

SLEEPWALKING THROUGH THE MINEFIELD: LEGAL AND ETHICAL ISSUES IN SURROGACY

This article will briefly explain the different types of surrogacy and regulatory approaches taken by states before examining some of the ethical and legal concerns arising out of surrogacy. It explores the significant human rights abuses that have affected surrogate mothers and the resulting children in the context of international commercial surrogacy. Regulatory responses to these abuses and the willingness of commissioning parents to evade restriction have led to children born stateless and without legal parents. Thus, in regulating surrogacy, states face the dilemma that what is in the best interests of children at a policy level may clash with the best interests of the individual child already born through surrogacy.

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I. Introduction

1 While the concept of family has been a fluid throughout history and across cultures, the development of reproductive technology over the past decades has seen significant changes to our understanding of family, parenthood and the creation of life itself. Surrogacy, a form of assisted reproductive technology, has enabled those with reproductive difficulties, or who are unable to have a child naturally, to have a family. In many and most situations, this is a happy occasion. Advocates for surrogacy often focus on the aching desire to be a parent and the struggles and joy of the commissioning parent to achieve this desire. However, surrogacy has also created a baby-making “wild west”, where the rights and interests of children and surrogate mothers are being trampled by those desperate to start a family, and those hoping to profit from that desire.

2 Surrogacy is a controversial topic that is dynamic and complex. The precise locations, ethical concerns and legal problems are constantly

* Any views expressed in this article are the author’s personal views and are expressed in an academic rather than a judicial capacity. His Honour would like to thank Lisa Churcher, Legal Associate to Chief Justice Pascoe, for her assistance in preparing this article.

shifting and changing. The complexity of the different types of surrogacy and the desires and rights of the parties involved makes it difficult to comprehensively and consistently legislate for all surrogacy arrangements. The difficulties are magnified by its morally and ethically fraught nature.

3 This article will briefly explain the different types of surrogacy and the different regulatory approaches taken by states before exploring some of the ethical and legal concerns arising out of surrogacy, particularly international commercial surrogacy. It concludes by arguing that, in all the legal and ethical complexity, the primary focus must be the best interests of the child.

II. What is surrogacy?

4 In Australian family law, surrogacy has been defined in *Lowe & Barry* as:¹

[An] arrangement whereby a woman ('the surrogate mother') agrees to conceive and bear a child, which she intends to transfer to another or others (the 'commissioning couple' or 'commissioning husband' and 'commissioning wife') upon the child's birth ...

5 It would seem that Benjamin J in this case tactfully omitted the words "genetically related" and could have omitted the word "conceive" as, oddly enough, neither are strictly necessary for a baby to be born via surrogacy. Such a baby may be created using the genetic material of the commissioning parents, or with the use of a donor egg, donor sperm, or both. There may be no genetic link to the commissioning parents whatsoever.

6 Medically speaking, there are several different types of surrogacy:

(a) *Gestational (or total) surrogacy*. A surrogate mother is inseminated with an embryo created by in vitro fertilisation⁴⁵⁶ ("IVF"), using the egg and sperm of the commissioning woman and man. The resulting child is genetically related to both the commissioning parents, and genetically unrelated to the surrogate mother.

(b) *Gestational surrogacy and egg/sperm donation*. A surrogate mother is inseminated with an embryo created by IVF, using the commissioning male's sperm and a donor egg, or the commissioning female's egg and donor sperm. The resulting

1 *Lowe & Barry* [2011] FamCA 625 at [5].

child is genetically related to one of the commissioning parents and genetically unrelated to the surrogate mother.

(c) *Gestational surrogacy and donor embryo.* A surrogate mother is inseminated with a donor embryo created by IVF. Such embryos may be available when other people undergoing IVF treatment have embryos left over, which they opt to donate or sell to other people or clinics. The resulting child is genetically unrelated to the commissioning parents and genetically unrelated to the surrogate mother.

(d) *Traditional surrogacy.* A surrogate mother is naturally or artificially inseminated with the Commissioning father's sperm via intrauterine insemination ("IUI"), IVF or home insemination. The resulting child is genetically related to the commissioning father and genetically related to the surrogate mother.

(e) *Traditional surrogacy and donor sperm.* A surrogate mother is artificially inseminated with donor sperm via IUI, IVF or home insemination. The resulting child is genetically unrelated to the commissioning parents and genetically related to the surrogate mother.

7 A surrogacy arrangement can be "commercial"; where the surrogate mother is paid a fee, above and beyond reimbursement for her pregnancy-related expenses, to carry and birth the child. Conversely, an "altruistic" surrogacy arrangement is one where the surrogate mother is reimbursed for her pregnancy-related expenses only. Altruistic surrogacy is rare and primarily an arrangement between close intimate relationships, such as sisters or close friends. Commercial surrogacy makes up the majority of surrogacy arrangements but is prohibited in many countries.²

8 Regulation of surrogacy varies greatly between jurisdictions, but can be roughly grouped in to four approaches:³

(a) All forms of surrogacy are prohibited.

(b) Commercial surrogacy is prohibited but altruistic surrogacy is permitted and regulated.

2 Petra De Sutter, Parliamentary Assembly of the Council of Europe, *Children's Rights Related to Surrogacy* (Doc 14140, 23 September 2016) at p 4.

3 Hague Conference on Private International Law, *A Study of Legal Parentage and the Issues Arising from International Surrogacy Arrangements* (Preliminary Document No 3C, March 2014) at p 15.

- (c) Commercial surrogacy is permitted and regulated.
- (d) Surrogacy is unregulated.

9 Domestic altruistic surrogacy⁴ is often seen as more acceptable than other forms of surrogacy, due to (a) the expectation of an ongoing relationship between child, birth mother, and the people who will parent the child, (b) a lack of financial coercion of the surrogate mother, and (c) avoidance of issues related to the commodification and exploitation of women and children.⁵ Nevertheless, pregnancy and birth are very risky practices. Carrying and bearing a child is also a highly emotional and connective process; bonding with the child that grows within a woman's body is common, and handing the child to other people (even if related or friends) can be emotionally fraught. To address this to some degree, the laws in jurisdictions that permit altruistic surrogacy may also restrict such practices to gestational surrogacy, with at least one of the commissioning parents having to be related to the child. The perception is that relinquishment of a child that is not genetically related to the birth mother, and is genetically related to at least one of the commissioning persons, will be more acceptable.⁶ Altruistic surrogacy is, however, clearly something that women do not enter into lightly and remains relatively uncommon.

10 Relatively few countries now permit commercial surrogacy, including Armenia, Georgia, Israel,⁷ Kazakhstan, Russia, Uganda, Ukraine, Liechtenstein and some states in the USA.⁸ Fewer still allow commercial surrogacy services to be provided to foreigners.⁹ Some

4 International altruistic surrogacy arrangements have also been known to happen: eg, *Re G (Surrogacy: Foreign Domicile)* [2007] EWHC 2814 (Fam) and *McQuinn & Shure* [2011] FamCA 139.

5 Note that altruistic surrogacy is not itself a form of surrogacy that always avoids coercion or pressure, nor one that proceeds seamlessly in all cases, with different familial and relationship pressures sometimes coming to the fore.

6 Simona Florescu & Julia Sloth-Nielsen, "Visions on Surrogacy – From North to South: The Approach of the Netherlands and South Africa to the Issue of Surrogacy and the Child's Right to Know His Origin" in *The International Survey of Family Law: 2017 Edition* (Margaret Brinig gen ed) (Jordan Publishing, 2017).

7 Israel authorises monthly "compensation payments" to the surrogate for pain and suffering, which are seen by many as placing it in the category of permissive states.

8 There is affirmative case law allowing commercial surrogacy in California, Maryland, Massachusetts, Ohio, Pennsylvania and South Carolina, and legislation allowing the same in Alabama, Arkansas, Connecticut, Illinois, Iowa, Nevada, North Dakota, Oregon, Tennessee, Texas, Utah, West Virginia and Wisconsin: see Petra De Sutter, Parliamentary Assembly of the Council of Europe, *Children's Rights Related to Surrogacy* (Doc 14140, 23 September 2016) at p 5.

