regulatory approach overseas experience suggests that our legislature is unlikely to favour a proposal of this nature.[173]

It is more likely that reform will follow the approach taken in England and several Australian states and provide that surrogacy contracts are unenforceable. Further predictions are more difficult. If overseas developments are a good indication it is quite probable that our legislature would prohibit the commercial involvement of intermediaries. This is the approach favoured by a number of Australian states and England.[174] This course of action would be a rational one if it is decided that surrogacy is to be discouraged.

It is less clear, however, that the criminalising of surrogate mothers and commissioners is an effective response to the problems posed by surrogacy. The weight of opinion seems to be against such a measure and it is unlikely to find favour in New Zealand. If this was the case section 25 of the Adoption Act 1955 ought to be amended so as to ensure that it does not apply to commissioners attempting to adopt children who are the subject of surrogacy agreements. In addition, it is suggested that the law should be amended to provide that parties to surrogacy arrangements who use AID have the same rights and responsibilities in relation to children resulting from the procedure as parties relying on natural intercourse.

The Adoption Act 1955 has been regarded as in need of major reform for some time.[175] It would be desirable that legislation relating to surrogacy coincide with such reform. The Children, Young Persons, and Their Families Act 1989 and the Guardianship Act 1968 might also be amended to provide for issues arising from surrogacy arrangements. Whatever approach the court takes towards the adults who are involved in a surrogacy arrangement there is a need to ensure that the welfare of the child is safeguarded. One means of endeavouring to provide this might be through the appointment of counsel for the child in adoption proceedings.[176] At present adoption legislation makes no provision for such an appointment.

Predictions regarding legislative action in this area are highly speculative. All that seems clear at the present is that there is no prospect of reform in the immediate future.

V Conclusion

Commercial surrogacy on any significant scale is a new phenomenon. There has been some doubt as to how common law contractual principles

173 Consider the experience of Canada, supra n 152, and Australia, supra n 154, and accompanying text.

174 Supra nn 159 and 163-166 and accompanying text.

175 Webb, *A Review of the Law on Adoption* (1979).

176 This was one of the recommendations of the Adoption Practices Review Committee, *Report to the Minister of Social Welfare* (1990) 75.

ought to be applied to surrogacy situations. Not surprisingly, current legislative principles, drafted without considering surrogacy, fail to deal with the consequences of the activity in a logical or consistent way.

Legislative reform to provide a rational approach to the problems associated with surrogacy is warranted. However, our legislators should be careful not to act simply on the basis of their own perceptions of the morality of the activity. Rather the task requires careful evaluation of the dangers surrogacy poses and a response commensurate with those dangers.