

NOTES

MOMMA DRAMA: A STUDY OF HOW CANADA’S NATIONAL  
REGULATION OF SURROGACY COMPARES TO AUSTRALIA’S  
INDEPENDENT STATE REGULATION OF SURROGACY

Ailis L. Burpee\*

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\* J.D., University of Georgia School of Law, 2009; B.S., Applied Psychology, Georgia  
Institute of Technology, 2005.

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## I. INTRODUCTION

Infertility is a problem faced by couples worldwide.<sup>1</sup> In the United States an estimated 6.1 million women between the ages of fifteen and forty-four have an impaired ability to conceive children;<sup>2</sup> in Australia, an estimated 1 in 6 couples between the ages of twenty and fifty suffer from infertility;<sup>3</sup> in Canada an estimated 600,000 people are dealing with infertility;<sup>4</sup> and these rates could double in the decade to come.<sup>5</sup> Partly because of these staggering statistics, the field of assisted reproduction—which includes egg donation, intrauterine fertilization, *in vitro* insemination, embryo screening, and surrogacy<sup>6</sup>—has grown astoundingly in the past three decades.<sup>7</sup> Of these assisted reproductive techniques, surrogacy is arguably the most controversial.<sup>8</sup>

<sup>1</sup> MARCIA C. INHORN, LOCAL BABIES, GLOBAL SCIENCE: GENDER, RELIGION AND INVITRO FERTILIZATION IN EGYPT 4 (2003) (“Infertility is a global health issue that affects millions of people worldwide.”).

<sup>2</sup> See JOYCE C. ABMA ET AL., NAT’L CTR. HEALTH STATISTICS, FERTILITY, FAMILY PLANNING, AND WOMEN’S HEALTH: NEW DATA FROM THE 1995 NATIONAL SURVEY OF FAMILY GROWTH 7 (1997) (noting that in 1995, 6.1 million women of reproductive age had “impaired fecundity,” meaning “difficult or impossible to get pregnant or carry a baby to term”).

<sup>3</sup> *Hearing Before the Standing Comm. on Health and Ageing*, H.R., Commonwealth of Australia 6 (July 6, 2005) (statement of Professor Michael Chapman, Chairman, IVF Directors Group), available at <http://www.apf.gov.au/hansard/rep/commtee/r8499.pdf>.

<sup>4</sup> The Infertility Awareness Association of Canada, <http://www.iaac.ca/en/home> (last visited Mar. 5, 2009).

<sup>5</sup> See Alex Barnum, *For Infertile Couples, It's California or Bust: State Has Become Major Destination for Making Babies*, S.F. CHRON., Aug. 15, 2005, at A1 (noting estimates that infertility in industrialized European nations could double in the next decade).

<sup>6</sup> John A. Robertson, *Commerce and Regulation in the Assisted Reproduction Industry*, 85 TEX. L. REV. 665, 665 (2007) (book review); Jami L. Zehr, Student Article, *Using Gestational Surrogacy and Pre-Implantation Genetic Diagnosis: Are Intended Parents Now Manufacturing the Idyllic Infant?*, 20 LOY. CONSUMER L. REV. 294, 296 (2008); see CHARLES P. KINDREGAN, JR. & MAUREN MCBRIEN, ASSISTED REPRODUCTIVE TECHNOLOGY: A LAWYER’S GUIDE TO EMERGING LAW AND SCIENCE 8–10 (2006) (listing examples of uses of assisted reproduction technology).

<sup>7</sup> Cf. Robertson, *supra* note 6, at 665 (stating that the “assisted reproduction field has grown phenomenally since [the first IVF birth in 1978] with over two million births worldwide”).

<sup>8</sup> See A. Mavroforou et al., *Medically Assisted Human Reproduction: The Greek View*, 26 MED. & L. 339, 343–44 (2007) (“Surrogacy has received more adverse criticism than any other of the new reproductive techniques.”); Lisa L. Behm, *Legal, Moral & International Perspectives on Surrogate Motherhood: The Call for a Uniform Regulatory Scheme in the United States*, 2 DEPAUL J. HEALTH CARE L. 557, 557 (1999) (stating that of all new reproductive technologies, surrogacy is possibly the most controversial).

A surrogate-parenting agreement is defined as

[a] contract between a woman and typically an infertile couple under which the woman provides her uterus to carry an embryo throughout pregnancy; esp[ecially], an agreement between a person (the intentional parent) and a woman (the surrogate mother) providing that the surrogate mother will (1) bear a child for the intentional parent, and (2) relinquish any and all rights to the child.<sup>9</sup>

The oldest form of surrogacy involves artificially impregnating the surrogate mother with the sperm of a man that is not her husband; most often the sperm of the intended father.<sup>10</sup> This form of surrogacy is referred to as traditional surrogacy or artificial insemination surrogacy.<sup>11</sup> A child born from a traditional surrogacy arrangement is biologically related to the surrogate mother because the surrogate mother's egg was used for conception.<sup>12</sup>

The second and newest form of surrogacy, known as gestational surrogacy, was reported for the first time in 1985.<sup>13</sup> Gestational surrogacy involves the surrogate mother carrying an embryo created from the egg of another woman, often the intended mother's egg, and the sperm of a man that is not the surrogate mother's husband, often the intended father.<sup>14</sup> Gestational surrogacy allows the intended mother to be genetically related to the child<sup>15</sup> and is most often used when the intended mother "has viable eggs but cannot carry a child to term."<sup>16</sup> Gestational surrogacy may also involve the use of an egg from a woman other than the intended mother, resulting in a child that is not genetically related to either the surrogate mother or the intended mother.<sup>17</sup> Gestational surrogacy is legally a safer option when compared to traditional surrogacy because under a gestational surrogacy arrangement, the child is not biologically related to the surrogate mother, and traditional western legal

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<sup>9</sup> BLACK'S LAW DICTIONARY 1485 (8th ed. 2004).

<sup>10</sup> See KINDREGAN & MCBRIEN, *supra* note 6, at 129-31 (discussing the history of "traditional surrogacy").

<sup>11</sup> *Id.*; Behm, *supra* note 8, at 557-58.

<sup>12</sup> KINDREGAN & MCBRIEN, *supra* note 6, at 130-31.

