

THE LEGISLATIVE COUNCIL SELECT COMMITTEE ON SURROGACY MET IN COMMITTEE ROOM 2, PARLIAMENT HOUSE, HOBART, ON 1 JULY 2008

SENATOR STEPHEN CONROY WAS CALLED, MADE THE STATUTORY DECLARATION AND WAS EXAMINED.

CHAIR (Ms Thorp) - Senator, you, of course, have the option to go into private hearings or in camera, or are you happy to keep going with the media present?

Senator CONROY - No worries.

CHAIR - If you would like to speak freely about what you would like to tell us and then is it okay if ask some questions towards the end?

Senator CONROY - No worries, that would be great, thanks.

I would first like to thank the committee for the opportunity to make a submission at this stage and congratulate you on taking the initiative in establishing the committee.

My family circumstances may be well known to the committee but allow me to recap. My wife, Paula Benson, was diagnosed with ovarian cancer in August 2003 and required a radical hysterectomy. This meant that she could not carry a child and as her ovaries were also removed, she did not have any eggs.

We applied for international adoption but were rejected on medical grounds, despite Paula's gynaecological oncologist giving her a clean bill of health. We were then approached by a wonderful woman, an old and close friend of Paula, who offered to carry a child for us. We investigated the surrogacy options in Australia and discovered that it was not legal in my own State of Victoria. In fact our only options were either in the ACT through what was then called the Canberra Fertility Clinic - it may have changed its name now because I think it was bought out recently - or New South Wales through Sydney IVF. Meanwhile another incredible friend offered to donate eggs to us. We then discovered that only Sydney IVF would undertake a surrogacy arrangement with a surrogate and a third-party egg donor. We had a slightly more complex situation than most couples do.

The process undertaken through Sydney IVF was complex, challenging and extremely rigorous. Sydney IVF required everyone involved to undertake detailed and multiple consultations with IVF specialists, psychologists, psychiatrists and lawyers before their ethics committee approved our application. We were then able to commence the egg-harvesting process followed by a six-month period where the embryos were frozen for medical screening purposes. After that period the embryo transfer took place. All this clearly required interstate travel.

We were incredibly fortunate in that our surrogate became pregnant on the first attempt and our beautiful baby girl, Isabella, was born on 6 November 2006 about two-and-a-half years after our family friend first approached us.

This, however, presented us with significant legal issues. Despite being the genetic father of Isabella, I could not be recognised legally as her father or on the birth certificate. My wife, Paula, had no legal rights at all and the surrogate was deemed to be the legal mother. The egg donor relinquishes any rights at the time of embryo creation.

After Isabella's birth we returned to Victoria and in the Family Court of Australia we applied for parenting orders and I applied for recognition as Isabella's father. This was granted in August 2007. It was a very emotional and significant moment for all of us. We believe that this extra emotional stress could be avoided if the legal concept of commissioning parents was incorporated into any legislation that you would be considering. This would enable the people who will parent the child to be recognised as the parents as soon as the child is born and alleviate the worry and concern that comes with not being recognised as the legal parents. The whole process was extremely costly though obviously we do not regret a single penny; our beautiful girl is priceless. However, there is no doubt that the cost of the travel to and from New South Wales and the extra legal costs in the Family Court do add to the financial burden of any IVF process and we hope that other people in a similar position may be spared these extra costs.

Mr WILKINSON - Without knowing the specific costs down to the last cent, Steve, are you able to give us a ballpark figure of the costs involved?

Senator CONROY - As I said, we were lucky because the IVF process took first time and the costs escalate depending on the number of attempts. I think all up it was around \$30 000 for the medical processes and the legal costs that followed for the Family Court case were around, I think, \$10 000. They are not exact figures.

Mr WILKINSON - So approximately \$40 000.

Senator CONROY - Yes, and, as I said, it would have been more if we had been unlucky and not had the IVF process work the first time.

Mr WILKINSON - So it is \$30 000 for that medical process that you were speaking about. Does that involve a second attempt if the first attempt fails?

Senator CONROY - No, there would have been extra costs for a second attempt and subsequent attempts.