9 Petra De Sutter, Parliamentary Assembly of the Council of Europe, *Children's Rights Related to Surrogacy* (Doc 14140, 23 September 2016) at p 5.

jurisdictions limit access to commercial surrogacy to heterosexual couples or those with fertility issues.¹⁰

11 The creep of financial incentives to engage women as surrogate mothers may also be seen in some nations in which “altruistic” surrogacy is permitted. For example, expanding interpretations of altruistic surrogacy, as seen recently in the UK, have seen a move beyond the law that requires reimbursement of “expenses reasonably incurred” in the pregnancy, to payments that “were not so disproportionate to ‘expenses reasonably incurred’ that the granting of an order would be an unacceptable affront to public policy”.¹¹ In Greece, due to the wide interpretation given to “altruistic” arrangements, around €20,000 is being paid, in an environment in which the unemployment rate is currently around 50%, and a rising number of young women are offering themselves to act as surrogates in order to generate income.¹² These, of course, are not “altruistic” arrangements at all, but rather by their very nature, commercial.

12 International commercial surrogacy, where commissioning parents travel to another country to engage in surrogacy, is a phenomenon that has developed and grown exponentially over the last few decades.¹³ Domestic restrictions or the inability to find women willing to engage in surrogacy without significant financial incentive has led commissioning parents to seek commercial surrogacy services abroad. An industry has sprung up around this desire, comprised of for-profit intermediaries such as agents, clinics and lawyers¹⁴ who strongly market commercial surrogacy as an acceptable means of achieving “parenthood” to wealthy couples.¹⁵ These intermediaries advertise to potential commissioning persons in their home state, as well as recruiting women to be surrogates. The surrogate mothers

10 Hague Conference on Private International Law, *A Study of Legal Parentage and the Issues Arising from International Surrogacy Arrangements* (Preliminary Document No 3C, March 2014) at pp 16–17.

11 *Re X and Y (Foreign Surrogacy)* [2009] 2 WLR 1274 at [19], [21] and [22].

12 Konstantina Davaki, “Surrogacy Arrangements in Austerity Greece: Policy Considerations in a Permissive Regime” in *Babies for Sale: Transnational Surrogacy, Human Rights and the Politics of Reproduction* (Miranda Davies ed) (ZedBooks, 2017) ch 8, at pp 142–159.

13 Hague Conference on Private International Law, *The Desirability and Feasibility of Further Work on the Parentage/Surrogacy Project* (Preliminary Document No 3C, March 2014) at p 11.

14 Hague Conference on Private International Law, *A Study of Legal Parentage and the Issues Arising from International Surrogacy Arrangements* (Preliminary Document No 3C, March 2014) at pp 63–64.

15 Claire Achmad, “Contextualising a 21st Century Challenge: Part One Understanding International Commercial Surrogacy and the Parties Whose Rights and Interests Are at Stake in the Public International Law Context” [2012] *New Zealand Family Law Journal* 190 at 193–194.

usually enter the arrangements for financial reasons, often being significantly impoverished, in debt and from lower social classes.¹⁶ Sometimes, these women come from neighbouring countries, such as the well-documented cases of Indian women who travelled into Nepal to be surrogates for Israeli gay couples and were trapped during the 2015 earthquake.¹⁷

13 This occurs not only in countries in which commercial surrogacy is permitted and regulated. In fact, some places that lack regulations have been seen as opportune destinations for commercialised practices to set up clinics and market them internationally to people as “affordable” destinations to enter into commercial surrogacy arrangements. Indeed, over the past decade, such practices have resulted in international commercial surrogacy being referred to as a billion-dollar “booming global business”.¹⁸

III. Human rights and child welfare concerns

14 Surrogacy, particularly where commercial and cross-border, is a controversial and deeply divisive issue due to a range of human rights, child welfare and ethical concerns. The profit-driven industry is largely unregulated, as it simply shifts to new countries when one tightens its regulations, with clinics and agencies shifting from India to Thailand to Cambodia and now to Laos.

15 The lack of regulation leaves surrogacy arrangements to be determined by the market. That is, the market determines the terms of the contract.¹⁹ This unregulated market creates an unwholesome race to the bottom; commissioning parents may engage in “rampant forum shopping ... seeking the best surrogacy prices and conditions”.²⁰ One reason surrogacy in Southeast Asian countries has been so popular with Australians is that the price (of the arrangement itself, airfares and

16 Claire Achmad, “Contextualising a 21st Century Challenge: Part One Understanding International Commercial Surrogacy and the Parties Whose Rights and Interests Are at Stake in the Public International Law Context” [2012] *New Zealand Family Law Journal* 190 at 193.

17 NPR, “Israel Criticized for Leaving Pregnant Surrogates in Nepal” *Morning Edition* (30 April 2015) <<http://www.npr.org/2015/04/30/403231777/israel-criticized-for-leaving-pregnant-surrogates-in-nepal>> (accessed 3 July 2017).

18 Hague Conference on Private International Law, *Private International Law Issues Surrounding the Status of Children, Including Issues Arising from International Surrogacy Arrangements* (Preliminary Document No 11, March 2011) at pp 6–7.

19 Margret Ryznar, “International Commercial Surrogacy and Its Parties” (2010) 43 *John Marshall Law Review* 1009 at 1016.

20 Margret Ryznar, “International Commercial Surrogacy and Its Parties” (2010) 43 *John Marshall Law Review* 1009 at 1011.

accommodation) is so much cheaper compared with countries such as the US that offer better protection for women. Even couples from the US look overseas to engage in commercial surrogacy, due to the lower costs, the more strictly contractual nature of the interaction, and the tighter control exercised over the surrogate mother.²¹ One participant described the process as “like going to the supermarket to pick up your baby”.²²

16 The result is serious risks to the human rights of parties involved, particularly the most vulnerable – the surrogate mother and the child.

A. *Surrogate mother*

17 Surrogate mothers vary considerably depending on where they are located.²³ However, in the majority of international cases that take place in low-income countries, the women are poor and frequently illiterate.²⁴ The relatively large sums of money offered to surrogate mothers leave them open to exploitation.²⁵ Women are vulnerable to trafficking, abuse and exploitation and, indeed, there are many instances that prove the risk is real.

18 Surrogacy agency practices can resemble those used by human or sex traffickers. Agents looking for potential surrogate mothers prey on unsophisticated and often illiterate rural women, who they then compel to move to major cities away from their family. One surrogate mother recalled her recruitment process in the following terms: “Madam told me I should become a surrogate and if I do, all my worries will go away”. This woman was also told to “think of the pregnancy as ‘someone’s child comes to stay at your place for nine months’”.²⁶

21 Pamela Laufer-Ukeles, “Mothering for Money: Regulating Commercial Intimacy” (2013) 88 Ind LJ 1223 at 1266–1269.

22 Heath Aston, “It Was Like Going to a Supermarket to Pick up Your Baby” *The Sydney Morning Herald* (2 September 2012) at p 16.

23 Hague Conference on Private International Law, *A Study of Legal Parentage and the Issues Arising from International Surrogacy Arrangements* (Preliminary Document No 3C, March 2014) at p 62.

24 Pamela Laufer-Ukeles, “Mothering for Money: Regulating Commercial Intimacy” (2013) 88 Ind LJ 1223 at 1269.

25 Sonia Allen, “Commercial Surrogate and Child: Ethical Issues, Regulatory Approaches, and Suggestions for Change (Working Paper)” (30 May 2014) at p 12 <<https://ssrn.com/abstract=2431142>> (accessed 12 August 2017).

26 Sam Dolnick, “Pregnancy Becomes Latest Job Outsourced to India” *USA Today* (30 December 2007) <http://www.usatoday.com/news/health/2007-12-30-surrogacy_N.htm> (accessed 3 July 2017).

19 In one critic's view, this process should more accurately be labelled "reproductive trafficking" because "it creates a national and international traffic in women in which women become moveable property, objects of reproductive exchange, and brokered by go-betweens mainly serving the buyer".²⁷

20 The notorious "Baby 101" case is a telling example of how such a view is by no means fanciful or exaggerated. In this case, a surrogacy clinic in Thailand called Baby 101 trafficked at least 13 Vietnamese women to Thailand, where they were imprisoned, and impregnated with genetic material supplied by commissioning parents, mostly wealthy Taiwanese citizens. In some cases, the method of impregnation was rape by the would-be father.²⁸ This case is not unique, as women from Guatemala, Poland and Myanmar have been trafficked or otherwise forced to act as surrogates.²⁹

21 Where women are not physically trafficked, the marginalised nature of most surrogate mothers raises serious questions about whether socio-economic or familial coercion was a causative factor in the final decision to become a surrogate mother.³⁰ Putting it bluntly:³¹

The choice between 9 months of being well-fed and medically monitored as a surrogate (even if behind lock and key) is far superior to being forced into prostitution internally or trafficked for sex in other nations... where women face brutal conditions of sex work/slavery.