<sup>13</sup> Valerie L. Baker, *Surrogacy: One Physician's View of the Role of Law*, 28 U.S.F. L. REV. 603, 605 (1994).

<sup>14</sup> *Id.* at 604; Behm, *supra* note 8, at 558.

<sup>15</sup> KINDREGAN & MCBRIEN, *supra* note 6, at 132-33.

<sup>16</sup> *Id.* at 133.

<sup>17</sup> *Id.*

norms are more inclined to recognize the genetic parent as the legal parent.<sup>18</sup> For the aforementioned legal reason, and because the technology necessary for gestational surrogacy has become more widely available, traditional surrogacy has declined in popularity.<sup>19</sup>

With respect to compensation for the surrogate mother, there are two types of surrogacy arrangements: commercial and altruistic.<sup>20</sup> A commercial surrogacy arrangement is one in which the surrogate mother stands to gain financially from simply birthing the child for the intended parents.<sup>21</sup> In a commercial surrogate arrangement, the intended parents may compensate the surrogate mother for expenses associated with pregnancy, such as living and medical expenses, in addition to making a fixed payment for the service itself.<sup>22</sup> In contrast, an altruistic surrogacy arrangement may involve payment to the surrogate mother for the expenses associated with the pregnancy and birth, but she is not paid for the surrogacy arrangement itself.<sup>23</sup> In altruistic surrogacy arrangements, the surrogate mother can be reimbursed for medical expenses associated with the pregnancy, living expenses, and in some instances even telephone and internet expenses for the purpose of keeping in contact with the intended parents.<sup>24</sup> Both gestational surrogacy arrangements and traditional surrogacy arrangements can be commercial or altruistic.<sup>25</sup>

This Note discusses the following: (1) the current Canadian and Australian laws regulating surrogacy; (2) the social and political issues faced by most industrialized nations surrounding surrogacy, especially Canada and Australia; (3) the effects of Canada's Assisted Human Reproduction Act on the practice of surrogacy within Canada and worldwide; (4) the effects of Australian state

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<sup>18</sup> See *id.* at 133–35 (discussing the legal contours of gestational surrogacy and stating that “gestational surrogacy agreements are more likely to be enforceable than traditional surrogacy agreements”).

<sup>19</sup> *Id.* at 132.

<sup>20</sup> Dan R. Reilly, *Surrogate Pregnancy: A Guide for Canadian Prenatal Health Care Providers*, 176 CAN. MED. ASS'N J. 483, 483 (2007).

<sup>21</sup> See Zehr, *supra* note 6, at 301 (“Commercial surrogacy involves . . . compensation to the surrogate from the intended parents for the surrogate's service.”).

<sup>22</sup> *Id.* at 301–02.

<sup>23</sup> Reproductive Technology Council, Assisted Reproductive Technology (ART) Glossary, <http://www.rtc.org.au/glossary/index.html> (last visited Jan. 21, 2009).

<sup>24</sup> See Mary Gazze, *Canada: Destination for Infertile Couples; An Increasing Number of Foreigners are Choosing Canadian Surrogates Because the Practice is Illegal in Their Home Countries*, GLOBE & MAIL (Can.), June 26, 2007, at A12 (stating that in addition to food, transportation, folic acid, clothing, massage therapy and fitness expenses altruistic “surrogates have claimed phone and [i]nternet bills to keep in contact” with the intended parents).

<sup>25</sup> Reilly, *supra* note 20, at 483.

and territorial regulations on the practice of surrogacy within Australia and worldwide; and (5) the benefits Australia would see if it were to adopt national legislation similar to Canada's. This Note contends that Australia would be best served by adopting national regulations on surrogacy.

## II. THE CURRENT LAWS ON SURROGACY IN CANADA AND AUSTRALIA

### A. Canada's Assisted Human Reproduction Act

As the use of surrogates has become more prevalent, courts and legislatures have been challenged by the legality of surrogacy agreements.<sup>26</sup> The majority of countries worldwide have yet to establish legislation regulating surrogacy,<sup>27</sup> but in the past two decades there has been an increase, mostly among common law jurisdictions, in the regulation of surrogacy.<sup>28</sup> Of the few countries that have legislation regulating surrogacy, several, including Germany and Italy, prohibit all forms of surrogacy.<sup>29</sup> Canada is one of the very few nations to enact a national legal framework governing surrogacy.<sup>30</sup> In 2004, Canada enacted the Assisted Human Reproduction Act.<sup>31</sup> Through the Act,

[t]he Parliament of Canada recognizes and declares that

...  
(b) the benefits of assisted human reproductive technologies and related research for individuals, for families and for society in

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<sup>26</sup> See generally Behm, *supra* note 8, at 563–90 (providing a thorough explanation of leading surrogacy cases in the United States, a survey of U.S. state laws, and a summary of Canada's similar struggles and proposals).

<sup>27</sup> KINDREGAN & MCBRIEN, *supra* note 6, at 182.

<sup>28</sup> See Anita Stuhmcke, *Looking Backwards, Looking Forwards: Judicial and Legislative Trends in the Regulation of Surrogate Motherhood in the UK and Australia*, 18 AUST. J. FAMILY L. 1, 2 (Lexis 2004) (stating that despite its relatively recent presence in the legal world, the "legal regulation of surrogacy is now common place").

<sup>29</sup> KINDREGAN & MCBRIEN, *supra* note 6, at 182–87 (noting that as of 2006, in addition to Canada, the United Kingdom, Israel, Hong Kong, and Italy also have national regulations on surrogacy); Debora L. Spar, *Where Babies Come From: Supply and Demand in an Infant Marketplace*, HARV. BUS. REV., Feb. 2006, at 133, 134 ("In Germany, a deep-seated wariness of genetic manipulation has manifested itself in more restrictive legislation: no egg transfers, no surrogacy . . .").

<sup>30</sup> See KINDREGAN & MCBRIEN, *supra* note 6, at 182–87 (giving a brief overview of the few nations that have laws regarding surrogacy).