Mr WILKINSON - Sure. How much approximately?

Senator CONROY - We were lucky and I never had to investigate that but it is a couple of thousand dollars per attempt. It is not an insignificant amount of money for most people, depending on how many attempts you make.

Mr WILKINSON - Okay, thank you.

Senator CONROY - We would like to submit to the committee that the legal concept that I mentioned earlier of commissioning parents be included in your considerations for any proposed legislation. Obviously our case did create a large amount of publicity. I would

probably say to you 95 per cent of it was overwhelmingly positive. We received many expressions of support as well as a number of criticisms. One commentator even said that I should resign as a Senator for Victoria on the basis I had subverted the Victorian laws by going interstate.

There was much debate because a surrogate was involved, an egg donor, and obviously my wife as the mother of the child. There was criticism from some sections, including commentary from significant figures in the church. I was born and raised a Catholic. I would not define myself, despite what you may have read, as a high-profile, prominent Catholic but Isabella has been baptised and she will go on to have her first holy communion and confirmation as it was stated by Archbishop Hart during the debate that no child would be denied the sacraments.

Fortunately the church recognises that it does not matter how children come into being, they should all be treated in the same way. However, the legal situation seems to have fallen behind science in this case. I would argue that a child is entitled to the protections that pertain to all children, irrespective of how they were conceived. Both the parents and the child need to know their legal rights.

We could literally have had a knock on the door from the Victorian authorities after our return to Victoria, asking what right we had to have this child in our home as we had no legal standing. We received Isabella immediately after she was born and cared for her from that moment. We returned to Victoria after about a week and could have been accused of kidnapping the child as we had no legal standing. This was patently absurd. I was always the genetic father.

Mr WILKINSON - Kidnapping would have been against the wishes of who was supposed to be the parent so I doubt that would have been the case, but I know what you are saying.

Senator CONROY - We had no legal standing. We were in a situation where both our and Isabella's legal rights were unclear. I put it to you that all children deserve the same level of protection and parliaments need to address the fact that each child needs the same basic protections. They need to know they are protected in terms of property and legal issues. We could not take Isabella out of the country or enrol her in a school because we had no legal standing.

CHAIR - What if she had become ill?

Senator CONROY - We were very lucky that Medicare put her on our Medicare card, probably because of the profile of the case. She became registered with Medicare almost immediately. We could not get her health insurance, and doctors' costs had to be covered by us.

CHAIR - What if an emergency operation had been required?

Senator CONROY - There would have been a very complex legal situation where we would have had to contact the surrogate mother and seek her permission for legal certainty. Those issues are very significant during the process. That has now been resolved as we were successful in the Family Court. I am now legally recognised as the genetic father

and my wife and I have been awarded what is called in Victoria parenting orders. I am not sure of the terminology in Tasmania.

As I said, this case generated a great deal of controversy. For instance, the rights of gay couples to have access to IVF and surrogacy is a significant matter in Victoria as well as the rest of the country.

Mr WILKINSON - What is the situation with that?

Senator CONROY - At the moment there is no legal recognition and I would argue that, irrespective of how the child came into being, there should be. I have now corresponded and spoken with many people who have been through surrogacy processes both here and overseas. I have also corresponded with gay couples who have children and their children are in exactly the same situation. Irrespective of whether you agree or disagree with the rights of a gay couple to go through an IVF process, the children should be entitled to the same protection under law as every other child. I know that there are many who do not agree with that but these children exist today and they should be entitled to the same rights as every other child.

Mr WILKINSON - With this ethics committee you spoke about, the parents to be - if I can call them that - had to be spoken to and examined by the committee to see if they were going to be appropriate, didn't they?

Senator CONROY - We never spoke to the ethics committee, we dealt with a representative of the committee who examined the case file. There were a range of measures that Sydney IVF had in place. I cannot speak about other clinics. In our circumstances, they preferred that the surrogate and the egg donor had already completed their family. This was to ensure that there was the least amount of potential for future changes of mind, given that there was no legal framework. These are legitimate issues. Part of the reason the laws are as they are is that politicians and judges don't want to play King Solomon. That is a legitimate issue and why we should create a legal framework for children in these circumstances to be able to have rights.

