

Surrogacy: a black-hole for children's rights

Tim Cannon

Central to the Australian Family Association's ethos is the proposition that the natural family – comprising a mother, father, and naturally conceived children – is the basic unit on which human societies are built, and is the prime agency for the total development of children. Although it is unavoidable that alternative family structures will exist in any society, it is suggested that they are exceptional to the natural family, whose integrity should be safeguarded and indeed promoted. In this significant task, we suggest that the state plays a critical role. Further, the state plays an important role in helping to meet the needs of persons – and in particular, of children – who have been deprived of the benefits of family life, either through family breakdown, through the premature death of one or both parents, through unavoidable separation, or otherwise.

The state's role is twofold: apart from responding to the needs of fractured and non-traditional families, and particularly the needs of the children in such families, public policy must additionally forestall, as best it can, the disintegration of the family as the basic unit of society. This requires an honest acknowledgment of the causes of such disintegration.

The controversial issue of surrogacy engages directly with these responsibilities of the state. Surrogacy raises serious

questions regarding the nature of the family unit, and the nature of particular relationships within the family unit. It is inevitable, therefore, that the position adopted by legislators on surrogacy will have far reaching consequences for the family in general, for the individuals who are party to surrogacy arrangements, and especially for the children produced by any such arrangement. This paper considers various ways in which surrogacy interferes with the rights and interests of children. It is suggested that a strong case for the prohibition of surrogacy can be established by examining the ways in which surrogacy unavoidably interferes with the rights, interests and welfare of the children born through surrogacy arrangements.

Surrogacy goes wrong

The New South Wales Standing Committee on Law and Justice recently released its report on an inquiry into the legalisation of altruistic surrogacy. Additionally, the NSW attorney-general's office is currently overseeing a national review of the law relating to surrogacy. The NSW committee has recommended a policy whereby surrogacy would be regulated, rather than prohibited. The recommendations fail to recognise any inherent problems with the practice of surrogacy, and do not propose to discourage surrogacy in any way. It is safe to assume that the widespread adoption

of the recommended policy will result in an increase in the incidence of surrogacy arrangements in Australia.

Given that surrogacy arrangements are uniquely prone to certain complications, the proliferation of surrogacy arrangements will inevitably result in a proliferation of such complications. Typically these complications arise where there is a breakdown in the agreement between the surrogate and the person or persons who have commissioned the surrogacy arrangement. Complications of this kind, which have already arisen in documented cases in Australia and overseas, include:

The surrogate mother deciding to keep the baby herself;

The surrogate mother deciding she does not want the intended couple to raise the child, even though she does not want to raise the child herself;

A change in the circumstances of the intended parents (including the breakdown of the relationship between the intended parents, or the death or incapacitation of one or both intending parents) leading to a change of heart from either the intended parents or the surrogate mother;

The intended parents deciding not to proceed with the agreement because the child is diagnosed with a condition such as Down Syndrome; and

The intended parents simply having a change of heart and deciding they would rather not proceed with the arrangement.

In these and other circumstances, an extant child's welfare and future prospects are plunged into uncertainty because of the breakdown of an inherently artificial and fragile arrangement. This uncertainty is a direct product of the choices and changing whims of the parties, and it is ultimately the child who must bear the cost.

It is no justification to say that cases where surrogacy arrangements break down will be few in number. The fact is that they will occur, and the impact on the child will be significant. An American case, *In re Buzzanca*¹, exemplifies the potential complications foisted upon a child where surrogacy goes wrong: it took courts three years to determine who, at law, the child's parents were. In that case the commissioning parents' relationship had broken down, and the surrogate mother had refused to surrender the child to the commissioning mother alone. None of the parties to the surrogacy arrangement were genetically related to the child, who had been conceived with donated gametes.