<sup>31</sup> Assisted Human Reproduction Act, 2004 S.C., ch. 2, (Can.); Reilly, *supra* note 20, at 484.

general can be most effectively secured by taking appropriate measures for the protection and promotion of human health, safety, dignity and rights in the use of these technologies and in related research.<sup>32</sup>

One of the reproductive technologies covered by the Assisted Human Reproduction Act is surrogacy.<sup>33</sup> First and foremost, the Act prohibits commercial surrogacy.<sup>34</sup> Specifically, the Act states that “[n]o person shall pay consideration to a female person to be a surrogate mother, offer to pay such consideration or advertise that it will be paid.”<sup>35</sup> Additionally, the Act prohibits people from “accept[ing] consideration for arranging for the services of a surrogate mother” or “offer[ing] to make such an arrangement for consideration.”<sup>36</sup> The Act also establishes that “[n]o person shall counsel or induce a female person to become a surrogate mother, or perform any medical procedure to assist a female person to become a surrogate mother, knowing or having reason to believe that the female person is under 21 years of age.”<sup>37</sup> Finally, the Act allows for altruistic surrogacy.<sup>38</sup> Specifically, the Act allows an intended parent to “reimburse a surrogate mother for an expenditure incurred by her in relation to her surrogacy” provided that “a receipt is provided to that person for the expenditure.”<sup>39</sup> To assist in regulation, the Act provides for the establishment of the Assisted Human Reproduction Agency of Canada.<sup>40</sup>

The Agency is an entity separate from Health Canada.<sup>41</sup> While “Health Canada is responsible for setting policy and developing the regulations stemming from the Act, . . . [the Agency’s] role is to administer the new regulations once they are finalized.”<sup>42</sup>

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<sup>32</sup> Assisted Human Reproduction Act, 2004 S.C., ch. 2, § 2 (Can.).

<sup>33</sup> *Id.* § (6).

<sup>34</sup> *Id.* § 6(1); Reilly, *supra* note 20, at 484.

<sup>35</sup> Assisted Human Reproduction Act, 2004 S.C., ch. 2, § 6(1) (Can.).

<sup>36</sup> *Id.* § 6(2).

<sup>37</sup> *Id.* § 6(4).

<sup>38</sup> *Id.* § 12(1). A license is required and specific regulations, however, must be followed.  
*Id.*

<sup>39</sup> *Id.* § 12(1)(c)–(2).

<sup>40</sup> *Id.* § 21(1).

<sup>41</sup> See ASSISTED HUMAN REPRODUCTION CANADA, 2007–2008 ANNUAL REPORT 8 (“AHRC’s role in overseeing the use of reproductive technology in Canada is not to be confused with that of Health Canada.”).

<sup>42</sup> *Id.*

Once the Act's regulations (currently being developed by Health Canada) come into force, the Agency will . . .

- [i]ssue, renew, amend, suspend or revoke licenses for [Assisted Human Reproduction] procedures or research involving *in vitro* embryos;
- [i]nspect [Assisted Human Reproduction] clinics and research laboratories for compliance with the Act;
- [c]ollect, manage and analyze health reporting information related to controlled activities; and
- [d]esignate inspectors and analysts to enforce the Act.<sup>43</sup>

The Assisted Human Reproduction Act, together with the Assisted Human Reproduction Agency, help to establish uniformity in Canada.

### *B. Australian State Regulation*

In contrast to Canada's Assisted Human Reproduction Act, most countries do not have national regulations on surrogacy.<sup>44</sup> However, Australia allows for individual state regulation of surrogacy.<sup>45</sup> Australia's first national governmental inquiry into the issue of surrogacy ended in 1985 and resulted in a Family Law Council recommendation that Australia adopt uniform legislation prohibiting commercial surrogacy.<sup>46</sup> Before national legislation could be written, a second governmental inquiry into the issue of surrogacy was conducted, resulting in the National Bioethics Consultative Committee recommending national legislation to permit, but regulate, altruistic surrogacy arrangements.<sup>47</sup> Despite this recommendation, the Reproductive Technology

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<sup>43</sup> *Id.* at 7. As of February 15, 2009, the only regulations in force involve section 8 of the Act and require written consent from a donor before his or her reproductive material can be used to create an embryo or be used as an *in vitro* embryo. *Id.* at 13.

<sup>44</sup> See KINDREGAN & MCBRIEN, *supra* note 6, at 182–88 (noting that “the majority of countries have neither laws nor cases regarding surrogacy”). The United States allows for individual state regulation. *Id.* at 145.

<sup>45</sup> See *id.* at 184–85 (discussing approaches taken by various Australian states and territories); Suzanne Harrison, *State Kidding Itself*, GOLD COAST BULL., July 27, 2007, at 27 (noting that residents in Queensland, where surrogacy is illegal, can “shop around for a state where surrogacy is legal” and discussing various state laws and federal initiatives).

<sup>46</sup> Stuhmcke, *supra* note 28, at 11.

<sup>47</sup> *Id.* The issue of surrogacy was referred to the National Bioethics Consultative Committee by the Health and Social Welfare Ministers in May 1988, and the Committee's proposal for national legislation was completed in 1990. *Id.*



Working Group, established by the Australian Health Minister's Advisory Committee, recommended that the states and territories prohibit surrogacy and make all contracts for surrogacy void through their own legislation.<sup>48</sup> As a result, the seven Australian states and territories have sought to develop and, in some cases, have adopted legislation regarding surrogacy.<sup>49</sup> At the time this Note was written, the Standing Council of Attorneys-General had started a new initiative to harmonize the various surrogacy laws.<sup>50</sup> Whether it will be more successful in creating a uniform set of laws than the earlier efforts is yet to be seen.

### 1. *Queensland*

Of the current state laws regarding surrogacy, Queensland's law is the most controversial.<sup>51</sup> Under Queensland's Surrogate Parenthood Act of 1988, all forms of surrogacy, altruistic or commercial, are prohibited.<sup>52</sup> Furthermore, under the Act, a resident of Queensland can face a penalty of \$10,000 or three years in prison for entering into a surrogacy arrangement in Queensland,<sup>53</sup> or for traveling to another state or nation and entering into a surrogacy agreement.<sup>54</sup> The Surrogate Parenthood Act prohibits any advertisements for surrogacy and states that all contracts for surrogacy are void.<sup>55</sup> In 2008, a Queensland Parliamentary Select Committee recommended the

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<sup>48</sup> The Reproductive Technology Working Group's proposal was adopted by the Australian Health and Social Welfare Ministers in March 1991 with the suggestion that it be uniformly adopted by all Australian states and territories but uniform adoption has not yet occurred. *Id.*

<sup>49</sup> See STANDING COMM. OF ATTORNEYS-GENERAL AUSTRALIAN HEALTH MINISTERS' CONFERENCE CMTY. & DISABILITY SERV. MINISTERS' CONFERENCE, JOINT WORKING GROUP, A PROPOSAL FOR A NATIONAL MODEL TO HARMONISE REGULATION OF SURROGACY 24-32 (2009) [hereinafter SCAG PROPOSAL 2009] (summarizing current Australian state and territory laws on surrogacy).

