LEGAL PROBLEMS WITH INTERNATIONAL SURROGACY ARRANGEMENTS

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The law relating to surrogacy arrangements is not at all easy to understand. Some countries do not permit it at all, and in those that do, an arrangement with an international element is likely to be complicated not only by the highly localised nature of the legislation relating to surrogacy,[1] including its criminal law, but also by the effect of legislation about other methods of artificial conception, which is usually designed to confer parentage in a way that is completely incompatible with the intentions of a surrogacy arrangement.

So when it comes to surrogacy arrangements with an international element, problems arise because different countries (and different parts of different countries) have widely different views about surrogacy and, therefore widely different legislative schemes about it. Several countries including France, Italy, Germany, China and Japan ban surrogacy arrangements altogether, even if there is no commercial element in the agreement.

The United Kingdom, Australia, New Zealand, Israel and Holland allow "altruistic" but not commercial, unenforceable surrogacy arrangements. In a few countries, commercial surrogacy arrangements are permitted and are legally enforceable. These include India, the Ukraine, Russia, Panama, Thailand and some American states, notably California and Florida.

In other words, a significant part of the problem with international surrogacy arrangements is that the law in the home country of the commissioning parents more often than not reflects and supports social and political objectives (expressed in the form of regulatory regimes supported by a criminal code) that are completely at odds with an international surrogacy arrangement.[2]

As a result, people taking part in an international surrogacy arrangement face problems about defining their legal relationship with the resulting child, how they can be recognised as that child's only legal parents and, if they achieve that, whether that parental status will be recognised in other countries. There is also the problem of whether what they have done might result in them being prosecuted for a criminal offence.

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1 As Mary Keyes puts it in "Cross Border Surrogacy Agreements", the overall effect of the Australian surrogacy legislation permitting the courts to make parentage orders is that it appears to be intended only to give effect to altruistic surrogacy agreements that are entirely local to the relevant state or territory (Australian Journal of Family Law (Lexis Nexis), Vol. 26, No. 1 (May 2012)).

2 "The birth of a child of a surrogate mother in one country with genetic or intended parents from another creates a myriad of legal hurdles often not anticipated by those involved at the time of artificial conception" – Prof Mark Henaghan, Otago University, International Family Law, July 2013. "Preliminary research has suggested that by far the highest number of cases reported involving cross-border difficulties related to legal parentage (and its legal consequences, *e.g.*, nationality) are those involving international surrogacy arrangements." Hague Conference paper on "Private international law issues surrounding the status of children, including issues arising from international surrogacy arrangements." 11 March 2011.

Who are the child's parents in an international surrogacy arrangement?

In the past, "traditional surrogacy" involved the egg of a surrogate mother and, usually, the sperm of the commissioning father. The commissioning father would usually be regarded as being the child's legal father, and the surrogate mother the child's legal mother, in the home country of both the surrogate and the commissioning parents. So at least one of the commissioning parents, usually the father, would be regarded as the child's legal parent. The problem was therefore limited to conferring parentage on the commissioning mother.

Now there are more problems for surrogacy arrangements because of the legislation designed to confer parentage on couples who want to use artificial fertilisation techniques. A good example is AID. In the ordinary course of events (that is, at common law) the sperm donor would be regarded as the father of the child, so legislation had to be enacted to make it clear that (provided the process was undergone with his consent) the husband of the woman who is inseminated by way of AID is to be regarded in law (and by operation of law – that is, without the need for a court order) as the child's father. That rule has obvious implications for surrogacy arrangements.

Who was legally a child's mother was not until fairly recently, a problem, but advances in medical technology have resulted in "gestational" surrogacy, in which an embryo is created from a donor egg and sperm from either the commissioning father or a sperm donor and then implanted into a surrogate mother. That has made it necessary for the first time to identify, and legally define, a "mother".

So now that it is quite possible for neither the commissioning parents nor the surrogate mother to have any genetic link with the child, even more complicated questions are raised about the legal identity of the various persons involved, even before starting to think about conferring or removing parentage. Resolving the question of the legal relationships, in terms of parentage, of the people involved involves applying legal rules that might be quite different in the home country of the surrogate and the home country of the commissioning parents. It is very likely that there will a serious conflict of laws that will have consequences for matters like as nationality and immigration.

That means that a serious stumbling block to persons who are involved in, or contemplating, an overseas surrogacy arrangement is exactly what their legal relationship with the resulting child is going to be. This because there will be almost certainly be conflicting rules in different countries about who is, or who is not, a parent.

In countries that permit commercial surrogacy arrangements, there will probably be rules to the effect that the commissioning parents will have parental rights over the child, and the surrogate mother (and her husband if she has one) will not. However, that will not necessarily be recognised by other countries, which will probably apply their own rules.

