

## ‘Surrogacy: Whose Rights Are We Concerned With?’

Friday, 17 April 2015

### Introductory Remarks for the Panel

Surrogacy is the subject of an extremely complex legal landscape in Australia, not least because it is regulated separately across nine distinct jurisdictions. Each of the Commonwealth, State and Territory governments deals differently with the practice of surrogacy within the bounds of its own jurisdiction<sup>1</sup> and some extend their reach far beyond it geographically. For example, while entering into any surrogacy arrangement under which a reward or material benefit is owed is illegal in most Australian States and Territories,<sup>2</sup> under New South Wales law, it is illegal to enter into a commercial surrogacy arrangement anywhere, including abroad, if an individual is ordinarily resident or domiciled in that State.<sup>3</sup> This is to be distinguished from the position in Queensland and the Australian Capital Territory, where an individual’s ordinary residency alone creates the geographical nexus for surrogacy offences.<sup>4</sup> In New South Wales, although domicile of choice supersedes domicile of origin, origin will remain determinative of the issue where no domicile of choice exists.<sup>5</sup> This has the result that

---

<sup>1</sup> Stephen Page, ‘The Dirty Dozen Rules in International ART’ (Paper presented at a Conference of the American Academy of Assisted Reproductive Technology Attorneys, Charleston, SC, 12 November 2013) 4, 10, 13-17. The relevant legislation in each jurisdiction is as follows: *Family Law Act 1975* (Cth); *Australian Citizenship Act 2007* (Cth); *Parentage Act 2004* (ACT); *Surrogacy Act 2010* (NSW); *Surrogacy Act 2010* (Qld); *Family Relationships Act 1975* (SA) pt 2B; *Surrogacy Act 2012* (Tas); *Assisted Reproductive Technology Act 2008* (Vic) pt 4; *Status of Children Act 1974* (Vic); and *Surrogacy Act 2008* (WA). No legislation exists in the Northern Territory.

<sup>2</sup> See *Parentage Act 2004* (ACT) div 2.5, especially s 31; *Surrogacy Act 2010* (NSW) s 8; *Surrogacy Act 2010* (Qld) s 56; *Surrogacy Act 2012* (Tas) s 40; *Assisted Reproductive Technology Act 2008* (Vic) s 44(1); and *Surrogacy Act 2008* (WA) s 8. The Victorian legislation appears only to criminalise the surrogate mother’s entry into the arrangement. The effect of *Family Relationships Act 1975* (SA) s 10G is that a contract is void and illegal if, under it, a person becomes, seeks to become or already is pregnant and then seeks to surrender custody of or rights in relation to the child born of the pregnancy. Recognised surrogacy arrangements are an exception: s 10G(4). Section 10HA(b)(ix) of that Act also makes it a requirement of a recognised surrogacy agreement that no valuable consideration be payable. Entry into the contract itself is not an offence, but procurement for reward is: s 10H. The position in the Northern Territory is unclear due to the absence of legislation, however such contracts may be void on public policy grounds: Lindy Willmott, ‘Surrogacy: Ill-conceived Rights’ (2002) 10 *Journal of Law and Medicine* 198, 201, citing *Re A and B* (2000) 26 Fam LR 317, *Re D and E* (2000) 26 Fam LR 310 and *W: Re Adoption* (1998) 23 Fam LR 538; and Westlaw, *The Laws of Australia* (at 1 March 2011) 20 Health and Guardianship, ‘12 Medical Technology’ [20.12.2630], citing Margaret Otlowski, ‘Surrogacy Contracts Act 1993’ (1993) 2 *Australian Health Law Bulletin* 26.

<sup>3</sup> *Surrogacy Act 2010* (NSW) s 11.

<sup>4</sup> *Parentage Act 2004* (ACT) s 45; *Surrogacy Act 2010* (Qld) s 54(b).

<sup>5</sup> *Hyland v Hyland* (1971) 18 FLR 461, 463 (Asprey JA, with whom Sugerman ACJ agreed); *Bell v Kennedy* (1868) LR 1 Sc & Div 307 (HL). However, on loss of domicile of choice, domicile does not revert back to the place of origin, but rather remains until a new domicile of choice is established: s 6.

an itinerant individual from New South Wales who seeks surrogacy abroad could be prosecuted in that State on return to the jurisdiction.<sup>6</sup>

On the other hand, legislation in most Australian jurisdictions permits the transfer of parentage in a manner that accords with an altruistic surrogacy arrangement, although the enforceability of the arrangement itself is a separate issue.<sup>7</sup> Some jurisdictions prohibit surrogacy being undertaken by single people and gay and lesbian couples, while others do not.<sup>8</sup> The diversity and even inconsistency of regulatory regimes makes ascertaining the legality and logistics of surrogacy undertaken within and outside Australia exceedingly complicated.

The variety within the legal regimes appears to be reflective of ongoing uncertainty about how to most effectively prevent exploitation of women and protect the best interests of children.<sup>9</sup> Yet whether or not law and society are ready for the impact of surrogacy and the questions it raises, surrogacy via both altruistic and commercial means is already an established practice.

---

<sup>6</sup> See *Crimes Act 1900* (NSW) s 10C; and Page, above n 1, 4-5.