22 The economic pressure undermines any notion of true consent. Furthermore, the terms of contract as stipulated by the clinic or commissioning parents may quite literally control how the surrogate mother behaves and what she may or may not do; the surrogate mother

27 Janice G Raymond, "Reproduction, Population, Technology and Rights" *ISIS International* (1998) <http://www.isiswomen.org/index.php?option=com_content&view=article&id=534:reproduction-population-technology-and-rights&catid=134> (accessed 12 August 2017).

28 James O'Toole & Mom Kunthear, "Baby Sellers Spark Alert" *The Phnom Penh Post* (1 March 2011) <<http://www.phnompenhpost.com/national/baby-sellers-spark-alert>> (accessed 6 October 2017); see also AFP, "Women Freed from 'Inhuman' Baby Ring" *ABC News* (24 February 2011).

29 Sonia Allen, "Commercial Surrogate and Child: Ethical Issues, Regulatory Approaches, and Suggestions for Change (Working Paper)" (30 May 2014) at pp 11–12 <<https://ssrn.com/abstract=2431142>> (accessed 12 August 2017).

30 Hague Conference on Private International Law, *A Study of Legal Parentage and the Issues Arising from International Surrogacy Arrangements* (Preliminary Document No 3C, March 2014) at p 82.

31 Karen Smith Rotabi & Nicole Footen Bromfield, "The Decline in Intercountry Adoption and New Practice of Global Surrogacy: Global Exploitation and Human Rights Concerns" (2012) 27 *Affilia* 129 at 136.

is effectively renting out her womb and, in doing so, relinquishing her right to control her body.³² Often uneducated and poor, the surrogate mother can be bullied into agreeing to these terms, and may be isolated from her own family during the pregnancy to increase her docility and compliance.³³ The prospect of rescission or threats of non-payment, and without adequate knowledge of her own rights or the unenforceability of the purported contract, may see her acquiesce to the suppression of her right to autonomy.

23 It was a common term in many surrogacy contracts in India that where the surrogate is diagnosed with a life-threatening illness during pregnancy, she is to be “sustained with life support equipment to protect the foetus viability and ensure a healthy birth on the genetic parents’ behalf”.³⁴

24 Also commonly seen in India whilst the practice was legal there, women subject to surrogacy agreements were forced to have caesareans with little or no information as to the risk that such an operation posed to them.³⁵ More recently in Cambodia, surrogate mothers also reported being forced to have caesareans despite wanting to have a natural delivery.³⁶ The high number of caesareans is not for any legitimate medical reason, but to accommodate flight schedules of commissioning parents. Some commissioning parents find it easier, less messy and less time consuming, which displays a lack of regard for the risks to the surrogate mother. From the perspective of the clinic and the commissioning parents, the financial and emotional investment that has gone into the creation of the foetus makes it particularly precious. Thus, they are ready to perform a caesarean at the slightest chance of risk, prioritising the health of the foetus and desires of the commissioning parents well above the health and well-being of the surrogate mother.³⁷

32 Sonia Allen, “Commercial Surrogate and Child: Ethical Issues, Regulatory Approaches, and Suggestions for Change (Working Paper)” (30 May 2014) at pp 13–14 <<https://ssrn.com/abstract=2431142>> (accessed 12 August 2017); Hague Conference on Private International Law, *A Study of Legal Parentage and the Issues Arising from International Surrogacy Arrangements* (Preliminary Document No 3C, March 2014) at pp 83–84.

33 Pamela Laufer-Ukeles, “Mothering for Money: Regulating Commercial Intimacy” (2013) 88 Ind LJ 1223 at 1268.

34 Pamela Laufer-Ukeles, “Mothering for Money: Regulating Commercial Intimacy” (2013) 88 Ind LJ 1223 at 1268.

35 Daisy Deomampo, *Transnational Reproduction: Race, Kinship and Commercial Surrogacy in India* (New York University Press, 2016) at pp 180–183.

36 Lindsay Murdoch, “Once Cambodia Closes Its Doors, Where Will Australia’s Surrogate Baby Trade Go Next?” *The Sydney Morning Herald* (11 December 2016).

37 Daisy Deomampo, *Transnational Reproduction: Race, Kinship and Commercial Surrogacy in India* (New York University Press, 2016) at pp 180–183.

25 In one horrific incident, a young surrogate collapsed and went into convulsions at her eight-month check-up. The clinic performed an emergency caesarean, delivering a healthy baby boy, before sending the mother to another hospital where she died.³⁸ Another young surrogate mother suffered post-birth complications. She was rejected by the surrogacy clinic and told to find a public hospital; as she had delivered the baby, the clinic had no further contractual obligations towards her. The young woman subsequently died before her husband was able to secure a hospital bed for her.³⁹

26 “Forced” abortions, euphemistically referred to as “selective reduction”, are also commonplace. Surrogate mothers, impregnated with multiple embryos to ensure the possibility of conception is maximised, often become pregnant with multiple births and are given no control over the outcome.⁴⁰ This commodification of the surrogate mother to a mere incubator is a form of uterine indentured slavery.

27 While the risks of exploitation and abuse are higher for poor women in countries such as India, Thailand and Cambodia, these risks and difficulties still exist in wealthier countries with better protection for surrogate women. Contractual terms in the US often require women to agree to an abortion if the child has serious defects or for multiple births. If the woman disagrees and goes against the commissioning parent’s wishes, she may be forced to pay for the costs of rearing the child or sued for wrongful birth.⁴¹

B. Child

28 Surrogacy also commodifies children, raising risks of exploitation and abuse. Under the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography,⁴² sale of children is defined as “any act or transaction whereby a child is transferred by any person or group of

38 Pamela Laufer-Ukeles, “Mothering for Money: Regulating Commercial Intimacy” (2013) 88 Ind LJ 1223 at 1268.

39 Scott Carney, “Inside India’s Rent-a-Womb Business” *Mother Jones* (10 March 2010) <<http://www.motherjones.com/politics/2010/02/surrogacy-tourism-india-nayna-patel>> (accessed 10 August 2017).

40 Tamar Lewin, “Coming to US for Baby, and Womb to Carry It” *The New York Times* (5 July 2014).

41 Tamar Lewin, “Coming to US for Baby, and Womb to Carry It” *The New York Times* (5 July 2014).

42 *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography* (25 May 2000) 2171 UNTS 227.

persons to another for remuneration or any other consideration”.⁴³ The recent report of the special rapporteur on the sale and sexual exploitation of children found that commercial surrogacy as currently practised meets this definition.⁴⁴ While there are arguments that surrogacy is not a sale of children but a sale of services, when the transfer of the child is an essential part of the agreement, this differentiation cannot be maintained.⁴⁵ The buying and selling of a human being is generally seen as repugnant because it reduces the inherent personhood of a human to a market commodity. While many may still love and cherish the child they obtain through commercial surrogacy, the commodification changes our view of the inherent worth of those bought and may allow us to behave towards a child as if it were a product, for purchase, return or upgrade.⁴⁶ Furthermore, it may change the way the child views themselves.

29 Unfortunately, this is not just a hypothetical risk. *The New York Times* reported of a case where a prospective client requested six embryos to be implanted. He proposed to choose the “best” two and give the rest up for adoption, treating human beings like excess product to give away.⁴⁷

30 The international nature of commercial surrogacy, often taking place in locations without regulation and/or poor law enforcement, provides parents with a back-out option if they change their mind – a crude “returns policy” where the unwanted child is abandoned or left behind when the commissioning parents return to their home country. Such a scenario occurred in the infamous “Baby Gammy” scandal, where a Western Australian couple commissioned a child through surrogacy in Thailand. When the surrogate mother developed twins, and one twin was revealed to have Down syndrome, the couple

43 *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography* (25 May 2000) 2171 UNTS 227, Art 2.

44 United Nations, General Assembly, *Report of the Special Rapporteur on the Sale and Sexual Exploitation of Children, Including Child Prostitution, Child Pornography and Other Child Sexual Abuse Material*, A/HRC/37/60 (15 January 2018) at p 12.