<sup>50</sup> See *id.* at 2 (noting the consideration of a national law on surrogacy).

<sup>51</sup> Cf. Harrison, *supra* note 45, at 27 (noting that Queensland is the only state in Australia where one can face prison time for entering a surrogacy arrangement).

<sup>52</sup> Surrogate Parenthood Act, 1988, §§ 2(a), 3(1) (Queensl.); SCAG PROPOSAL 2009, *supra* note 49, at 30.

<sup>53</sup> Surrogate Parenthood Act, 1988, § 3(1) (Queensl.); SCAG PROPOSAL 2009, *supra* note 49, at 30.

<sup>54</sup> Surrogate Parenthood Act, 1988, § 3(2) (Queensl.); SCAG PROPOSAL 2009, *supra* note 49, at 30.

<sup>55</sup> Surrogate Parenthood Act, 1988, §§ 3-4 (Queensl.); GLENDA EMMERSON, RESEARCH BULLETIN NO. 8, SURROGACY: BORN FOR ANOTHER 38 (1996), available at <http://www.parliament.gld.gov.au/view/publications/documents/research/researchBulletins/1996/rb0896ge.pdf>.

decriminalization of altruistic surrogacy.<sup>56</sup> The Queensland Government has not yet responded to the Committee's recommendations.<sup>57</sup> If Queensland were to adopt the Committee's recommendation, it would move closer to the views held by the other Australian States.

## 2. Victoria

While Victoria was the first state to introduce legislation dealing specifically with surrogacy, that first statute has been replaced by the current Infertility Treatment Act of 1995.<sup>58</sup> The Infertility Treatment Act of 1995 is slightly less harsh than the Queensland statute.<sup>59</sup> Like Queensland, commercial surrogacy in Victoria is a crime and those who enter into commercial arrangements can be criminally penalized.<sup>60</sup> But because the 1995 Act only forbids commercial surrogacy and advertisements for surrogacy,<sup>61</sup> it passively permits altruistic surrogacy arrangements in some limited circumstances.<sup>62</sup> These circumstances are so limited, however, that it makes certain types of altruistic surrogacy virtually impossible.<sup>63</sup> Specifically, the 1995 Act prohibits a woman from undergoing *in vitro* fertilization unless she is "unlikely to become pregnant"; in other words, she must be infertile.<sup>64</sup>

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<sup>56</sup> SCAG PROPOSAL 2009, *supra* note 49, at 31.

<sup>57</sup> *Id.*

<sup>58</sup> See Stuhmcke, *supra* note 28, at 12 (discussing the introduction of the Infertility (Medical Procedures) Act of 1984, which was passed into law in 1986 and subsequently repealed in 1995).

<sup>59</sup> Compare Infertility Treatment Act, 1995, §§ 59–60 (Vict.) (authorizing two years imprisonment for entering into a commercial surrogacy agreement or advertising one's willingness to enter into such agreement), with Surrogate Parenthood Act, 1998, § 3(1) (Queensl.) (authorizing three years imprisonment for entering into any surrogacy agreement or advertising one's willingness to enter such agreement).

<sup>60</sup> Infertility Treatment Act, 1995, § 59 (Vict.); EMMERSON, *supra* note 55, at 42 (discussing provisions for the 1995 Act before it became law).

<sup>61</sup> See KINDREGAN & MCBRIEN, *supra* note 6, at 185.

<sup>62</sup> See SCAG PROPOSAL 2009, *supra* note 49, at 26 (stating that the Act "prohibits commercial surrogacy but is silent on altruistic surrogacy"); Adam P. Morton, Letter to the Editor, *A Case for Altruistic Surrogacy*, 183 MED. J. AUSTL. 162, 162 tbl., available at [http://www.mja.com.au/public/issues/183\\_03\\_010805/letters\\_010805\\_fm.pdf](http://www.mja.com.au/public/issues/183_03_010805/letters_010805_fm.pdf) (noting that "[t]he [Infertility Treatment Act, 1995 (Vict.)] prohibits commercial surrogacy, and has complex criteria regarding eligibility of surrogate mothers").

<sup>63</sup> Stuhmcke, *supra* note 28, at 12 (discussing how restricting the use of IVF only to infertile women disqualifies a large number of potential surrogates).

<sup>64</sup> See Infertility Treatment Act, 1995, § 20 (Vict.) (providing the limited circumstances wherein donor procedures may be used); Stuhmcke, *supra* note 28, at 12 (interpreting the 1995 Act).

Because most surrogate mothers are not themselves infertile, the Act forbids potential surrogate mothers from receiving *in vitro* fertilization thus eliminating their ability to serve as surrogates, unless they are willing to use more traditional forms of insemination.

In December 2008, the Victorian legislature passed a new law that addresses these concerns.<sup>65</sup> While the Assisted Reproductive Treatment Act 2008 still prohibits commercial surrogacy and dictates that all such surrogacy contracts are void,<sup>66</sup> it allows the payment of specific payments, like medical or legal expenses.<sup>67</sup> Further, the law no longer requires that the surrogate mother be infertile, but rather the intended mother must be infertile.<sup>68</sup> Critics of the new law note that it fails to require surrogate mothers to have previously given birth before she may serve as a surrogate.<sup>69</sup> The Assisted Reproductive Treatment Act 2008 becomes effective on January 1, 2010.<sup>70</sup>

### 3. *Tasmania*

Tasmania's Surrogacy Contracts Act of 1993 prohibits commercial surrogacy but does not mention altruistic surrogacy arrangements.<sup>71</sup> However, all surrogacy contracts, regardless of whether they form commercial or altruistic surrogacy arrangements, are void and unenforceable.<sup>72</sup> The Act also prohibits third parties from arranging a surrogacy contract and prohibits third parties from providing professional services to achieve a surrogate pregnancy.<sup>73</sup> Recent recommendations to amend the Surrogacy Contracts Act

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<sup>65</sup> Assisted Reproduction Treatment Act, 2008 (Vict.); SCAG PROPOSAL 2009, *supra* note 49, at 27.

