

What have genes got to do with it?

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Surrogacy in Aotearoa New Zealand

- Domestic ‘commercial’ surrogacy prohibited; ‘altruistic’ permitted
- For assisted reproductive treatment (ART) of a surrogate, Ethics Committee on Assisted Reproductive Technology (ECART) consent required. About 25 surrogacy-related applications per year to ECART in 2010-2013
- Birth-mother and partner are legal parents; adoption necessary
- In 2012-2013, 8% of 154 reported adoptions surrogate-born
- Same applies for children born of international surrogacies

Genetic relationships and surrogacy

- For ECART consent to ART of a surrogate: genetic connection with one or other intending parent required
- Immigration New Zealand (INZ) policy requires genetic link between at least one intending parent and a surrogate-born child for whom they are seeking a NZ visa
- Surrogate-born children normally need to be adopted by intending parents: different regime applies, depending on whether child is 'habitually resident' in NZ, which in practice requires child to enter NZ
- Parental status laws (Status of Children Act 1969) treat genetic connection as irrelevant

ART regulation and genetic relationship

Human Assisted Reproductive Technology (HART) Act 2004:

- Requires ECART approval for IVF treatment of a surrogate (s16)
- ECART applies Advisory Committee on Assisted Reproductive Technology (ACART) Guidelines (2013)
- Genetic relationship a mandatory requirement for ECART approval
- Rationale is presumably that maintaining genetic relationship is the main justification for surrogacy rather than adoption

Immigration policy and genetic relationship

- No legal regulation of surrogacy and immigration
- Usual route is application for a visitor's visa to enable consideration of adoption application by NZ Family Court
- Depending on child's 'habitual residence' either treated as an inter-country adoption or a domestic adoption
- Established process, involving multiple Government agencies
- INZ requires DNA test before issuing a visa to the child
- Possible in theory (but difficult in practice) to acquire New Zealand citizenship by descent overseas for surrogate-born child and enter NZ on NZ passport

Re SCR & MCR [2012] NZFC 5466

“having regard to the fact of their biological parenthood of C, the [pre-birth parenting] declaration of the Superior Court of California, their intention to reside in New Zealand and the actuality of C returning to New Zealand within a month of her birth. ... I find the Adoption (Inter-Country) Act does not apply” [30]

Genetics relevant to ‘habitual residence’ of child

Re DMW & KW [2012] NZFC 2915

“I cannot accept the submission ... that I should look at the social reality ... rather than the biological reality. If it was not important for the applicants to have biological status then they would not have proceeded with the surrogacy arrangement. The point of surrogacy is to maintain a biological link.” [34]

Absence of genetic link meant that habitual residence of intending parents could not be imputed to child and inter-country adoption convention applied

CGL v SJP & GPL [2012] NZFC 9828

“The Court first must be satisfied on the evidence that that ... reflects T’s welfare and best interests. There is little relevant background ... other than ... history surrounding T’s birth. In such circumstances, the Court would be negligent in relying on inferences and not fact.” [21]

Genetics alone insufficient

Parental status and genetic relationship

Status of Children Act 1969

- birth mother is the ‘the mother’ for all purposes, even if donor ovum used
- birth mother’s partner (if consent to ART – presumed) is for all purposes ‘a parent’, even if no genetic contribution
- donor only ‘a parent’ if donor is birth mother’s partner (despite any evidence of paternity)
- only one partner may become a ‘parent’

Genetics considered irrelevant

Paternity and genetic relationship

Status of Children Act 1969

Paternity may be established by:

- marriage to birth mother at time of conception of subsequently
- lifetime admission of paternity or establishment of paternity by evidence
- declaration of paternity by court

Evidence includes:

- entry on registry of births deaths and marriages
- genetic testing
- deed between birth mother and father

What have genes got to do with it?

- Genetic connection **important** to many parents and children
- Children have well-recognised **rights** to information about their genetic identity
- BUT does not follow that genetic connection should be **required** for surrogacy
- Primary consideration should be welfare of the child; genetics a **mandatory consideration?**
- **Fragmentation** of parental status?

How can we achieve consistency

- **Unified and consistent** approach to immigration, ART, adoption and parental status laws
- Adoption/parental status prioritised
- Cart before the horse?
- Pre-birth interim parenting orders?

Thank you

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