45 United Nations, General Assembly, *Report of the Special Rapporteur on the Sale and Sexual Exploitation of children, Including Child Prostitution, Child Pornography and Other Child Sexual Abuse Material*, A/HRC/37/60 (15 January 2018) at p 15.

46 Margaret Jane Radin, “What, If Anything, Is Wrong with Baby Selling?” (1995) 26 *Pacific Law Journal* 135.

47 Tamar Lewin, “Coming to US for Baby, and Womb to Carry It” *The New York Times* (5 July 2014).

abandoned the child with Down syndrome and returned to Australia with his sister only.⁴⁸

31 In another case of abandonment, an Australian couple of Indian descent employed an Indian surrogate to carry their child. The surrogate pregnancy bore twins, a boy and a girl. The commissioning parents only wanted the girl and refused to accept the boy, as they apparently already had a son and could not afford another. The couple applied at the Australian High Commission for papers for only the girl. There is no onus on the official at the High Commission to investigate whether the child in question has any siblings or whether there is a moral dynamic that needs to be observed in the application; their bureaucratic role is to process the applications that are made. The abandoned twin in this case is in a very precarious situation; under Indian law (as it then was), the surrogate mother is *not* the mother of the child; rather, the Australian couple are the parents. However, without diplomatic recognition, the child has no legal recourse to Australian protections. The commissioning parents and one child are back in Australia. No one has been able to locate the boy and there are rumours of paid adoption – a euphemism for trafficking.⁴⁹ If the twins had been conceived and borne by the wife for nine months, one wonders whether they would have been so ready to leave one child behind. Disturbingly, the Department of Foreign Affairs and Trade (“DFAT”) reported an increase in complex cases, including ones where the parents decide not to seek Australian citizenship for one or more children born through surrogacy.⁵⁰ Presumably, these children are left behind when the parents fly home.

32 This is not just an issue that occurs in international commercial surrogacy, as there have been far more cases in the US of commissioning parents changing their minds than those in which the surrogate mother does.⁵¹

33 Commodification affects the child’s sense of worth and personhood. While people’s views and experiences vary, the following

48 This was widely reported in Fairfax and other Australian media outlets, commencing 1 August 2014. See Lindsay Murdoch, “Australian Couple Leaves Down’s Syndrome Baby with Thai Surrogate” *The Sydney Morning Herald* (1 August 2014).

49 Samantha Hawley, Suzanne Smith & Michael McKinnon, “India Surrogacy Case: Documents Show New South Wales Couple Abandoned Baby Boy Despite Warnings” *ABC News* (13 April 2015).

50 Department of Foreign Affairs and Trade, *Inquiry into Regulatory and Legislative Aspects of Surrogacy Arrangements* (2016).

51 Tamar Lewin, “Coming to US for Baby, and Womb to Carry It” *The New York Times* (5 July 2014).

comments by a now-adult surrogate child highlights the pain of feeling commodified.⁵²

(2) I don't care why my parents or my mother did this. It looks to me like I was bought and sold ... When you exchange something for [money] it is called a commodity. Babies are not commodities. Babies are human beings. How do you think this makes us feel to know that there was money exchanged for us? ... Because somewhere between [the] narcissistic, selfish or desperate need for a child and the desire to make a buck, everyone else's needs and wants are put before the kids' needs. We, the children of surrogacy, become lost. That is the real tragedy.

(1) *Surrogacy and abuse*

34 This commodification and sale of children has led to instances of horrific abuse of children obtained through surrogacy.

35 In the appalling case of Peter Truong and Mark Newton, this US/Australian couple purchased a newborn baby from a mother in Russia for US\$8,000, after several failed attempts at international commercial surrogacy. The child was then regularly sexually abused from the age of 21 months to six years old. As he grew, he was instructed and groomed and abused and videotaped for posterity, not only by his fathers, but by those to whom he was offered around the world organised via online child abuse forums. The abuse only stopped when police agencies arrested the two men.⁵³

36 The Pennsylvanian case of *Huddleston v Infertility Center of America, Inc*⁵⁴ also highlighted this risk. There, a young man commissioned a surrogate child as the sole intended parent. The surrogate infant died, six weeks after being delivered to the commissioning father, as a result of severe physical abuse.⁵⁵ In 2016, a 49-year-old Australian paedophile was gaoled for 22 years for sexually assaulting his specifically-commissioned-for-abuse twin daughters when they were just 27 days old.⁵⁶

52 Brian C, "The Son of a Surrogate" (9 August 2006) <<http://sonofasurrogate.tripod.com/>> (accessed 10 October 2017).

53 United States Attorney Joseph H Hogsett, Department of Justice, "Hogsett Announces Charges against Four Men in International Child Exploitation Conspiracy" (28 June 2013); United States Sentencing Memorandum, *United States of America v Mark Jonathan Newton* No 1:12-CR-00121 (SD Ind, 25 June 2013).

54 *Huddleston v Infertility Center of America, Inc* 700 A 2d 453 (Pa Super Ct, 1997).

55 Hague Conference on Private International Law, *Private International Law Issues Surrounding the Status of Children, Including Issues Arising from International Surrogacy Arrangements* (Preliminary Document No 11, March 2011) at p 19.

56 Nino Bucci, "Man Pleads Guilty to Sexually Abusing His Twin Surrogate Babies" *The Sydney Morning Herald* (21 April 2016).

(2) *Trafficking of children and surrogacy*

37 In 2016, an Australian woman – Tammy Davis-Charles, a surrogacy broker – was arrested on trafficking charges. Cambodian authorities alleged that multiple passports had been granted to Australian children born to Cambodian surrogate mothers using falsified documents. The birth certificates listed the husband as Australian and the wife as Cambodian, but the women were already married to Cambodian men and there is no evidence they married the Australians.⁵⁷

38 Australian consular officials have reported cases where the parents claim the commissioning mother gave birth to the child, but officials strongly suspect the birth was the result of a surrogacy arrangement. Officials require the consent of the surrogate mother before a passport is issued to an Australian child born through surrogacy, but where the surrogacy arrangement is not declared, children may be taken out of the country without the knowledge or permission of the surrogate mother.⁵⁸ The use of such falsified documents raises serious concerns about potential trafficking of children.

39 This risk in relation to trafficking of children is further highlighted in a number of other instances. In 2014, an Australian man apparently commissioned twin girls using donor eggs in India, but a DNA test revealed that he had no biological links to the children. Authorities were unable to determine whether it was an error on the part of the clinic, donor sperm was knowingly used or the children were trafficked. At this point, the Australian Department of Immigration and Border Protection issued a warning that surrogacy may be being used as a smokescreen for trafficking children.⁵⁹ In the same year, a wealthy Japanese businessman was alleged to have fathered around 15 children through multiple surrogates in Thailand, several of whom had already been removed from Thailand and were apparently headed for Japan. Three of the children were found in Cambodia. Despite the man's lawyer stating that the man just wanted a large family, authorities suspected him of human trafficking and child exploitation.⁶⁰

57 Lindsay Murdoch, "Babies Given Australian Passports on Basis of False Documents, Cambodia Alleges" *The Sydney Morning Herald* (27 November 2016).

58 Department of Foreign Affairs and Trade, *Inquiry into Regulatory and Legislative Aspects of Surrogacy Arrangements* (2016).

59 Natasha Bitá, "Fears Surrogacy Hiding Scams" *The Australian* (16 August 2014).

60 Lindsay Murdoch, "'Baby Factory' Claims Close Bangkok IVF Clinic" *The Age* (10 August 2014); "Alleged Trafficker Fathered 15 Babies through 11 Surrogate Mothers in Thailand" *The Sydney Morning Herald* (13 August 2014).

40 In another example of the interplay between surrogacy and trafficking, a woman was arrested in September 2017 in India for buying babies from poor parents and selling them to wealthy childless couples. She worked with agents through IVF centres, where she located potential couples to buy the babies. She had become involved in the business after working as a surrogate and is also believed to recruit surrogate women for these centres.⁶¹

(3) *Right of child to know their parents and origins*

41 An oft-overlooked part of the dangers posed by commercial surrogacy is that the genetic material used may be anonymous. Further, the role of the surrogate mother in the child's identity may be repressed. This is contrary to the child's right to know their parents and their origins.