It should be noted that in this case, as in all cases of legally sanctioned surrogacy, the surrogacy agreement itself was legally unenforceable. That is to say, although parties may agree to a surrogacy, no party can have a court enforce that agreement between the parties. Rather, where a surrogacy agreement breaks down, it is left to the courts to determine who should retain custody of the child. This fact alone indicates that it may not, in fact, be in the best interests of a child to be carried to term by

one woman, only to be given to another woman at or shortly after birth.

Cases in which surrogacy arrangements break down raise serious questions regarding the potential impact of surrogacy on a child. The choices of adults in *In re Buzzanca* created a child, and then left it without legal parents for three years. Is it acceptable for any state to be complicit in exposing children to such a fate? A policy which permits surrogacy is a policy which effectively says, “although we realise that surrogacy arrangements may expose children to the trauma of parent-less-ness, we will allow surrogacy anyway, and basically just hope for the best.” Shouldn’t the state’s responsibility to children require it to pursue a policy which actively discourages surrogacy arrangements on account of the potentially harrowing outcomes to which they expose children?

Who are my parents?

Surrogacy arrangements necessarily confuse the question of who a child’s parents are. It is suggested that the question of who a child’s parents are is generally recognised as being a question of fundamental importance to that child’s sense of identity and emotional and psychological wellbeing². Further, the question of the identity of a child’s parents is a matter of objective fact, and is not a purely arbitrary matter determined by the decisions of judges and legislators.

It follows that, as a society, we do not treat the separation of children from their natural parents lightly. Adoption is recognised as a necessary solution for children who are deprived of an ongoing relationship with their natural parents for a variety of unavoidable reasons, including the death of parents, or in rare cases, to preserve the safety of the child. Adoption is widely acknowledged to present serious challenges both for adoptive parents and for adoptees.

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We do our utmost to ensure that the negative outcomes of adoption are minimised, and yet we recognise that adoptees do in fact suffer ongoing negative outcomes on account of the disruption of their natural family relationships.

In the case of adoption, such negative outcomes are the result of unavoidable circumstances. These circumstances are not imposed on adoptees by choice. Surrogacy arrangements impose a similar burden on the children they produce. However, surrogacy arrangements are a product of the exercise of the free choice of the parties to such arrangements. The negative impact of the disruption of natural family relationships is thus forced upon children to satisfy the demands of adults.

Other circumstances further demonstrate the negative outcomes for children who are separated from their natural parents. Cases of parents mistakenly taking home the wrong child from hospital rightly provoke community uproar. And in Australia, the plight

of the Stolen Generations – children removed from their families for what at the time were considered altruistic motives – represents a grave blight on this nation’s human rights record. We are still coming to terms with the negative outcomes of this policy, which is broadly recognised as having inflicted grave harm upon Australia’s Indigenous communities.

And yet surrogacy necessarily and by its very nature destroys and disfigures the vitally important parent-child relationship. It does so while seeking to provide a solution to the deep-seated desire to reproduce, a desire which is tragically frustrated for many adults. But altruistic motives do not justify harmful outcomes for children. The fact that an Indigenous child taken from his or her parents might have enjoyed the material benefits of a more affluent upbringing does not justify a policy which removes children from their families. Neither can the appeasement of adults’ desire to reproduce justify the disfiguration of a child’s biological origins.

To legalise surrogacy is to assume that the question of who a child’s parents are is unimportant. Legalising surrogacy amounts to a failure to give due recognition to the importance of a child’s biological heritage, sense of identity, and emotional and psychological wellbeing.

Negative effects

Although there is currently a lack of substantial scientific evidence concerning the psychological and social outcomes of surrogacy for children, a

significant body of evidence concerning the views and attitudes of children conceived by assisted reproductive technologies (ARTs) is beginning to emerge. In a paper relating the impact of ARTs on children, Richard Egan recounts the experience of two persons – now adults – who were conceived by donor insemination³:

‘Bill Cordray writes: “What is it like to be conceived through donor insemination? Infertility experts do not know. The social scientists do not know. The politicians do not know. No one knows because no one has actually asked us, the people who have been created through donor insemination. We are left to make sense of ourselves without the roadmap of our genetic blueprint. We are lost in an unfamiliar landscape. We are invisible.”