<sup>66</sup> Assisted Reproductive Treatment Act, 2008, § 44 (Vict.); SCAG PROPOSAL 2009, *supra* note 49, at 27.

<sup>67</sup> Assisted Reproductive Treatment Act, 2008, § 44 (Vict.); SCAG PROPOSAL 2009, *supra* note 49, at 27.

<sup>68</sup> Assisted Reproductive Treatment Act, 2008, §§ 40(1)(a)(i)–(ii), 42(c) (Vict.); SCAG PROPOSAL 2009, *supra* note 49, at 27.

<sup>69</sup> Jill Singer, Op-Ed., *Pregnant Pause Time to Think Again on Surrogacy Laws*, HERALD SUN (Austl.), June 18, 2007, at 19 (discussing the Victorian Law Reform Commission's report that influenced the current law).

<sup>70</sup> Assisted Reproductive Treatment Act, 2008, § 2 (Vict.); SCAG PROPOSAL 2009, *supra* note 49, at 27.

<sup>71</sup> Surrogacy Contracts Act, 1993, (Tas.); see EMMERSON, *supra* note 55, at 42–43 (stating that the legislative history indicates that the bill “would not penalise parties to non-commercial surrogacy”).

<sup>72</sup> Surrogacy Contracts Act, 1993, § 7 (Tas.); EMMERSON, *supra* note 55, at 42–43.

<sup>73</sup> Surrogacy Contracts Act, 1993, §§ 5–6 (Tas.); EMMERSON, *supra* note 55, at 43.

of 1993 have been proposed and include prohibiting third party professional services other than legal, medical, and psychological services.<sup>74</sup> The proposal would also allow for the Family Court to supervise and sanction lawful, albeit unenforceable, surrogacy contracts.<sup>75</sup> The legislature has not yet taken action on any of these recommendations.<sup>76</sup>

#### 4. *South Australia*

Similar to other Australian states' legislation, South Australia's Family Relationships Act of 1975, as amended, distinguishes between commercial and altruistic surrogacy, allowing altruistic surrogacy while prohibiting commercial surrogacy.<sup>77</sup> The South Australian Act does not penalize the immediate parties to a surrogacy arrangement, but it does make third-party involvement in surrogacy arrangements an offense.<sup>78</sup> Additionally, South Australia's Act provides that the woman who gives birth to the child, not the egg donor, is the child's legal mother.<sup>79</sup> Likewise, sperm donors other than the childbearing woman's husband are not to be considered the child's legal father.<sup>80</sup> Thus, gaining legal rights to the child born under a surrogacy arrangement is difficult for the intended parents. Clinics in the Northern Territory operate under South Australia's guidelines and legislation with the exception that only married or de facto infertile couples can access infertility treatments in the Northern Territory.<sup>81</sup>

#### 5. *New South Wales*

In December 2007, New South Wales (NSW) passed a law regulating surrogacy, the Assisted Reproductive Technology Act 2007.<sup>82</sup> While the Act

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<sup>74</sup> SCAG PROPOSAL 2009, *supra* note 49, at 31–32.

<sup>75</sup> *Id.* at 32.

<sup>76</sup> *Id.*

<sup>77</sup> Family Relationships Act, 1975, § 10(f)–(i) (S. Austl.); EMMERSON, *supra* note 55, at 43–44.

<sup>78</sup> Stuhmcke, *supra* note 28, at 14.

<sup>79</sup> Family Relationships Act, 1975, § 10(c) (S. Austl.); EMMERSON, *supra* note 55, at 44.

<sup>80</sup> Family Relationships Act, 1975, § 10(d) (S. Austl.); EMMERSON, *supra* note 55, at 44.

<sup>81</sup> SA Council on Reproductive Technology, Reproductive Technology, Legislation Around Australia, <http://www.dh.sa.gov.au/reproductive-technology/other.asp#NT> (last visited Mar. 18, 2009).

<sup>82</sup> Assisted Reproduction Technology Act, 2007 (N.S.W.).

is not currently in force,<sup>83</sup> it will continue the general Australian trend of banning commercial surrogacy and advertising surrogacy, but it permits altruistic surrogacy.<sup>84</sup> Similarly, the Act makes all surrogacy agreements void.<sup>85</sup> Until this Act is put into force, NSW will be governed by guidelines established by the National Health and Medical Research Council, “a Commonwealth statutory authority.”<sup>86</sup> Although NSW does not have legislation currently in force, the Status of Children Act 1996 presumes that the woman who gave birth to the child is the child’s mother even if another woman’s egg was used to conceive the child, thus making it difficult for the intended mother to gain legal rights to the child born under a surrogacy arrangement.<sup>87</sup>

## 6. *Western Australia*

In December of 2008, Western Australia passed the Surrogacy Act.<sup>88</sup> While currently not in force, the Surrogacy Act is expected to enter into force in 2009.<sup>89</sup> Under the Surrogacy Act, commercial surrogacy is prohibited,<sup>90</sup> but altruistic surrogacy is allowed.<sup>91</sup> In line with the regulations, a person may advertise or publish stories seeking a person to enter into an altruistic surrogacy arrangement.<sup>92</sup> Further, the altruistic surrogate may be compensated for reasonable expenses including medical costs, earnings lost due to maternity leave, psychological counseling costs, or the premium payments for related insurance claims.<sup>93</sup> While surrogacy contracts are unenforceable under the Act, the law does allow for the reimbursement and payment of costs agreed to

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<sup>83</sup> *Id.* § 2; see SCAG PROPOSAL 2009, *supra* note 49, at 2 (noting that the NSW act had not commenced as of January 2009).

<sup>84</sup> Assisted Reproduction Technology Act, 2007, §§ 43–44 (banning commercial surrogacy and advertising); see SCAG PROPOSAL 2009, *supra* note 49, at 2 (“When commenced the NSW [Assisted Reproduction Technology] legislation will prohibit commercial surrogacy and soliciting commercial surrogacy agreements. . .”).

<sup>85</sup> Assisted Reproduction Technology Act, 2007, § 44.