The Western Australian rules about parentage

To take Western Australia as an example, to identify a child's legal parents, it is necessary to look at the *Artificial Conception Act* 1985 (WA). That Act applies to

artificial fertilisation procedures as defined by the *Human Reproductive Technology Act* 1991 (WA),[3] **whether carried out within or without Western Australia**, both before or after its commencement, and to children born both before or after its commencement (whether within or without Western Australia), and relates to "the status of persons conceived by artificial means and for related purposes".

It ascribes to persons who are involved in "artificial fertilisation procedures" parentage in relation to the resulting child. It is important to understand that the social and legal objectives of this legislation (in common with similar legislation elsewhere) is to provide a legal mechanism whereby persons who might not otherwise be regarded as parents are, for the purpose of law, regarded as parents.

Who is the child's mother?

When it comes to who is a "mother", maternity is dealt with by s5 of the *Artificial Conception Act* 1985 (WA). It provides that:

"5. Rule relating to maternity

(1) Where a woman undergoes an artificial fertilisation procedure in consequence of which she becomes pregnant and the ovum used for the purposes of the procedure was taken from some other woman, then for the purposes of the law of the State, the pregnant woman is the mother of any child born as a result of the pregnancy."

This makes it clear that the woman who donated the egg that created the embryo that in due course became the child is not the child's mother, but that the woman who gave birth to the child is.

Section 5 is supported by s7(1) that provides that:

"**7. Donor of genetic material**

(1) Where —

(a) a woman becomes pregnant in consequence of an artificial fertilisation procedure; and

(b) the ovum used for the purposes of the procedure was taken from some other woman,

then for the purposes of the law of the State, the woman from whom the ovum was taken is not the mother of any child born as a result of the pregnancy."

So, for the purposes of the law of Western Australia, the question of who is the mother of a child born as a result of an overseas surrogacy arrangement is driven by the laws of Western Australia, to be found in ss5 and 7 of the *Artificial Conception Act* 1985 (WA).

The problem is, of course, that the law of the country in which the child is born may not regard the surrogate mother as being the child's "mother" and, although to some people it might seem unlikely, it is perfectly possible for a child to have two "mothers", in two (or possibly more) different legal systems.

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[3] An artificial fertilisation procedure is defined by s 3 of the *Human Reproductive Technology Act* 1991 (WA), to mean any artificial insemination procedure or in vitro fertilisation procedure.

Who is the child's father?

The question of who the child's father is, unsurprisingly, a bit more complicated. It is quite possible that a child may have one father, two fathers, or no father at all.

Again, using the example of Western Australia, s6 of the *Artificial Conception Act* 1985 (WA) deals with paternity and provides that:

"**6. Rule relating to paternity**

(1) Where a married woman undergoes, with the consent of her husband, an artificial fertilisation procedure in consequence of which she becomes pregnant, then for the purposes of the law of the State, the husband —
  (a) shall be conclusively presumed to have caused the pregnancy; and
  (b) is the father of any child born as a result of the pregnancy.

(2) In every case in which it is necessary to determine for the purposes of this section whether a husband consented to his wife undergoing an artificial fertilisation procedure, that consent shall be presumed, but the presumption is rebuttable."

As can be readily seen, if the surrogate is a married woman who undergoes an artificial fertilisation procedure with the consent of her husband (as will almost certainly be the case if there is a commercial surrogacy arrangement involving a married woman) then her husband is conclusively presumed to have caused the pregnancy and to be the father of the resulting child.

It does not matter if the sperm used to create the embryo was provided by the commissioning father or by a donor because s 7(2) provides that:

"**7. Donor of genetic material**

…

(2) Where —
  (a) a woman becomes pregnant in consequence of an artificial fertilisation procedure; and
  (b) a man (not being the woman's husband) produced sperm used for the purposes of the procedure,

then for the purposes of the law of the State, the man referred to in paragraph (b) —
  (c) shall be conclusively presumed not to have caused the pregnancy; and
  (d) is not the father of any child born as a result of the pregnancy."

So from ss5, 6 and 7 of the *Artificial Conception Act* 1985 (WA), it would seem that in the case of a commercial surrogacy arrangement overseas involving a married woman, the surrogate mother is regarded as being the child's "mother" and her husband as the child's "father".

Could the commissioning couple be "parents"

Although not a "mother' or a "father" it might be possible to be a legal "parent". Again, taking Western Australia as an example, although neither "mother' nor "father' are defined in the *Interpretation Act* 1984 (WA), s5 provides that: ***"parent*** includes the following —

"(a) a person who is a parent within the meaning of the *Artificial Conception Act 1985*;

(b) a person who is an adoptive parent under the *Adoption Act 1994*;

(c) a person who is a parent in a relationship of parent and child that arises because of a parentage order under the *Surrogacy Act 2008;"*

A "parent" under the *Artificial Conception Act* 1985 is (and is limited to) to the female de facto partner of a woman who undergoes an artificial fertilisation procedure with her consent.[4] So it is possible to be a "parent" even if you are not a "mother" or a "father", but only if you are a woman.