Lyn Spencer, another donor-insemination child, writes, “I long to know who my biological father is and to meet and speak with him at least once. I search for my half-siblings in other people’s faces. We have a right to know our identity.”

Being deprived of the opportunity to be raised by their biological parents has rendered many ART-conceived children incapable of developing a sense of identity. In an address to the Queensland University of Technology Applied Ethics Seminar Series in 2001, Joanna Rose said⁴:

‘It is unfortunate that there has been an assumption that we as donor-conceived people would not feel connection and then loss in regard to our blood relatives. While many of us have developed

deep attachments and loyalties towards those who raise us, there are fundamental questions regarding our identities which leave gaping holes. There needs to be recognition of this complex and difficult process, which is hindered by the projections and sensitivities of others.

‘The process of becoming ‘whole’ involves the reclaiming of our own voices, meanings, losses, and a complex journey towards the self. This is an individual journey, but shares many similarities with those of others, such as birth mothers, adoptees, members of the stolen generations, and of course with each other. For some, the circumstances of our conceptions lead to the eventual unravelling of the stories that we are told, to the absence of the stories that we are not told. We cannot live our lives for others, and must be recognised as people with losses and voices; we need not be pathologised and repressed, but understood.’

A further indication of the impact of ARTs on children is evident in the proliferation of groups such as Tangled Webs – groups established by ART-conceived people in an attempt to deal with the psychological and social issues which are attached to the circumstances of their conception⁵. The emergence of such organisations indicates that children conceived through ARTs, including surrogacy, are in great need of support, and that the circumstances of

their conception is a cause of significant psychological and social turmoil.

Surrogacy, as a form of ART, poses many of the same issues as do other ARTs, particularly with regard to questions of identity, and the importance and nature of child-parent relationships, and especially the child’s relationship with his or her mother. While these issues are not thoroughly understood from a clinical point of view, the response of the children of ARTs suggests that negative social and psychological outcomes for children of surrogacy should be expected, and that government policy should seek to minimise these outcomes in legislating on the issue of surrogacy.

Negative social and psychological outcomes for children of surrogacy should be expected,

Mother-child relationship

The issues faced by children born through surrogacy arrangements partly stem from the way surrogacy disrupts certain family relationships, which in their natural form are clear and uncomplicated. Principally, surrogacy confounds the question of who a child’s mother is, by artificially dividing motherhood into discrete, functional categories. A child born via surrogacy will have an intended mother, a gestational mother, and in cases where donated gametes are used, a separate genetic mother.

One effect of this division of motherhood is to deprive the child of the benefits of the bond formed with the mother during gestation. A 2007 study

identified the importance hormonal activity during pregnancy in establishing a bond between the mother and the child ⁶. That the development of such a bond is linked to the gestational period itself is of great significance in considering the potential effects of surrogacy on children. Children who, through a surrogacy arrangement, are separated at birth from their gestational mother, are unavoidably denied the lifelong benefits of the mother-child bond established during gestation.

Again, while many children are unintentionally deprived of the benefits of the mother-child bond, for example through divorce and death, surrogacy is unique in actively and intentionally imposing the deprivation of the mother-child bond on the child.

Additionally, by segregating motherhood into discrete categories, surrogacy presumes that certain aspects of motherhood are not sufficiently important to the child to outweigh the desire of the parties to the surrogacy to proceed with the surrogacy arrangement. Whereas the women who are party to the surrogacy freely forego certain aspects of motherhood (i.e. the surrogate mother forgoes the ongoing mother-child relationship; the commissioning mother forgoes the gestational aspect of motherhood) the child does not freely forgo the benefits of being conceived, carried to term, and raised by the same mother. Rather, surrogacy denies a child's right to be born free from such negative impositions, in favour of adults' preferences to have a child by whatever means possible.