<sup>86</sup> SCAG PROPOSAL 2009, *supra* note 49, at 1.

<sup>87</sup> Stuhmcke, *supra* note 28, at 13.

<sup>88</sup> Surrogacy Act, 2008, § 1 (W. Austl.) (not in force).

<sup>89</sup> SCAG PROPOSAL 2009, *supra* note 49, at 27–28.

<sup>90</sup> Surrogacy Act, 2008, §§ 8–9 (W. Austl.) (not in force).

<sup>91</sup> See SCAG PROPOSAL 2009, *supra* note 49, at 28 (“[I]t is an offense to undertake . . . a surrogacy arrangement that is for reward.”).

<sup>92</sup> *Id.*

<sup>93</sup> Surrogacy Act, 2008, § 6(3) (W. Austl.) (not in force).

in the agreement.<sup>94</sup> The Surrogacy Act also allows the court to issue orders of parental status for intended parents.<sup>95</sup> Under the Act, the best interests of the child are the primary consideration when ordering parental status.<sup>96</sup> However, the Act establishes a presumption that it is in the “best interests of the child for the arranged parents to be the parents of the child, unless there is evidence to the contrary.”<sup>97</sup>

### 7. *Australian Capital Territory*

In 2004, the Australian Capital Territory (ACT) passed the Parentage Act 2004,<sup>98</sup> which “provides for the parentage of children and for the regulation of substitute parentage agreements in the [Act].”<sup>99</sup> These substitute parentage agreements are essentially surrogacy contracts. Under the Parentage Act, commercial surrogacy is banned.<sup>100</sup> Various restrictions are placed on altruistic surrogacy and it is only available in “very limited circumstances.”<sup>101</sup> Specifically, parental recognition via an altruistic surrogacy is only available when:

- the child was conceived as a result of a procedure (invitro [sic] fertilisation) carried out in the ACT[;]
- neither birth parent of the child is a genetic parent of the child[;]
- there is a substitute parent agreement between the birth parent/s and the substitute parents (the [intended] parents)[;]
- at least one of the substitute parents is a genetic parent of the child[; and]
- the substitute parents live in the ACT.<sup>102</sup>

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<sup>94</sup> Surrogacy Act, 2008, § 7 (W. Austl.) (not in force); SCAG PROPOSAL 2009, *supra* note 49, at 28.

<sup>95</sup> SCAG PROPOSAL 2009, *supra* note 49, at 28.

<sup>96</sup> *Id.*

<sup>97</sup> Surrogacy Act, 2008, § 13(2) (W. Austl.) (not in force); SCAG PROPOSAL 2009, *supra* note 49, at 28.

<sup>98</sup> Parentage Act, 2004 (A.C.T.).

<sup>99</sup> SCAG PROPOSAL 2009, *supra* note 49, at 24.

<sup>100</sup> Parentage Act, 2004, § 41 (A.C.T.); SCAG PROPOSAL 2009, *supra* note 49, at 24.

<sup>101</sup> SCAG PROPOSAL 2009, *supra* note 49, at 24.

<sup>102</sup> *Id.* at 24–25.

While these ACT regulations ensure that the intended parents' rights to the child are protected by requiring a genetic link between one intended parent and forbidding a genetic link with either of the birth parents, the requirement of a genetic link with one intended parent prevents couples who both suffer from infertility from using surrogacy as an option for having a child.

#### 8. Federal Law

While surrogacy is currently governed by the individual state legislatures, Australia's Family Law Act provides that if state laws do not provide otherwise, the child is legally the intended parent's child at birth.<sup>103</sup> Thus, the Australian federal government has exclusive jurisdiction between the birth of the child and the adoption of the child by the intended parents.<sup>104</sup> However, under the current version of the Family Law Act, intended parents do not meet the definition of a parent and cannot be recognized as parents unless they complete the adoption process.<sup>105</sup> Furthermore, under federal Australian law, the intended parents cannot automatically become the child's legal parents because the woman who bears the child is the legal mother.<sup>106</sup> Additionally, in cases where *in vitro* fertilization is used, the husband or partner of the childbearing mother is considered the legal father if he consented to the use of *in vitro* fertilization.<sup>107</sup> If the husband or partner of the childbearing mother did not consent to the use of *in vitro*, no father is specified.

The differing Australian state laws on surrogacy have led to confusion among the citizens of Australia.<sup>108</sup> As a result, former Federal Attorney-General Philip Ruddock proposed legislation and urged states to adopt a national law on surrogate births.<sup>109</sup> In January 2009, the Australian Attorneys-General together with Health and Community Services published *A Proposal for a National Model to Harmonise Regulation of Surrogacy*.<sup>110</sup> Under the proposed model, commercial surrogacy would be prohibited;<sup>111</sup> surrogacy

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<sup>103</sup> Harrison, *supra* note 45, at 27.

<sup>104</sup> Family Law Act, 1975, § 60H (Austl.).

<sup>105</sup> Harrison, *supra* note 45, at 27.

<sup>106</sup> Family Law Act, 1975, § 60H (Austl.); EMMERSON, *supra* note 55, at 15.

<sup>107</sup> EMMERSON, *supra* note 55, at 15.

<sup>108</sup> Cf. Harrison, *supra* note 45, at 27 (noting "the difficulties of . . . [the] challenges" involved with issues of surrogacy).

<sup>109</sup> *Id.*

<sup>110</sup> See generally SCAG PROPOSAL 2009, *supra* note 49.

<sup>111</sup> *Id.* at 4.

arrangements would need to be made before the child is conceived;<sup>112</sup> limited reimbursement, such as a reimbursement for medical treatment, would be allowed;<sup>113</sup> the parties would be required to undertake counseling;<sup>114</sup> and the intended parents would be allowed to apply for a parentage order recognizing the intended parents as the child's only legal parents,<sup>115</sup> provided that the birth parents consent to the order.<sup>116</sup> At the time of publication of this Note, this proposal was open for public comment.<sup>117</sup>

### III. SOCIAL AND POLITICAL ISSUES SURROUNDING SURROGACY

While primitive forms of surrogacy have been practiced since Biblical times, the legal controversy surrounding surrogacy is relatively recent.<sup>118</sup> In fact, of the countries that have introduced legislation on surrogacy, most did not begin discussions on the issue until the 1980s.<sup>119</sup>

Some opponents of surrogacy argue that surrogacy fragments the reproductive process by requiring a mother to give away the child to which she has given birth.<sup>120</sup> The main idea behind this argument is that "the entire process of reproduction is an inherent part of a woman's existence and that transferring a child to someone else upon its birth is unnatural and psychologically damaging."<sup>121</sup>

Supporters of surrogacy counter this argument by stating that all reproductive technologies fragment reproduction, such as fragmenting sexual intercourse from conception with the use of *in vitro* fertilization, and surrogacy should not be unnecessarily targeted because it fragments reproduction by separating childbirth from childrearing.<sup>122</sup> Fragmentation of reproduction may

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<sup>112</sup> *Id.* at 3.