The problems arising from how the different countries regard the status of the persons involved is vividly illustrated by the *Balaz* case.

The Balaz case

Very briefly, a German couple, Mr & Mrs Balaz, commissioned a surrogate pregnancy in India using Mr Balaz's sperm and a donated egg. Twins were born in 2008, and Indian birth certificates were issued naming Mr & Mrs Balaz as their parents. But the German authorities refused to recognise the birth certificates as establishing either parentage or German nationality because surrogacy is illegal in Germany.

Mr & Mrs Balaz then tried to get Indian passports for the children. That application was refused because they did not have an Indian "parent". So the children were stateless. The Indian birth certificates were then recalled and Mrs Balaz was replaced with the Indian surrogate mother as the children's "mother", although Mr Balaz was still identified as the "father". Although the nationality of the children was now recognised as Indian because they were born on Indian soil to an "Indian mother" (which meant that a surrogate mother was now recognised as a legal mother) the Indian passport authority continued to refuse the children passports. It was not until December 2009 that India's highest court urged the Indian authorities to consider non-judicial avenues and suggested adoption as a possible solution. But that was not possible, because requirements of neither the 1993 Hague Convention on Inter-Country Adoption[5] nor Indian domestic law had been met, because the children had been neither orphaned nor abandoned.

Eventually, after some two years, Germany issued the children with visas and they were able to leave India on the basis that Mr & Mrs Balzac would formally adopt them in Germany under German law.

Criminal offences

Another difficulty for some people, including Australians or people who live in Australia, is that although a number of countries permit altruistic surrogacy arrangements (that is, not for profit arrangements), they have regulatory regimes that make it a criminal offence to enter into a commercial surrogacy arrangement. The structure of their criminal codes are such that it does not matter where the

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4 *Artificial Conception Act* 1985, s6A(1): Where a woman who is in a de facto relationship with another woman undergoes, with the consent of her de facto partner, an artificial fertilisation procedure in consequence of which she becomes pregnant, then for the purposes of the law of the State, the de facto partner of the pregnant woman —
(a) shall be conclusively presumed to be a parent of the unborn child; and
(b) is a parent of any child born as a result of the pregnancy.

5 1993 Hague Convention on the Protection of Children and Co-operation in Respect of Inter-Country Adoption.

commercial surrogacy arrangement was entered into, because the criminal legislation has extraterritorial effect.

To take Western Australia as an example, there is an offence of "making surrogacy arrangement that is for reward". Section 8 of the *Surrogacy Act* 2008 (WA) provides that:

> "A person who enters into a surrogacy arrangement that is for reward commits an offence.
> Penalty: a fine of $24 000 or imprisonment for 2 years."

So a person living in Western Australia would commit a criminal offence if they entered into a surrogacy arrangement "for reward" either in Western Australia or somewhere like India or Thailand, where it is perfectly lawful to do so. [6]

It is also a criminal offence in Western Australia to "cause or permit" an artificial fertilisation except pursuant to a license or exemption by which it is authorised by the *Human Reproductive Technology Act* 1991 (WA).

Parentage orders and international cases

Countries that do permit surrogacy arrangements (whether commercial or otherwise) often provide the mechanism for transferring the parental rights that would, in the ordinary course of events, be conferred upon or attributed by operation of law to, the surrogate mother (and, if she has one, her male husband or partner) to the commissioning parents. In the United Kingdom, for example, these are referred to as "parental orders" in Western Australia "parentage orders".[7] The sorts of problems that arise with these orders in an international case include:

- They might only be available in respect of surrogacy arrangements that have taken place within the country and in conformity with its regulatory regime. So it would not be possible, for example, for a couple to commission a surrogacy arrangement in India, and then apply for a parentage order in Western Australia under the Western Australian legislation (the *Surrogacy Act* 2008 (WA)), because the arrangement would not have been approved by the Western Australian Reproductive Technology Council.

- They are not available to everyone who might enter into a surrogacy arrangement. In Western Australia, for example, they are only available to an "eligible couple" (that is, a couple consisting of a man and a woman) or, if not a couple, an "eligible person" (that is, a woman).[8]

- They might only be available if the gametes of at least one of the applicants was used to create the embryo.[9]

- They might only be available for altruistic, and not commercial, surrogacy arrangements.[10] Courts will be wary of anything that looks like "buying" a child.

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6 Extraterritorial effect is provided by virtue of s 12 of the Criminal Code of Western Australia.
7 *Surrogacy Act* 2008 (WA) s19.
8 *Surrogacy Act* 2008 (WA) ss16 and 19.
9 *Human Fertilisation and Embryology Act* 2008 (UK) s54(1)(b).
10 See, for example, the English case of *Re L (a minor)* [2010] EWHC 3146 (Fam) (Hedley J).