Breaching human rights

It is somewhat surprising that, at a time when human rights are exalted as the highest form of law in a globalised world, the practice of surrogacy is proliferating in spite of the fact that it blatantly breaches certain fundamental children's rights. It is also surprising that these breaches, which seemed so apparent only a short time ago, now fail to attract the concern of legislators. Writing in the Newcastle Law Review in 1996, J Neville Turner, then senior lecturer in law at Monash University and president of OzChild (an outreach organisation providing care and support for children), wrote ⁷:

'Surrogate motherhood, whether for 'commercial'...or so-called 'altruistic' reasons, cannot be justified in any circumstances. It is certain to lead to an identity crisis when the child ascertains that he or she has two mothers. It is astonishing that responsible persons continue to advocate for its legalisation.'

Turner goes on to assert that in this way surrogacy specifically breaches a child's right to preserve his or her identity. As shall be discussed below, this right is expressly recognised under the United Nations Convention on the Rights of the Child (CRC), a convention ratified by the Australian government in 1990. It is also protected by the United Nations Declaration of the Rights of the Child (DRC), as are other rights, including a child's right not to be separated from his or her parents; a child's right to know and be cared for by his or her parents; and a child's right to have his or her best

interests given priority of the rights and interests of adults, wherever such rights are in conflict.

A child's right to preserve his or her identity

Article 8.1 of the CRC states:

States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

As discussed earlier, the experience of children created through ARTs shows that the dislocation of a child from his or her biological parents clearly undermines that child's right to preserve his or her identity, and thereby breaches Article 8.1 of the CRC. Uncertainty regarding the identity of the mother in a surrogacy arrangement inevitably causes confusion regarding a child's own identity, thus further confounding a child's right to preserve his or her identity.

A child's right not to be separated from his or her parents

Article 9.1 of the CRC states that:

States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or

one where the parents are living separately and a decision must be made as to the child's place of residence.

Similarly, Principle 6 of the DRC states:

...a child of tender years shall not, save in exceptional circumstances, be separated from his mother...

Surrogacy, by its very nature, explicitly undermines these basic human rights. It does so firstly by creating confusion regarding the identity of the child's mother. As noted above, for a child born through a surrogacy arrangement, there are potentially three persons who might qualify as the child's mother: the intended mother, the gestational mother and (sometimes) the genetic mother.

Every surrogacy arrangement is undertaken with the explicit intention of removing the child from his or her gestational mother. Furthermore, in cases where the embryo has been created using gametes donated by a woman who is not the child's intended social mother, surrogacy arrangements will intentionally remove the child from his or her biological mother. These consequences, which constitute explicit breaches of Article 9.1 of the CRC and Principle 6 of the DRC, are simply unavoidable where a child is brought into the world via a surrogacy arrangement.

That surrogacy involves a breach of the child's right not to be separated from his or her parents becomes clearly evident in cases where rightful custody over the child is disputed. Where a surrogate mother (who is not the child's genetic

mother) refuses to honour the surrogacy agreement, the law presumes her to be the child's mother, and will recognise her right to custody of the child. Doing so requires a court to deny the child the opportunity of being raised by his or her biological parents. However the alternative – to force the surrogate mother to surrender a child whom she has carried to term and laboured to bear – provides an equally unsatisfactory outcome. The court is faced with ordering a serious breach of human rights in either case.

Clearly Article 9.1 of the CRC contemplates situations where it is necessary to separate the child from one or both of its parents, including where “the parents are living separately and a decision must be made as to the child's place of residence.” It has been suggested that surrogacy falls into this exception, and therefore does not breach Article 9.1, or else does so only out of necessity. However such a suggestion threatens to obscure the fact that, although separating the child from his or her parents may be necessary where the child's parents do not live together, the fact of the separation is nevertheless harmful to the child and a clear breach of his or her rights. It follows that, in the interests of the child, such circumstances should be avoided as far as possible. Surrogacy not only fails to avoid such circumstances, but actively, deliberately and needlessly imposes them on the child. For this reason it cannot be said that the exceptions identified in Article 9.1 somehow make surrogacy ok.