<sup>113</sup> *Id.* at 5.

<sup>114</sup> *Id.* at 6.

<sup>115</sup> *Id.* at 8.

<sup>116</sup> *Id.* at 12.

<sup>117</sup> *Id.* at 2.

<sup>118</sup> Behm, *supra* note 8, at 560.

<sup>119</sup> See Angie Godwin McEwen, Note, *So You're Having Another Woman's Baby: Economics and Exploitation in Gestational Surrogacy*, 32 VAND. J. TRANSNAT'L L. 271, 282-85 (1999) (stating Australia began addressing the issues presented by surrogacy in the mid-1980s and Canadian citizens first addressed surrogacy in 1982); see also Behm, *supra* note 8, at 567 (stating that U.S. state courts began to address the issue of surrogacy in the 1980s).

<sup>120</sup> Rakhi Ruparelia, *Giving Away the "Gift of Life": Surrogacy and the Canadian Assisted Human Reproduction Act*, 23 CAN. J. FAM. L. 11, 26 (2007).

<sup>121</sup> *Id.* at 26.

<sup>122</sup> *Id.* at 28.



not be a negative thing; serving as a surrogate may in fact be an empowering experience for a woman because being pregnant affirms her role as a woman even if she does not wish to raise another child.<sup>123</sup> Moreover, surrogacy supporters argue that a woman's ability to separate her sexuality from her ability to conceive children gives her a greater position in our patriarchal society.<sup>124</sup>

Opponents of surrogacy claim that the process may be harmful to the child born as a result of a surrogacy arrangement.<sup>125</sup> Specifically, opponents argue that the child may struggle with his self-identity because of a lack of customary genealogical family relationships, and a lack of knowledge about his biological history.<sup>126</sup> Opponents further this argument by claiming that by permitting surrogacy arrangements, infertile couples may feel as though they have the right to create a child by surrogacy; when couples feel as though they have a right to create a child, the child is transformed into property of the intended parents, and children should never be considered to be objects, property, or consumer items.<sup>127</sup>

Supporters of surrogacy respond by noting that all forms of assisted reproduction, especially sperm donation, could cause similar difficulties for the children born as a result of its use. For instance, such a child will certainly lose some knowledge about his genetic history. Therefore, surrogacy should not be unfairly targeted. Furthermore, surrogacy contracts can be established in a way similar to open adoption contacts, so that if the child born as a result of the arrangement wishes to contact the surrogate mother, the egg donor, or the sperm donor, she may do so.<sup>128</sup> Additionally, supporters note that children born from surrogacy arrangements will feel no less love from their parents than

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<sup>123</sup> See *id.* at 28 (suggesting that “[i]t may be empowering for women to be able to separate their reproductive capacities from their other roles and identities in society”).

<sup>124</sup> *Id.* (arguing that motherhood is a requirement in our patriarchal society and that fragmenting reproductive process can be source of liberation for women).

<sup>125</sup> See Adam Morton, Editorial, *Case Made for Altruistic Surrogacy*, COURIER MAIL (Austl.) (Nov. 8, 2006), at 22 (listing concerns of self-identity problems and the need for biological histories); see also EMMERSON, *supra* note 55, at 22–25 (discussing various possible psychological effects of surrogacy on a child).

<sup>126</sup> Morton, *supra* note 125, at 22.

<sup>127</sup> Cf. Lynn D. Wardle, *Global Perspective on Procreation and Parentage by Assisted Reproduction*, 35 CAP. U. L. REV. 413, 452 (2006) (stating that “[n]o one has the ‘right’ to create a child by [assisted reproductive technology]” because “[c]hildren are not objects,” “property,” or “consumer items”).

<sup>128</sup> See KINDREGAN & MCBRIEN, *supra* note 6, at 297 (stating that a surrogacy contract should contain a provision regarding confidentiality).

children born or adopted in traditional ways because intended parents who resort to using surrogacy arrangements have longed for a child to love, whereas children conceived as a result of ordinary conception methods might be unwelcome.<sup>129</sup>

While some opponents of surrogacy are against all forms of surrogacy for the aforementioned reasons, others oppose only commercial surrogacy or only altruistic surrogacy. The most widely vilified form of surrogacy is commercial surrogacy.<sup>130</sup> There are two main arguments against commercial surrogacy. One argument is that public policy bans certain types of agreements even if all parties agree to the terms of the agreement.<sup>131</sup> This argument vilifies commercial surrogacy in the same way the sale of children and prostitution are vilified<sup>132</sup> and stresses that surrogacy is a form of labor that should never be exchanged for money.<sup>133</sup> The second argument against commercial surrogacy is that allowing women to essentially “rent their wombs” for compensation will lead to the exploitation of poor, economically vulnerable women.<sup>134</sup> Proponents of this view believe that allowing surrogate mothers to receive compensation would create a market in which poor women would feel pressured to participate.<sup>135</sup> Opponents also argue that allowing commercial surrogacy could lead to a society in which wealthy women use a surrogate

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<sup>129</sup> Cf. EMMERSON, *supra* note 55, at 25 (noting Professor Laura Purdy’s argument that a child would feel more loved than a surrogate child if the “normal” birth child knew that its birth was not intended or a means to some other end).

<sup>130</sup> See Ruparelia, *supra* note 120, at 12 (noting that “[c]oncerns about surrogacy generally have been limited to the commercial context” while arguing that potential problems with altruistic surrogacy may be worse); McEwen, *supra* note 119, at 289 (“[M]ost European countries have laws prohibiting commercial surrogacy . . .”).