Mr WILKINSON - Do you believe that this ethics committee is the answer to people who may question same-sex couples having children? They seem to be going through a process to see whether these people are able to care for the child properly.

Senator CONROY - What should be paramount is the caring for the child.

Mr WILKINSON - That is right.

Senator CONROY - I think the Sydney IVF ethics committee were very professional about it. We went through much counselling. There was no correct answer to most of the questions we had to confront, such as the level of contact between Isabella and her surrogate mother. It was about creating a dialogue so that there was an understanding of the level of contact, how often the surrogate might want a conversation or to meet with the child. In our case the egg donor and surrogate are Isabella's godmothers. We have established a very healthy relationship with them.

We kept a record of all the information in the public sphere. We have taken advice from experts in the field. Adoption has changed from what they used to describe as closed adoption with no knowledge, to an open adoption system which involves informing Isabella as she grows up and is able to understand the circumstances. This is the information that comes to you and that you needn't necessarily confront. There were many challenging questions that we needed to discuss and hoped never to have to face. In our circumstance, she had to consider what happens in various scenarios.

Mr WILKINSON - Who ran you through that? Was that the IVF body or a solicitor?

Senator CONROY - As I said, they referred us to somebody who took us through the legal issues. They referred us to a psychologist and a psychiatrist who presented reports to the ethics committee through our file manager. All these considerations were taken into account and ultimately went back to the ethics committee for their consideration. It was slightly more complex in our circumstance because there was an egg donor involved as well as a surrogate.

CHAIR - I could see there would be some obvious benefits to that as the birth mother would have a lesser amount of connection because it wasn't her egg.

Senator CONROY - Each of these is an individual circumstance so I make no judgment on other sets of circumstances. When the surrogate offered to be a surrogate - which was a wonderful thing - she said, 'I would love to do this for you but I don't think I could give up a child that was half mine'. I can understand that aspect. We were lucky in that we were approached by someone willing to be a donor. The ethics committee's processes were genuinely very rigorous. The role the committee played in our case was very healthy. It was certainly necessary. It made us consider a range of issues we had never contemplated before, some of them tough and challenging. What would happen if my wife and I were killed in a car accident while the child was in the womb? Issues like that you don't think about too much.

Mr WILKINSON - What would happen in that case?

Senator CONROY - We had to approach and nominate somebody as a guardian. We had to consider my parents, my wife's parents, family. Both our parents are quite elderly and would not be able to look after a young child.

CHAIR - Particularly one who runs at a million miles an hour.

Laughter

Senator CONROY - So we had to approach somebody else to consider it in that circumstance.

CHAIR - These are considerations that every family has to make, to decide what would happen.

Senator CONROY - We had to confront them at the beginning of the process rather than as we went along. We were confronted with a list of things that could go wrong and you try not to think about those things.

CHAIR - In the normal course of events you don't want to, do you?

Senator CONROY - That's right so these were confronting.

Mr WILKINSON - Was a question put to you about what would happen if something happened to the surrogate?

Senator CONROY - In a legal sense the surrogate was the mother, and we were asked about issues around what would happen if the child endangered the life of the mother. Again, these were things which needed to be discussed and worked through. The legal situation is very clear; the surrogate has the legal right to make any medical decision that is necessary.

Mr WILKINSON - That is while the surrogate is carrying the child?

Senator CONROY - Yes, while carrying the child. These are issues that need to be considered. They are not easy issues and will spark a great deal of debate. They are not that different to existing laws covering a woman and her child, they carried over into the surrogacy circumstances. You would need to work through that situation to ensure there are no unintended consequences. For instance, for commissioning parents you need to take that set of circumstances before and after the child is born.

CHAIR - What about the issue of age limits? Also, what about people who have already had their babies?

Senator CONROY - Sydney IVF were very keen for both our surrogate and our donor to have completed their families.

CHAIR - Even if they'd decided they did not to have any children? There is some argument that people should have had at least one child.