A child's right to be cared for by his or her parents

Article 7.1 of the CRC states:

The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents (emphasis added).

The right to know and be cared for by one's parents necessarily raises the question: who are one's parents? As discussed earlier, by fragmenting motherhood and confusing the question of who a child's mother is, surrogacy separates children from – and deprives them of a relationship with – at least their gestational mother, and often their genetic mother, resulting in a further breach of article 7.1 of the convention. Furthermore, wherever surrogacy is facilitated by the use of donor gametes, the child will be necessarily deprived of the opportunity of being cared for by his or her parents, and may be deprived of the opportunity of knowing his or her parents in any substantial manner.

The paramouncy of the child's rights and best interests

Principle 2 of the DRC states:

The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. *In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration* (emphasis added).

Legislation concerning surrogacy clearly relates to the physical, mental, moral, spiritual and social development of the child, falling within the scope of Principle 2 of the Declaration. However, as discussed earlier, surrogacy impedes such development in children, and subjects children's rights and interests to those of the commissioning parents. In doing so, surrogacy breaches Principle 2 of the Declaration.

Commodifying children

By way of a final consideration, it is suggested that surrogacy – including altruistic surrogacy – commodifies children by making them the subject of a transaction between adults. The child is literally exchanged, potentially between complete strangers, with the sole end of satisfying the desires and interests of the adults who are party to the exchange. It has been suggested that in this way surrogacy actually breaches Article 35 of the CRC, “which proscribes the sale or traffic in children.”⁸

Agreements for the exchange of already-born children would be viewed as reprehensible. Surely the law would not countenance an agreement whereby a woman agreed to give birth to a child, raise it for 2 years (with compensation to be paid for any costs incurred in that time), and to subsequently “give” the child to another couple, according to the terms of the prior agreement. Exchanging children to serve the desires

of adults clearly reduces the status of a child to that of mere property. Surrogacy is no different, except that the agreement to exchange the child is made while that child is still in the womb.

Conclusion

In light of the harm which surrogacy causes to children, and the serious breaches of children's rights which surrogacy entails, a government whose policy merely regulates surrogacy, and even facilitates it, is complicit in the harm caused and the breaches committed. By catering to the desires of adult, while overlooking the impact of surrogacy on children, legislators and policy-makers neglect their duty to protect and promote the rights, interests and welfare of children. We contend that, as the generations of children born through the use

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of ARTs and through surrogacy come to terms with the harms they have suffered, it is the state which will be called to account, just as it has been called to account for the wrongs committed against the Stolen Generations of Australia's Indigenous population. This is a tragedy which could be easily avoided by the implementation of a policy which gives adequate regard to the rights and interests of children, by prohibiting surrogacy in all forms in Australia.

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Endnotes

1. *In re Buzzanca* 1998 Cal. App. Lexis 180, 72 Cal. Rptr. 2nd 280, 61 Cal. App 4th 1410 (1998)
2. This may be inferred from the recognition and protection of these interests set out in the United Nations Declaration on the Rights of the Child, and the United Nations Convention on the Rights of the Child, discussed below.
3. Richard Egan, 'The dark side of donor conception', *News Weekly*, 16 July 2005, p12.
4. Joanna Rose, 'From a "bundle of joy" to a person with sorrow: Disenfranchised grief for the donor-conceived adult', Queensland University of Technology Applied Ethics Seminar Series, 2001.
5. See www.tangledwebs.org.au
6. Ruth Feldman, Aron Weller, Orna Zagoory-Sharon, Ari Levine, "Evidence for a Neuroendocrinological Foundation of Human Affiliation: Plasma Oxytocin Levels Across Pregnancy and the Postpartum Period Predict Mother-Infant Bonding", *Psychological Science*, Vol 18 No 11, pp965-970.
7. J Neville Turner, "Panic over children's rights" (1996) *Newcastle Law Review*, Vol 1 No 2, p80.
8. *Ibid.*