42 In 1982, the United Nations Convention on the Rights of the Child⁶² ("CRC") was created to act as a shield for disenfranchised children. According to the CRC, all children, no matter where they live or how they were conceived, or the family arrangement in which they happen to live, have the right to know their parents.⁶³ Moreover, the Government has an obligation to help them preserve their identity, including name, nationality, and family ties.⁶⁴ The right to know one's parents and origins is interpreted to include one's legal or social parents, biological or genetic parents, as well as birth parents.⁶⁵ The CRC was groundbreaking, as it was the first international law to recognise the importance of a child to know his origins, not only for medical and practical reasons, but also for the sense of identity and belonging which that knowledge entails.⁶⁶

43 The importance for children to know their parents and their origins has been highlighted by numerous studies on adopted children and those conceived with donor gametes. Understanding one's genetic

61 Megha Sood & Megha Pol, "Mumbai Baby Dealer Was Helped by Agents in Tracking Customers; Illegal IVF Centres under Lens" *Hindustan Times* (27 September 2017).

62 (20 November 1989) 1577 UNTS 3.

63 Convention on the Rights of the Child (20 November 1989) 1577 UNTS 3, Art 7.1.

64 Convention on the Rights of the Child (20 November 1989) 1577 UNTS 3, Art 8.1.

65 Samantha Besson, "Enforcing the Child's Right to Know Her Origins: Contrasting Approaches under the Convention on the Rights of the Child and the European Convention on Human Rights" (2012) 21 *International Journal of Law, Policy and the Family* 137 at 143.

66 Samantha Besson, "Enforcing the Child's Right to Know Her Origins: Contrasting Approaches under the Convention on the Rights of the Child and the European Convention on Human Rights" (2012) 21 *International Journal of Law, Policy and the Family* 137 at 143.

origins is a fundamental part of many people's sense of identity and self-worth. The sense of distress and confusion arising from unknown heritage is often referred to as "genealogical bewilderment".⁶⁷ This is often worse for those who discover their origins later in life. Such adults experience shock, feelings of deceit and abandonment, mistrust of family, frustration and loss due to a lack of information.⁶⁸ A lack of information about family medical history poses real risks, not just to children without access to their genetic history, but for generations to come.⁶⁹ There is also the risk that children who are genetically related but unaware of the relationship will marry and seek to have children, as was the case for fraternal twins in England who were separated at birth and unaware they had a twin until after they met and married.⁷⁰ This is a genuine fear for donor offspring, and due to "genetic sexual attraction" and the fact that a significant number of donors have donated multiple times, it is a possibility.⁷¹

44 The use of anonymous genetic material and practical difficulties with locating a surrogate mother mean that it is not possible for many children born through international commercial surrogacy to ever learn their genetic heritage or know their surrogate mother. Sweden was the first country to abolish anonymity for donors in 1985, in recognition of the importance to donor-conceived persons of knowing their history and identity. This approach has spread, with Austria, Switzerland, the Netherlands, Norway, the UK, Finland and New Zealand now prohibiting anonymous donations too.⁷² However, there are still many

67 Richard Chisholm, "Information Rights and Donor Conception: Lessons from Adoption?" (2012) 19 *Journal of Law and Medicine* 722 at 734; Sonia Allan "Donor Conception, Secrecy and the Search for Information" (2012) 19 *Journal of Law and Medicine* 631 at 636–637.

68 A J Turner & A Coyle, "What Does It Mean to Be a Donor Offspring? The Identity Experiences of Adults Conceived by Donor Insemination and the Implications for Counselling and Therapy" (2000) 15(9) *Human Reproduction* 2041 at 2049 as referenced in Edwina Anne Schneller, "The Rights of Donor Inseminated Children to Know Their Genetic Origins in Australia" (2005) 19 *Australian Journal of Family Law* 222 at 224.

69 Sonia Allan, "Donor Conception, Secrecy and the Search for Information" (2012) 19 *Journal of Law and Medicine* 631 at 637.

70 Fiona Barton, "Shock for the Married Couple who Discover They Are Twins Separated at Birth" *Daily Mail* (11 January 2007). There are other reported instances of siblings separated from early childhood who have met as adults and fallen in love, including a couple in South Africa, and in Germany: see Stewart Maclean, "Engaged Couple Discover They Are Brother and Sister when Their Parents Meet Just Before Wedding" *Daily Mail* (3 November 2011) and Kate Connolly, "Brother and Sister Fight Germany's Incest Laws" *The Guardian* (27 February 2007).

71 Sonia Allan "Donor Conception, Secrecy and the Search for Information" (2012) 19 *Journal of Law and Medicine* 631 at 638.

72 Sonia Allan "Donor Conception, Secrecy and the Search for Information" (2012) 19 *Journal of Law and Medicine* 631 at 635.

countries that allow anonymity. In fact, Denmark actively promotes its donor anonymity laws, having developed a “safe sperm” market and a thriving and lucrative reproductive tourism industry based on allowing indefinite anonymity under law.⁷³ Parents seek out anonymous gamete donations because they want their role as mum or dad undisputed. They may wish that *their* child never know that they are anything less than 100% *theirs*. This strikes at the heart of the right to know. It is selfish and does not promote a parent’s love, but rather their insecurity, and lays an unnecessary bedrock of confusion, pain, and secrecy.

45 Further, there are real difficulties in tracing surrogate mothers. In Australia, it is not uncommon for courts to permit substituted service or waive service on the surrogate mother in proceedings regarding parentage in international commercial surrogacy cases because of an inability to locate her.⁷⁴ These cases are usually shortly after the child has been born, so the difficulties would be even greater for a child to seek to locate their surrogate mother years later when they are old enough to wish to do so.

46 Admittedly, the child’s right to know may impinge on the rights of others. For instance, the right of a child to know his parents may conflict with the rights of the biological parents to privacy or autonomy. Granting access to records where people donated on the expectation of anonymity creates problems that need to be recognised. However, it does not negate the need for children to know such information.

IV. Regulatory responses to surrogacy

47 There has been a rapid retreat by countries that once permitted commercial surrogacy. The inherent risks of commodification and exploitation of children and surrogate mothers have led the majority of countries to prohibit commercial surrogacy.⁷⁵ Some, such as France and Italy, ban all forms of surrogacy, on the basis that surrogacy is inherently

73 Usha Rengarchary Smerdon, “Crossing Bodies, Crossing Borders: International Surrogacy Agreements between the United States and India” (2009) 39 *Cumb L Rev* 15 at 19.

74 Mary Keyes & Richard Chisholm “Commercial Surrogacy – Some Troubling Family Law Issues” (2013) 27(2) *Australian Family Law Journal* 105 at 128–129. The difficulty of locating surrogate mothers months after the birth and its impact on the ability of surrogate-born children to trace their birth origins was noted in Petra De Sutter, Parliamentary Assembly of the Council of Europe, *Children’s Rights Related to Surrogacy* (Doc 14140, 23 September 2016) at p 9.

75 Petra De Sutter, Parliamentary Assembly of the Council of Europe, *Children’s Rights Related to Surrogacy* (Doc 14140, 23 September 2016) at p 7.

reductive and exploitative of women.⁷⁶ Australia, along with many others, prohibits commercial surrogacy while permitting and regulating altruistic surrogacy.

48 In Australia, altruistic surrogacy is generally permitted and commercial surrogacy is not. However, the laws and requirements vary throughout Australia. Australia is a Federation; it has six states and two territories, each with its own body of laws and a federal government with powers stipulated in the Australian Constitution.⁷⁷ The federal government is empowered to legislate with regards to marriage⁷⁸ and “divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants”.⁷⁹ Thus, “human creation” is not a matter for the federal government but rather, for the states and territories. In some states, commercial surrogacy is criminal; in others, it is simply illegal. In some states, there are laws with extraterritorial application, and in one territory, the word “surrogacy” is not mentioned at all.⁸⁰

49 While altruistic surrogacy is permitted, the agreements themselves are generally unenforceable except with regards to the payment or reimbursement of pregnancy-related expenses.⁸¹ Legal parentage goes automatically to the birth mother and her partner, if any, and a court order is required to transfer parentage to the commissioning parents. Specific criteria must be met for a court to transfer legal parentage in order to protect the vulnerable parties involved. While this varies from state to state, common criteria include that the surrogate mother is over a particular age and has given birth to a live child previously, that all parties have undertaken counselling prior to entering into the arrangement, and frequently post-birth, that all parties have received independent legal advice and that the surrogate mother has provided her consent. States frequently require the commissioning

76 Antony Blackburn-Starza, “Council of Europe Rejects Surrogacy Guidelines” *BioNews* (17 October 2016) <http://www.bionews.org.uk/page_715312.asp> (accessed 5 October 2017); Ismini Kriari & Alessia Valongo “International Issues Regarding Surrogacy” (2016) 2 *Italian Law Journal* 331 at 332 and 336.