- They might only be available to people who have a very strong connection with the country – for example, being domiciled there.[11]

- There might be serious difficulties in getting the necessary documents and, particularly, consents from the surrogate mother (and her husband, if she has one).

- There will be very serious difficulties if the surrogate mother changes her mind and refuses to consent.

- There will be serious problems if the relationship between the commissioning couple breaks down and the one who is a parent refuses to allow the other to be involved in the child's life.

- The order might not solve all your problems – in Australia, for example, s8 of the *Australian Citizenship Act* 2007 enables citizenship to be granted to a child born as a result of a surrogacy arrangement, but only if parentage is transferred under Australian legislation – which would exclude an international arrangement, and one in which the surrogate was paid.

- Although Commonwealth courts have taken a somewhat relaxed view about the requirement to adhere to the rules, and have tended to put the child's welfare first, as far as they can, civil law jurisdictions have been much stricter.[12]

- Even if a "parental order" is made, it does not necessarily mean that other countries will recognise it. That is because there is no reciprocity between countries when it comes to recognising the results of surrogacy arrangements. They are not, for example, covered by the 1996 Hague Convention on the Protection of Children[13] because it does not deal with parentage. So even if a couple has an order from a court conferring parentage upon them, it does mean that other countries will regard them as the child's parents, a problem that might not come to light for many years.

Good examples of things going far from well are to be found in two English cases in which British couples commissioned commercial surrogacy arrangements in the Ukraine with married surrogate mothers using sperm from the male partner and a donated egg. English law regarded the surrogates' husbands as being the father of the children.[14] The Ukraine, however, regarded the commissioning couples as the legal parents. So the starting-point was orphaned, stateless children.

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11 *Human Fertilisation and Embryology Act* 2008 (UK) s54(4)(b).

12 France refuses to recognize relationships arising from surrogacy. In 2011 the Cour de Cassation refused French citizenship to a child born as a result of a surrogacy arrangement in California. Two cases are currently pending before the European Court of Human Rights challenging the French ban on surrogacy (*Mennesson v. France* no 65192/11 and *Labesse v. France* no 65941/11).

13 Long title: *The Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children.*

14 *Human Fertilisation and Embryology Act* 1990 (UK).

Adoption as a solution

Although it is likely that that commissioning parents returning to, for example, Australia with a child born as a result of an overseas surrogacy arrangement would be able to get an order that the child is to live with them and that they are to have parental responsibility,[15] that does not make them legal parents, which is what they really want.[16] So another route that is often chosen is to make an application for an adoption order.

That raises its own problems; adoption and surrogacy are often seen as being very different and the use of adoption to support surrogacy is seen as inappropriate. As the Department of Child Protection's website puts it in Western Australia: "The *Adoption Act* sees no link between surrogacy and adoption. The principle behind surrogacy is to provide a child for those unable to have their own. The principle behind adoption is to provide a new family for a child who cannot be raised by their birth family.".

The Hague Conference has expressed concern that the use of the Adoption Convention on an *ad hoc* basis in the past in surrogacy cases might lead to more widespread use in the future.[17] Characterising this as "inappropriate", a number of reasons why it cannot be used have been advanced. These include the need for the consent of the birth mother to be given after the birth of the child (Art 4(c)(4)) and not to have been induced by payment or compensation of any kind (Art 4(c)(3)), and the principles of subsidarity and the procedural safeguards, particularly in the receiving state.[18]

Some adoption regimes are also very restrictive, and might exclude those who have made any payment to, or have met, the birth mother. It might also exclude same-sex couples. There are also requirements as to the necessary connections between the adoptive parents, the child and the country in which the adoption order is to be made.[19]

Nevertheless, here might be two possible approaches to adoption; if one of the couple can be brought within the definition of "parent" it might be possible for the other to make an application for a step-parent adoption. Otherwise, it might be possible to apply jointly as carers.

Adoption might be difficult, but there are likely to be less problems over international recognition of the adoption order.

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15 *Family Law Act* 1975, ss64B(2) and 64C. See *Dudley and Anor & Chedi* [2011] FamCA 502.

16 It is an interesting question as to whether in Western Australia the application would have to be made under the *Family Law Act* 1975 or the *Family Court Act* 1997 (WA) – see *Family Law Act* 1975, s60H. Another question is who should be parties to the proceedings.

17 Hague Conference paper on "Private international law issues surrounding the status of children, including issues arising from international surrogacy arrangements", 11 March 2011, para. 43.

18 Hague Conference paper on "Private international law issues surrounding the status of children, including issues arising from international surrogacy arrangements", 11 March 2011, para. 43.

19 See, for example, *Re an application by KR* [2011] NZFLR 429.