Senator CONROY - The Western Australian legislation was considering that. I don't know if the final vote has been taken. Obviously this is a conscience issue, as it is in other parliaments. Western Australia have gone through their debate at the Committee stage and their debate in Parliament. I think they inserted a minimum age before being considered for surrogacy. These are well worthwhile considerations. Each individual circumstance will be different and I am not sure that Parliament can legislate for all circumstances. That is why it becomes so difficult. You have to try to create a legal framework to ensure the certainty.

You can set standards, you can set minimums. It is the same with medical procedures; ethics committees take very tough decisions. These are genuinely tough issues that I encourage you to work through and not be put off by the fact that they are tough and complex.

Mr WILKINSON - Did you enter into an agreement with the two women involved?

Senator CONROY - It is not legally binding but we did have an agreement to cover costs. Obviously, any costs incurred we paid along the way. I think everywhere had the same

situation except the ACT where they have already gone down this path of commissioning parents. I think there was a legal contract that set out our wishes in the case of an accident. We needed to go through a process where we did certain things but they ultimately would not be legally binding. This is the same as the original pre-nuptials which were not legally binding. The law has evolved and now they are considered to be binding legal documents.

CHAIR - What about birth certificates? What do you think should be on them?

Senator CONROY - If you adopt a commissioning parent role, I would suggest that the commissioning parent should be identified. In my circumstances, because of the existing laws, the surrogate chose to nominate her name on the birth certificate which is Isabella Grace Benson Conroy. That was entirely her choice. She felt that was the way things should proceed. She did not nominate a father, but left that space blank. There is a presumption, which the High Court recently ruled on, that the person who bears the child is the mother and spouse is the father. This caused some deliberation for the surrogate.

Ideally it would have been preferable for my wife and myself to have been nominated on the birth certificate. We had to go to court to be considered regarding that and ultimately my wife will adopt Isabella. I can now be put on the birth certificate whenever I choose and my wife can once the adoption process goes through. Because it is a partner adoption it is more complicated than a full-scale adoption. We were asked why we didn't just adopt using existing adoption laws. There is no certainty that you can adopt your own child, as silly as that may sound. Adoptions go through the State, for good reason. We have to ensure arrangements are not made outside the law and I support that.

Mr WILKINSON - Do I understand correctly that on the actual birth certificate the mother was the surrogate and the father was blank?

Senator CONROY - Yes. That was the decision taken by the surrogate.

Mr WILKINSON - What should occur is that the mother and father should be classed as the people commissioning the child but there should also be something to show who gave birth to the child and that file should be kept safe for only that family to access. Why I say that is because, as you realise, a number of people want to know who their real parents are. They do not have that opportunity without going to extreme lengths. Their birth certificate should enable them to get that information.

Senator CONROY - All the expert advice we received was that we should have an open situation so that Isabella was fully aware of the circumstances of her arrival into the world. As such, we have kept all the documentation, articles, commentary and commonsense would suggest that if Bella wants to look at her original birth certificate she should be able to.

Mr WILKINSON - Should the actual legislation ensure that the child is able to find out who her parents are?

Senator CONROY - Most of the processes now automatically go down that path. That is the best advice. I make no commentary on past practices of closed adoptions. I understand that things have evolved over many years. I think those legal protections are

important. You have seen the debate around sperm donors and adoption processes and people who are unable to find out about their genetic inheritance, for instance because they cannot trace the origin of the donor sperm. Those are complex issues for which there is no easy answer.

In the surrogacy circumstance I think an open approach is the best approach. We have been pursuing that. As I said, Isabella's surrogate and egg donor are her godmothers. It has been a very healthy relationship.

CHAIR - This leads me to something else. The fact that you were fortunate in having friends who were willing to help, what about those people who don't have such supportive friends or family? What do you feel about the COTS set-up in the UK, an agency to which people can apply if they wish to get someone to help them with surrogacy?