77 Commonwealth of Australia Constitution Act 1900.

78 Commonwealth of Australia Constitution Act 1900, s 51(xxii).

79 Commonwealth of Australia Constitution Act 1900, s 51(xxii).

80 For a detailed analysis on the state and territory laws in Australia, see Sonia Allan & Meredith Blake, *The Patient and Practitioner, Health Law and Ethics in Australia* (LexisNexis Butterworths, 2013) at pp 405–420.

81 See s 26 of the Parentage Act 2004 (ACT), s 6 of the Surrogacy Act 2010 (NSW), s 15 of the Surrogacy Act 2010 (Qld), s 10G of the Family Relationships Act 1975 (SA), s 10 of the Surrogacy Act 2012 (Tas) and s 7 of the Surrogacy Act 2008 (WA).

parent/parents to be unable to conceive and bear a child naturally due to established medical reasons.⁸²

50 Other states provide similar protections. In the UK, commercial surrogacy is prohibited and altruistic surrogacy is permitted, although the agreements are not enforceable. Commissioning parents can apply to the court for a transfer of legal parentage on certain conditions, including that the application is made within six months of the child's birth but not until six weeks after the birth and the child must be living with the commissioning parents. This allows for the surrogate mother to change her mind. The applicants must be a couple that are both over the age of 18, and at least one of whom must be domiciled in the UK. The genetic material of at least one of the commissioning parents must have been used. If the commissioning parent is single or paid more than reasonable expenses then a parental order will not normally be made.⁸³

51 Hong Kong regulation of surrogacy is based on that of the UK, but has some tighter restrictions. The commissioning parents must be a married couple domiciled in Hong Kong, both over the age of 18, and the wife unable to carry a pregnancy to term. There must be a genetic link to the commissioning parents. A surrogate mother must be over 21, and have been assessed as suitable by a registered medical practitioner who is not responsible for the assisted reproductive technology procedure involved in the potential surrogacy. Counselling must be provided to all parties by a multi-disciplinary team to ensure that all parties understand the legal, ethical and medical implications.⁸⁴ In *Re D*,⁸⁵ the sole surrogacy case in Hong Kong, the commissioning parents entered into a surrogacy agreement in California prior to their marriage and were declared the child's parents by a pre-birth order in California. They sought orders in Hong Kong that the child was theirs, but the issues that they were unmarried and had engaged in commercial surrogacy, which is prohibited, meant the case was transferred to the

82 See s 26 of the Parentage Act 2004 (ACT), ss 18 and 21–38 of the Surrogacy Act 2010 (NSW), s 22 of the Surrogacy Act 2010 (Qld), ss 10HA and 10HB of the Family Relationships Act 1975 (SA), ss 16 and 22 of the Surrogacy Act 2012 (Tas), ss 10, 14, 40 and 42 of the Assisted Reproductive Treatment Act 2008 (Vic) and ss 17 and 19 of the Surrogacy Act 2008 (WA).

83 See s 54 of the Human Fertilisation and Embryology Act 2008 (c 22) (UK) and the Surrogacy Arrangements Act 1985 (c 49) (UK); see also Ismini Kriari & Alessia Valongo "International Issues Regarding Surrogacy" (2016) 2 *Italian Law Journal* 331 at 338–339.

84 Council on Human Reproductive Technology, "Code of Practice on Reproductive Technology and Embryo Research" (January 2013) <http://www.chrt.org.hk/english/publications/publications_code.html> (accessed 4 October 2017).

85 [2015] 1 HKLRD 229.

High Court and never proceeded.⁸⁶ It is unclear what happened to the child, and whether his status in Hong Kong was clarified.

52 In South Africa, at least one commissioning parent must be domiciled in South Africa and at least one must have a genetic link with the child. If the commissioning parent is single, that person must have a genetic link with the child. This was subject to recent litigation and the requirement of a genetic link upheld by the Constitutional Court of South Africa.⁸⁷ Unlike in Australia or the UK, surrogacy agreements are valid and binding in South Africa. However, they must be confirmed by the High Court *prior* to the commencement of the surrogate pregnancy and may be terminated by the surrogate mother within 60 days after the birth of the child. The High Court's oversight ensures that a number of conditions are met, including that (a) the commissioning parents are unable to give birth and that situation is permanent and irreversible, (b) the agreement is altruistic and not commercial, and (c) the surrogate mother is suitable, understands the legal consequences of the agreement, has given birth to a child before and has a living child. If the agreement is confirmed by the High Court, the commissioning parents will be the legal parents from birth but if not, the surrogate mother will be the legal parent.⁸⁸

53 In Singapore, there are laws restricting access to reproductive technology to couples with recognised reproductive difficulties. There are no laws on surrogacy in Singapore, but the Ministry of Health has issued a prohibition on clinics performing the procedure.⁸⁹ In a recent case, the Family Justice Courts held that a gay man who had fathered a son through surrogacy in the US was unable to adopt the child. District Judge Shobha Nair criticised the man for knowingly and deliberately circumventing the laws of Singapore and then seeking to use those laws to condone his actions and held that the payment of \$200,000 to the surrogate mother to carry the child "reflects the very thing the Adoption Act seeks to prevent – the use of money to encourage the movement of life from one hand to another".⁹⁰ In rejecting the adoption application, the judge noted that she had to consider the best interests of the child

86 Johnathan Mok, Partner, Mayer Brown JSM, "International Surrogacy Arrangements – Hong Kong Perspective", paper delivered at the 2016 LawAsia Conference (9 June 2016).

87 *AB v Minister of Social Development* 2017 (3) SA 570 (CC).

88 Children's Act 2005 (South Africa) ss 292–303.

89 Balvinder Sandhu, "6 Laws in Singapore about Fertility Treatments You Need to Know About" *Her World* (6 September 2016); Brad Bertrand, "Shifting Surrogacy Laws Give Birth to Uncertainty" *Nikkei Asian Review* (26 December 2015).

90 *Re UKM* [2018] SGFC 20 at [5].

but the child would not be stateless by this decision, nor would it remove him from the only parents he had known. She stated:⁹¹

This application is in reality an attempt to obtain a desired result – that is, formalising the parent–child relationship in order to obtain certain benefits such as citizenship rights, by walking through the back door of the system when the front door was firmly shut ...

54 In China, surrogacy is banned and yet the practice is thriving, with one of the main clinics, AA69, reporting the birth of 10,000 babies through its clinics since 2004.⁹² Based on anecdotal evidence, this is not the only country where surrogacy is purportedly banned, but occurring underground.

55 While there is money to be made, and people desperate enough for a child to risk potential criminal sanctions, the exploitation of local women and serious risks to the rights and welfare of the resulting child for the sake of becoming parents, the industry will continue to flourish. Unless commercial surrogacy is banned in every country, people will continue to take advantage of the gaps. The question then becomes what countries do when, despite prohibiting it, they are presented with a *fait accompli*: a child born abroad through commercial surrogacy.

V. What if the child is already here?

56 Where parents have travelled overseas to engage in commercial surrogacy, they will usually then seek to return to their home country with the child, where they will seek to be recognised as the child's parents. However, there are a number of hurdles, some of which may be insurmountable, due to the differing ways countries recognise both legal parentage and nationality.

A. Parentage and nationality

57 Cross-border commercial surrogacy arrangements, whether driven by lower prices, better conditions or more conducive legal environments, give rise to particular private international law problems regarding recognition of legal parentage and any consequent recognition of nationality. Countries have widely varying approaches to not only the determination of parentage or nationality, but also to the recognition of such determinations from other jurisdictions. These often-conflicting

91 *Re UKM* [2018] SGFC 20 at [9].

92 Alice Yan, "Official Ban Is No Brake on China's Surrogacy Sector" *South China Morning Post* (17 February 2017).

approaches can leave a child born from international commercial surrogacy with “limping” parentage and potentially stateless.