<sup>7</sup> See *Parentage Act 2004* (ACT) s 41; *Surrogacy Act 2010* (NSW) ss 6(1) and pt 3, especially ss 12, 23; *Surrogacy Act 2010* (Qld) ch 3, especially ss 15(1), 20, 22; *Family Relationships Act 1975* (SA) s 10HA(2), s 10HB; *Surrogacy Act 2012* (Tas) s 10(1) and pt 4, especially ss 13, 16, 20, 21; *Status of Children Act 1974* (Vic) ss 20, 22; and *Surrogacy Act 2008* (WA) s 7(1) and pt 3, especially ss 12, 16(1), 20, 21. *Assisted Reproductive Technology Act 2008* (Vic) s 39 expressly allows for assisted reproductive technology treatment to be carried out 'under' a surrogacy arrangement where the arrangement has been approved by the Patient Review Tribunal. In the Northern Territory, transfer of parentage would seem to be governed by adoption law, which would not require the court to examine the agreement: Tammy Johnson, 'Queensland's Proposed Surrogacy Legislation: An Opportunity for National Reform' (2010) 17 *Journal of Law and Medicine* 617, 625, with reference to *Adoption of Children Act 1995* (NT). See also *Family Law Act 1975* (Cth) s 60HB and *Australian Citizenship Act 2007* (Cth) s 8.

<sup>8</sup> *Parentage Act 2004* (ACT) does not appear to distinguish between same-sex and heterosexual people, but generally requires that two people apply for or agree to the making of a parentage order: ss 24(c), 25(2), 26(3). *Surrogacy Act 2010* (NSW) permits persons, whether gay, lesbian or heterosexual, who are single, married, or in a de facto relationship to seek a parentage order: s 25, read with the *Interpretation Act 1987* (NSW). The same position is taken in Queensland, Tasmania and Victoria: *Surrogacy Act 2010* (Qld) s 21, read with the *Acts Interpretation Act 1954* (Qld), *Surrogacy Act 2012* (Tas) s 14, read with *Relationships Act 2003* (Tas) s 4, and *Status of Children Act 1974* (Vic) s 20, read with *Assisted Reproductive Technology Act 2008* (Vic). *Family Relationships Act 1975* (SA) only permits heterosexual de facto or married couples to obtain parentage orders. In Western Australia, only single women, or married or de facto heterosexual couples may apply to obtain a parentage order: *Surrogacy Act 2008* (WA) s 19. In the Northern Territory, same-sex couples are prohibited from adopting, as well as from making use of South Australian surrogacy services, as some others do: Johnson, above n 7.

<sup>9</sup> Jenni Millbank, 'The New Surrogacy Parentage Laws in Australia: Cautious Regulation or "25 Brick Walls"?' (2011) 25 *Melbourne University Law Review* 165, 167-9.

Cases like those of Baby Gammy in 2014<sup>10</sup> and the 2012 controversy in India that came to light again earlier this week<sup>11</sup> bring surrogacy to front page headlines. Yet in spite of the attention such cases draw, they are in fact at the margins of the debate.

The title of tonight's event is 'Surrogacy – Whose Rights Are We Concerned With?'. It seems that often the main concern is with the desire and perceived right of individuals wishing to have a child to do so.<sup>12</sup> In that situation, the rights of others, such as the child born of a surrogacy arrangement and the surrogate, or birth mother, may be sidelined.<sup>13</sup> At the same time, it has been argued that the use of international surrogates via commercial arrangements is based on unequal power dynamics, where people from the affluent West outsource pregnancy to economically disadvantaged women, who cannot but accept an offer of what is often the equivalent to 10 to 15 years' wages.<sup>14</sup>

The desire for parenthood is an entirely natural one and it is a matter of biology that many of those who wish to have children cannot do so. The question is whether existing legal frameworks in this country that assist these individuals are sufficient to protect the rights of all involved.

The speakers on tonight's panel to discuss this important topic are family lawyer Stephen Page and academic Professor Andreas Schloenhardt.

Stephen Page, a partner of Harrington Family Lawyers, was admitted as a solicitor of the Supreme Court of Queensland in 1987. Mr Page has acted for clients in eight Australian jurisdictions and at least 16 other countries concerning surrogacy and fertility issues. He is an international representative on the American Bar Association's

---

<sup>10</sup> See, e.g., Australian Broadcasting Corporation, 'Baby Gammy Story Takes Startling Turn as Extreme Options Revealed', 7.30, 17 September 2014 <<http://www.abc.net.au/7.30/content/2014/s4089822.htm>>.

<sup>11</sup> See, e.g., Samantha Hawley, Suzanne Smith and Michael McKinnon, 'India Surrogacy Case: Documents Show New South Wales Couple Abandoned Baby Boy Despite Warnings', *Australian Broadcasting Corporation News* (online), 13 April 2014 <<http://www.abc.net.au/news/2015-04-13/australian-couple-abandon-baby-boy-in-india-surrogacy-case/6387206>>.

<sup>12</sup> Denise Cuthbert and Patricia Fronek, 'Perfecting Adoption? Reflections on the Rise of Commercial Offshore Surrogacy and Family Formation in Australia' in Alan Hayes and Daryl Higgins (eds), *Families, Policy and the Law: Selected Essays on Contemporary Issues for Australia* (Australian Institute of Family Studies, 2014) 55, 55-6, 58, 61-3.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.* 56, 62.

Artificial Reproductive Technologies Committee, where his role is to guide that organisation to a position regarding a proposed international Convention on surrogacy. He is also the first international fellow of the American Academy of Assisted Reproductive Technology Attorneys.

Andreas Schloenhardt is Professor of Criminal Law at the University of Queensland's TC Beirne School of Law. He holds positions as a visiting Professor to universities in Switzerland and has also held adjunct appointments at universities in Germany, Singapore, Canada and the United States. Professor Schloenhardt has conducted extensive research into human trafficking and is also a consultant to the United Nations Office on Drugs and Crime in Vienna.

I shall ask each of them to speak for a few minutes and then open the floor for comments and questions.