Senator CONROY - I would certainly favour a regulated approach rather than an advertising or a US-like financial route. I cannot stress enough that I am not a supporter of paid surrogacy. I am a supporter of altruistic surrogacy. That is not to dismiss people who have become desperate and gone to the US. I have corresponded with such people. I am not critical in any way. They have been forced to do that because of our laws. I would favour a regulated approach that ensures the protection of the child, more protections built in for the child. As I said, all children are entitled to the same level of protection whether they were born to a gay couple, whether they were born through the unusual circumstances we went through. Children should be entitled to the same levels of protection. So I would favour having an approach that sees a regulated approach, whether it is government agency regulated -

CHAIR - Or an NGO?

Senator CONROY - or an NGO, and many churches are involved in the adoption process. So there should be a regulated process that ensures the child has the same degree of protection and rights as other children.

CHAIR - I suppose the NGOs or the church group or the government agency could help parents who are trying to go through this process to find their way through the maze, if you like -

Senator CONROY - Yes.

CHAIR - and ensure all the counselling occurred and the reference to an ethics committee for a final tick could all go through a body like that.

Senator CONROY - Yes. As I said, I think this is something that requires a great deal of thought in terms of going into the process. It is very challenging; the information is not easy to find. It took us many years before we were able to get all the information we needed. That regulated process I think was ultimately a very worthwhile and beneficial process and I would support that rather than having the private sector possibly using financial means to manipulate people. I would not be comfortable with that.

As I said, I am not being in any way critical of people who have been forced to go down that path. What would be best is if they did not have to go path.

Mrs RATTRAY-WAGNER - Regarding the parenting orders, how difficult a process was that Stephen? It was about 12 months, is that right, from the time Isabella arrived until you were allocated?

Senator CONROY - A little less than 12 months.

We were very lucky. We clearly had a judge who believed the law needed to be reformed is probably the kindest way I can describe it. The possibility that could have occurred is a judge who was not a supporter of reform - and given it was a high-profile case, it was not an unknown situation - could have ordered that a lawyer be appointed for Isabella. We could have been subjected to a six-month or 12-month investigation by Community Services in Victoria to ensure that we were fit and proper people to be in charge. So this was quite a stressful circumstance where we were literally in the hands of the roster and it could have been a lengthy, far more costly process than it was. As I said, we do not begrudge a cent of this but it could have gone on for a lot longer and been far more costly, without getting lucky in the lottery of which judge you drew on the given day.

We were incredibly relieved when our case went through fairly simply, given the potential other sets of circumstances. Our lawyer said this could happen, this could happen, this could happen and we were again extraordinarily lucky in that we were able to have our case resolved very quickly and that meant far less legal cost and less intrusive circumstances than it otherwise could have been.

Mrs RATTRAY-WAGNER - Through this whole process have you been able to access any support? Is there a network of people like you or potentials who may be looking to go down this path?

Senator CONROY - As I said, because it was a high-profile case and obviously being a member of parliament I received many, many e-mails and phone calls asking for advice from people who lived all over Australia in all different circumstances who were very, very supportive. As I said, I corresponded with gay couples who had been to America and come back and have beautiful children of their own.

There is no formal network that I am aware of but there is certainly an informal one of information. I have done my best to try to respond to everybody and to give them as much information as possible. People just don't say, 'I live in Queensland. It's illegal. What do I do? Do I have to move interstate?' In Queensland if you have made one of these arrangements and you go back, you possibly face criminal charges for being in breach of the law.

To be fair, they had a very difficult surrogacy case a number of years back. As I said, politicians and judges do not want to be King Solomon in a literal sense so everyone said, 'This is just too hard. The simplest thing to do is bat it outright and make it go away. Medical science has now advanced enormously since then and so you see a circumstance where more and more children are being born in this way and Isabella is obviously higher profile than me. Certainly more popular than me, I promise you that.

Laughter.

Mr WILKINSON - To my mind there should be a national consistency and therefore it should be national legislation in relation to it otherwise what you are going to have is this jurisdiction shopping. No matter what you do in Tasmania they might say ACT is better, it might be New South Wales or it might be Western Australia so therefore even if you bring in your own legislation, you are going to have people choosing what is the best legislation.