58 In Australia, questions of nationality are a matter for federal law whereas questions relating to who is a parent of a child, as noted above, is a matter for the states. This can lead to a situation where a child acquires Australian citizenship but does not have legal parents in Australia. Australian commissioning parents who travel abroad may apply to the Australian embassy for recognition of the nationality of their child and a passport to enable them to travel “home” with the child. Acquisition of Australian citizenship by descent depends on who the child’s parents are as a matter of *fact*, and a genetic link gives substantial weight to that fact.⁹³ However, upon return to Australia, legal parentage is determined by state law.

59 In all Australian states,⁹⁴ legal parentage immediately goes to the birth mother (and her husband or *de facto* partner if she has one). Remembering that in surrogacy cases, the birth mother is not necessarily related to the child, the law, nonetheless, states that the birth mother will remain the legal parent until the child is recognised as the child of another by a court order. This protects the child from being parentless.

60 As noted above, no state in Australia recognises commercial surrogacy and so parents who have travelled internationally to engage in commercial surrogacy are unable to apply to a state court to be recognised as the child’s legal parents. Where this is the case, the parents may apply to the federal family courts for parenting orders.

61 A parentage order is a declaration as to who is the legal parent of the child. Such an order may be used to apply to the state or territory authority responsible for birth certificates for reissuance. Parenting orders are, however, altogether different. The family courts have the power to regulate who, and how a person, may care for the child including how much time a certain person may spend with the child and under what circumstances. Importantly, the carer is not necessarily the legal parent. A commissioning parent in receipt of parenting orders is in effect a legally appointed carer, responsible for the safety of the child but not necessarily the child’s legal parent with all the rights and

93 Hague Conference on Private International Law, *A Study of Legal Parentage and the Issues Arising from International Surrogacy Arrangements* (Preliminary Document No 3C, March 2014) at p 67.

94 Parentage Act 2004 (ACT); Status of Children Act 1996 (NSW); Status of Children Act 1978 (NT); Status of Children Act 1978 (Qld); Family Relationship Act 1975 (SA); Status of Children Act 1974 (Tas); Status of Children Act 1974 (Vic).

duties that accompany such a position. For the applicant commissioning parent, this may be an unsatisfactory situation. More importantly, the child lacks the formal protection of a legal parent.

62 Most countries take a similar approach, whereby the birth mother is legally the mother of the child – regardless of the intention of the parties – until a court order declares otherwise. This declaration may be dependent on specific legislative criteria being met. However, this is not the approach of all countries. As noted above, South Africa allows the approved surrogacy contract to determine parentage and the commissioning parents are the legal parents from birth. This is the case in Russia, Ukraine, and various states in the US and Canada.⁹⁵

63 Laws regarding acquisition of nationality are more diverse across jurisdictions but often flow from parentage. As noted, in Australia, it is a matter of fact and can be proved by genetic link independent of legal parentage. In other jurisdictions, it is determined by legal parentage. In the case of many “birth” countries, where the surrogate mother is located, the commissioning parents are considered to be the legal parents either from birth or shortly afterwards. Consequently, the child is not able to acquire the nationality of the birth country. The exceptions to this are the US and Canada, which have *ius soli* rule to nationality: if an individual were born in the country, he is entitled to become a citizen. In many “receiving” countries where the commissioning parents are resident or citizens, nationality (and legal parentage) may be dependent on whether or not they recognise the parentage determination of the birth country. If the receiving country, applying its private international law principles, recognises the “birth” country’s determination that the commissioning parents are the legal parents, then the child may acquire the commissioning parent’s nationality. However, if the receiving country considers the surrogate mother to be the legal parent, either because the “receiving” country applies its own law to the question of parentage or because public policy prohibits the recognition of a parentage through surrogacy, the child may not be eligible to acquire the nationality of its commissioning parents.⁹⁶

95 Ismini Kriari & Alessia Valongo, “International Issues Regarding Surrogacy” (2016) 2 *Italian Law Journal* 331 and 337; Hague Conference on Private International Law, *A Study of Legal Parentage and the Issues Arising from International Surrogacy Arrangements* (Preliminary Document No 3C, March 2014) at p 18.

96 Hague Conference on Private International Law, *A Study of Legal Parentage and the Issues Arising from International Surrogacy Arrangements* (Preliminary Document No 3C, March 2014) at pp 67–75.

64 The varying laws across jurisdictions regarding parentage, nationality and surrogacy can leave the child “marooned, stateless and parentless”.⁹⁷ This is exactly the case for the twins “of” Norwegian citizen, Ms Volden, who commissioned a child via a donor embryo surrogacy arrangement. The Indian government did not consider the Indian surrogate mother the parent of the twins, rather the commissioning parent, and so will not recognise the twins as Indian. However, Norway does not recognise Ms Volden as the mother of the twins, as they were born through an international commercial surrogacy arrangement and are not genetically related to her.⁹⁸ In a 2015 case between the US and the UK,⁹⁹ a single English man commissioned a child via commercial surrogacy in Minnesota. He obtained a parentage declaration and birth certificate from Minnesota declaring him to be the father. He then returned to the UK, where he sought a court order making him the legal parent. However, the English court refused to grant him the order because the relevant legislation did not permit such an application in the circumstances. As the English court set out:¹⁰⁰

The surrogate mother, although she no longer has any legal rights in relation to [the child] under Minnesota law, is treated in this country as being his mother. Whatever his legal rights in Minnesota, the father does not have parental responsibility for [the child] in this country ...

65 Thus, some parents are unable to regularise their legal status as parents and it is believed that many commissioning parents never seek to do so. This places the child in a precarious situation, as establishment of legal parentage and nationality are gateways for a whole suite of rights for the child.¹⁰¹ If a child is living with one or two parents who are not legally recognised, this can raise difficulties if the parents separate, one parent dies or there are issues relating to schooling or hospital access that leave the child’s parents without the legal status to act or intervene.

66 In the last few years, decisions of the European Court of Human Rights have begun to address these concerns. In *Mennesson v France*¹⁰²

97 *Re X & Y (Foreign Surrogacy)* [2009] 2 WLR 1274 at [10].

98 Sumitra Debroyl, “Stateless Twins Live in Limbo” *The Times of India* (2 February 2011).

99 *Re Z (A Child: Human Fertilisation and Embryology Act: Parental Order)* [2015] EWFC 73.

100 *Re Z (A Child: Human Fertilisation and Embryology Act: Parental Order)* [2015] EWFC 73 at 3.

101 Hague Conference on Private International Law, *The Desirability and Feasibility of Further Work on the Parentage/Surrogacy Project* (Preliminary Document No 3B, March 2014) at p 16.

102 *Mennesson v France* (European Court of Human Rights, Fifth Section, Application No 61592/11, 26 June 2014).

and *Labassee v France*,¹⁰³ the European court held that France's refusal to recognise the genetic father as the legal parent born via surrogacy was a violation of the child's right to respect for private life under Art 8 of the European Convention on Human Rights.¹⁰⁴ The court held that the right requires that everyone should be able to establish details of their identity including a legal parent-child relationship and that Member States must strike a fair balance between public policy and those directly affected. It held that while it was understandable to deter nationals from engaging in surrogacy when it is prohibited on its own soil, the effects of the non-recognition was not limited to the parents but the child. The best interests of the child must be prioritised.

B. Difficult dilemma for states

67 The CRC requires that "in all actions concerning children whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration".¹⁰⁵ Determining what is in the best interests of a child in individual cases can conflict with the best interests of children on a policy level and this is particularly true of regulation regarding international commercial surrogacy.

68 The consequence of these decisions by the European Court of Human Rights is that Council of Europe member States are required to recognise the legal relationship between a child and their genetically related father in circumstances where the receiving state has no, or very little, ability to control the circumstances leading to the child's conception and birth.¹⁰⁶ Where countries are required, or feel compelled on the basis of the best interests of the child, to recognise the legal parentage and nationality of children born through international commercial surrogacy, it may encourage prospective commissioning parents also to circumvent their own laws and engage in international commercial surrogacy. This leads to a continuation and growth of an industry that profits from the human rights violations of both women and children and leads to concerns about the rights of the child beyond recognition of parentage, including the right to know their genetic and birth origins and their rights to be protected from harm such as

103 *Labassee v France* (European Court of Human Rights, Fifth Section, Application No 65941/11, 26 June 2014).

104 *Convention for the Protection of Human Right and Fundamental Freedoms* (4 November 1950) 213 UNTS 221.

105 *Convention on the Rights of the Child* (20 November 1989) 1577 UNTS 3, Art 3.1.

106 Hague Conference on Private International Law, *The Parentage/Surrogacy Project: An Updating Note* (Preliminary Document No 3A, February 2015) at p 6.

exploitation and commodification. Such practices are certainly not in the best interests of children. Yet, if the states seek to deter prospective commissioning parents by enforcing criminal sanctions and refusing to recognise the parentage and nationality of those born through surrogacy, that will not be in the best interests of the specific child that is already here.

69 In response to these concerns about the complex issues of private international law and child protection arising from the growth in cross-border surrogacy arrangements, in 2011, the Permanent Bureau to the Hague Conference on Private International Law (“HCCH”) began examining the possibility of work in this area. A number of preliminary reports and studies have been undertaken and an expert group met for the first time in January 2016. Its mandate is to consider the feasibility of advancing work on the private international law issues surrounding the status of children, including issues arising from international surrogacy arrangements.¹⁰⁷ This work is focusing on the problems more broadly with the establishment and/or recognition of a child’s legal rights, with international surrogacy arrangements forming an important subset of this. HCCH believes an international framework that would build bridges between differing legal systems would assist to states.¹⁰⁸ The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption¹⁰⁹ could provide a possible model, as it is a combined human rights instrument, instrument for judicial and administrative co-operation and a private international law instrument.¹¹⁰ A model that builds co-operation and allows the two or more states involved in a surrogacy arrangement oversight and potential veto prior to conception would begin to address the dilemma states face themselves in following the decisions of the European Court of Human Rights. Setting minimum standards in relation to the consent, medical care, suitability of commissioning parents and the surrogate mother, as well as protection of the genetic and birth origins of a child would be crucial. Whether or not such a model is feasible is another matter. Likewise, the creation of central authorities in each state for managing cross-border surrogacy

107 Hague Conference on Private International Law, “Background Note for the Meeting of the Experts’ Group on the Parentage/Surrogacy Project” (drawn up by the Permanent Bureau of the Hague Conference on Private International Law) (January 2016) at p 4.

108 Hague Conference on Private International Law, *Desirability and Feasibility of Further Work on the Parentage/Surrogacy Project* (Preliminary Document No 3B, March 2014) at p 16.

109 Concluded 29 May 1993.

110 Hague Conference on Private International Law, *A Preliminary Report on the Issues Arising from International Surrogacy Arrangements* (Preliminary Document No 10, March 2012) at p 27.

arrangements may help to build co-operation and address the issues of misinformation and exploitative practices of for-profit intermediaries. However, the costs, administrative structure and political will needed to achieve this make this option less feasible.

70 A set of guiding principles that focus on the best interests of the child is being developed by the International Social Service, together with a group of experts – principles for a better protection of children's rights in cross-border reproductive arrangements, in particular international surrogacy. The principles aim to address divergent concerns while focusing on children's rights and the legal obligation to prohibit sale of children. It seeks to take into account the legitimate reasons for prohibiting surrogacy while providing protections for children who are born, nevertheless, and provide an international framework to guide states that do choose to permit surrogacy.

71 In the absence of international regulation, Australian courts have been left to grapple unsatisfactorily with the cases before them, leading to inconsistent decision-making¹¹¹ and judicial frustration at the lack of guidance¹¹² and of good quality evidence regarding the circumstances of the surrogacy.¹¹³ Ryan J, of the Family Court of Australia, has commented that:¹¹⁴

[The Australian Human Rights Commission] is demonstrably correct in its submission that 'the court is faced with having children in front of it and needs to make orders that are in the best interests of those children, and at that stage it's probably too late to ask whether – or to inquire into the legality of the arrangements that had been made. The court really needs to take the children as it finds them' ...

72 New Zealand has taken a more innovative approach in regulating the way their citizens engage in surrogacy. Firstly, commissioning parents – whether or not genetically related to the child and regardless of whether the surrogacy took place domestically or abroad – must go through the adoption process to become the legal parents of the child. This provides consistency and includes a number of safeguards. Once adopted, full rights including citizenship flow to the child. However, citizenship will not be granted outside of the adoption

111 See the different outcomes in *Mason & Mason* [2013] FamCA 424 and *Green-Wilson & Bishop* [2014] FamCA 1031. Both concern children born via surrogacy in India to gay couples with the use of donor eggs, but resulted in different outcomes regarding legal parentage due to the fact that commercial surrogacy is specifically prohibited in New South Wales where one couple was located but the law is silent in Victoria where the other couple lived.

112 *Green-Wilson & Bishop* [2014] FamCA 1031 at [10], per Johns J.

113 *Mason & Mason* [2013] FamCA 424 at [4], per Ryan J.

114 *Ellison & Karnchanit* [2012] FamCA 602 at [87].

process. Thus, New Zealand commissioning parents must travel to a country that will grant citizenship to the child, such as the US, in order for the parents to be able to get a visa for the child and bring it “home”. This mostly forces those who do wish to engage in international commercial surrogacy, despite its illegality in New Zealand, to use locations with better safeguards. Lastly, the criteria that the Minister of Immigration uses to grant a visa to the child include factors such as (a) whether there is a genetic link between the child and the commissioning parents, (b) whether there is satisfactory consent from the other parties involved, (c) whether steps have been taken to preserve the birth and genetic origins of the child, and (d) whether the commissioning parents have complied with laws in the country of birth and taken steps to secure parentage and nationality for the child.¹¹⁵ While cumbersome, this process provides guidance for officials and judges and puts safeguards in place to protect children and surrogate mothers without permitting or encouraging commercial surrogacy.

73 In her recent report, Maud de Boer-Buquicchio – the Special Rapporteur on the sale and sexual exploitation of children – identified a “safe harbour” amidst the controversy surrounding surrogacy in the premise that all states are obligated to prohibit, and to create safeguards to prevent, the sale of children.¹¹⁶ She concluded that it is possible for commercial surrogacy to be conducted without constituting the sale of children if the surrogate mother is paid only for gestation services and not the transfer of the child. In order to ensure this is not just a legal fiction, she made a number of recommendations. Most importantly, the surrogate mother must be under no contractual or legal obligation to legally or physically transfer the child; her obligations must be viewed as satisfied through the acts of gestation and childbirth even if she maintains parentage and parental responsibility. All payments must be made prior to any transfer of the child and be non-reimbursable if she chooses to keep the child. Transfer of legal parentage must be by a court or competent authority after the birth and with the best interests of the child a paramount consideration. Appropriate and non-discriminatory reviews of the suitability of the intending parents, close regulation of financial aspects and of all intermediaries involved are also recommended.¹¹⁷

115 See Oranga Tamariki–Ministry for Children, “Adopting a Child Born via Surrogacy” (2016), available at <<https://www.orangatamariki.govt.nz/adoption/surrogacy/>> (accessed 15 May 2018).

116 United Nations, General Assembly, *Report of the Special Rapporteur on the Sale and Sexual Exploitation of Children, Including Child Prostitution, Child Pornography and Other Child Sexual Abuse Material*, A/HRC/37/60 (15 January 2018) at p 7.

117 United Nations, General Assembly, *Report of the Special Rapporteur on the Sale and Sexual Exploitation of Children, Including Child Prostitution, Child* (cont'd on the next page)

74 Whether or not countries permit, regulate or prohibit surrogacy, the recommendations set out in the report of the special rapporteur should be adopted as the minimum standard necessary to prevent the sale of children and the normalisation of practices that violate human rights.

VI. Conclusion

75 Surrogacy pits the deep longing and desire for a child against a range of human rights of both the surrogate mother and the child born through the arrangement. Amidst the clamouring arguments of parents groups, profit-driven intermediaries and women's rights advocates, the voice of the child is lost. The child is the only party who has no say in the arrangement at all. There is an obligation on all signatories to the CRC to prevent the sale of children and to prioritise the best interest of the child. The complexities and dilemmas faced by states in ascertaining what *is* the best interests of the child from both an individual and broader perspective must be acknowledged. Further, the international nature of commercial surrogacy and the widely divergent positions taken by countries mean that it is impossible for a country to solve the problem alone. Nonetheless, it is clear we must keep returning to the best interests of the child, and let that be the guide through this minefield.