Senator CONROY - We have a mishmash of laws at the moment. A national uniform approach would be far preferable so that all Australian citizens have certainty in this situation. The basic principles have been set out for consideration, the States' attorneys-general have met with the Federal Attorney-General and they have agreed to try to introduce a national framework.

CHAIR - But meanwhile different States are moving ahead.

Senator CONROY - Some States are moving ahead. The Western Australians have already moved ahead. I think they are all based around the same basic principles so there are some individual areas which are more controversial and in Victoria Rob Hulls is moving forward in some areas that are going to draw a large amount of public debate. So certainly I would support a uniform national law. Some States may chose to go further than the individual national framework and that is for each of those to consider but I would strongly support the principle of let us get some national laws so people do not have to go interstate or more importantly, go overseas.

CHAIR - It also goes to the protection of the child too doesn't it?

Senator CONROY - Absolutely. This is paramount. As I said, paramount here should be the protection of the children. Whether you agree or disagree with how they came into being, this should be about ensuring all children have equal rights, and that is a really sound principle to start from.

Mr WILKINSON - Like it or not, you would be classed as an expert in the area because of the experience that you have had. With that experience and with your knowledge of the other legislations around the different States, if Tasmania was adopting any State as a framework to build on, which would you say would be the best?

Senator CONROY - Victoria has a paper that has been put out. There is no legislation at this stage so they are considering it.

Western Australia jumped out ahead very early and following discussions, I put in a written submission. I could not get to WA while their hearings were on. I think they have gone down the path of the commissioning parents. I think that is important to guarantee the certainty for all involved but I do not know whether anyone as yet has one model that I would point to just yet. Victoria are doing the most broad reform in these areas so certainly I would be watching what Victoria is going to do. Not every jurisdiction will necessarily agree with all of the issues that Victoria has put forward and a number of them that were recommended by the Law Reform Commission the Victorian

Government has said, 'No, we are not going to proceed there. We want to deal with these matters first'.

There is not any individual legislation I would point to yet and say that is the solution. The ACT has already introduced some legislation which is I think very positive. Western Australia has now gone down a similar sort of path. Regarding the broad framework which is outlined in the SCAG, a very unfortunate name, but I think those principles outlined by the Commonwealth, if people can start from there and if people want to build onto that other aspects then I think that is a healthy thing. But I would be starting with the principles that the State attorneys-general have agreed and then if the individual districts want to go a little bit further dealing with some of the more controversial matters, I think that is a positive as well because - I keep wanting to stress - it is about the rights of the child, not about whether you agree or disagree.

Mr WILKINSON - That is totally consistent with the Family Court anyway, isn't it?

Senator CONROY - Yes.

Mr WILKINSON - The paramount interest of the child they have spoken about since 1974, 1975.

Senator CONROY - Correct and that is the key to this. I think that is the way to move forward and just keep stressing that because this is controversial; 95 per cent of the publicity around Isabella's birth was very positive but there were genuine critics who believed that it was the wrong thing to do and that there should be no change in the legislation. Having spent 10 months with Isabella before the court case, even though I did not believe anything would truly happen that level of uncertainty is something that adds to the stress of being a normal parent.

Mr WILKINSON - It would have been a very brave court to take a child away from two parents who have had the child for 10 months.

Senator CONROY - We were very lucky. Our process went very, very smoothly.

CHAIR - Tania, do you have any further questions?

Mrs RATTRAY-WAGNER - I do not think I have any more at this stage. I really appreciate the opportunity, Stephen, to hear your story first hand. All the best with Isabella.

Senator CONROY - Thank you.

Mrs RATTRAY-WAGNER - I have four daughters so you only have a quarter of the problem or challenges to come.

CHAIR - I only have one and it is the way to go.

Thank you very, very much.

Senator CONROY - Thank you very much, and I want to again congratulate you on tackling what is a controversial and complex issue. I wish you well with your deliberations and I look forward to seeing your report and then hopefully some changes to the Tasmanian law, consistent with the national framework around the country.

Thank you very much for the opportunity.

THE WITNESS WITHDREW.