<sup>131</sup> McEwen, *supra* note 119, at 291 (noting that “humans represent commodities that cannot be exchanged in a market” and contracts to enter into activities such as slavery and prostitution are legally void).

<sup>132</sup> See *id.* (analogizing surrogacy to the sale of children and prostitution and stating that “human dignity prevents the sale of certain services”).

<sup>133</sup> Alan Wertheimer, *Exploitation and Commercial Surrogacy*, 74 DENV. U.L. REV. 1215, 1218 (1997) (noting an argument against the commodification of some goods but ultimately concluding that commercial surrogacy contracts, while exploitative, can be consensual and mutually advantageous).

<sup>134</sup> *Id.* at 1215 (arguing that some people hold this viewpoint); see Sarmishta Subramanian, *Wombs for Rent*, MACLEAN’S, July 2, 2007, at 40 (asking the question “is it moral to pay the world’s poor to have our children?”).

<sup>135</sup> See Subramanian, *supra* note 134 (noting that surrogacy is another part in a trend of trading the human body wherein the poor sell their kidneys or act as guinea pigs for Western pharmaceutical companies).

because they are either too busy for pregnancy or do not want to ruin their figures.<sup>136</sup>

Commercial surrogacy advocates claim that the majority of surrogacy arrangements are freely entered into by informed adults.<sup>137</sup> Supporters further emphasize that financial compensation for the surrogate mother is a necessity in order to reassure the intended parents that the agreement will be honored.<sup>138</sup> If a surrogate mother is not being paid for her service, she may feel as though she has more discretion to cancel or default on the contract.<sup>139</sup> According to Judge Richard A. Posner, commercial surrogacy “contracts would not be made unless the parties to them believed that surrogacy would be mutually beneficial.”<sup>140</sup>

Advocates also claim that if commercial surrogacy is prohibited, the practice will go underground.<sup>141</sup> To support this argument, they point to practices in the United States where residents of individual states that ban commercial surrogacy go elsewhere or participate in commercial surrogacy arrangements with the hopes that they will not be prosecuted nor need judicial interference.<sup>142</sup>

Supporters of commercial surrogacy also point to the flourishing practice currently emerging in India.<sup>143</sup> India is currently host to an estimated 200 fertility clinics that offer surrogacy.<sup>144</sup> Couples from all over the world travel to India to enter into commercial surrogacy arrangements because the

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<sup>136</sup> See Mindelle Jacobs, Editorial, *Keep Surrogacy Out of Governments' Hands*, OTTAWA SUN, Aug. 31, 2001, at 13 (quoting Dr. Calvin Green, director of the regional fertility program at Calgary's Foothills Hospital, on why paying surrogates would not work in Canada).

<sup>137</sup> See *Outsourcing Life Itself: What India Teaches Us*, MACLEAN'S, July 2, 2007, at 4 (claiming that the commercial surrogacy contracts permitted in India are “an important expression of free choice between informed adults” and should be allowed in Canada).

<sup>138</sup> Cf. Iris Leibowitz-Dori, Note, *Womb for Rent: The Future of International Trade in Surrogacy*, 6 MINN. J. GLOBAL TRADE 329, 344 (1997) (stating that prohibiting surrogacy leaves both parties vulnerable to abuses because they have no legal recourse).

<sup>139</sup> Cf. *id.* (“Intermediary exploitation and dishonesty is effectively granted immunity where the activity is illegal, since the parties lack access to courts of law to enforce the terms of the transaction.”).

<sup>140</sup> Richard A. Posner, *The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood*, 5 J. CONTEMP. HEALTH L. & POL'Y 21, 22 (1989).

<sup>141</sup> Leibowitz-Dori, *supra* note 138, at 343; Jacobs, *supra* note 136, at 13.

<sup>142</sup> See Jacobs, *supra* note 136 (stating that “[b]lack-market arrangements have sprung up in the States that reject surrogacy agreements”).

<sup>143</sup> See Subramanian, *supra* note 134 (discussing the growth of the industry with several anecdotes).

<sup>144</sup> *Id.*

arrangements often carry lower price tags than those performed in the United States.<sup>145</sup> The practice is self-regulated by the clinics.<sup>146</sup> For example, one Indian clinic has developed rules which include only allowing women with children of their own to serve as surrogates, requiring AIDS screenings for both parties, and requiring that the intended parents be heterosexual and unable to have children of their own through other methods.<sup>147</sup> Those who are involved with infertility clinics in India are highly supportive of commercial surrogacy arrangements because they offer lower-class women a way to earn a better life for themselves and their families that would not be possible without the ability to become a surrogate mother for financial compensation.<sup>148</sup> Advocates argue regulations similar to those practiced by some Indian fertility clinics, such as screening potential surrogates, requiring counseling, and requiring proof that the intended parents are unable to have children, could be established by national governments so as to prevent the exploitation of economically vulnerable women.<sup>149</sup> Finally, advocates of commercial surrogacy claim that if the practice is prohibited and forced underground, the exploitation of women is more likely to occur than if the practice is regulated by law because the surrogate mothers would have no legal recourse for abuses.<sup>150</sup>

The Canadian Parliament chose to prohibit commercial surrogacy under the Assisted Human Reproduction Act because Canadians deemed it to be an unacceptable practice.<sup>151</sup> A report preceding the Assisted Human Reproduction Act entitled *Proceed with Care: The Final Report of the Royal Commission on New Reproductive Technologies*, assembled by then Prime

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<sup>145</sup> See *id.* (noting that surrogacy costs in the United States or Canada can exceed \$20,000 whereas in India the costs are between \$5,000 and \$10,000); see also Amelia Gentleman, *India Nurtures Business of Surrogate Motherhood*, N.Y. TIMES, Mar. 10, 2008, at A9 (stating that for many, the attraction to India is the low price of surrogacy where "[t]he cost comes to about \$25,000, roughly a third of the typical price in the United States").

<sup>146</sup> Cf. Subramanian, *supra* note 134 (noting that current guidelines are not binding and that accreditation requirements are forthcoming).

<sup>147</sup> *Id.* (listing specific requirements and noting homosexuality stands in contrast to the religious views of many of those that run the infertility clinics in India). But see Gentleman, *supra* note 145 (giving an example of an Indian clinic that serves homosexual intended parents).

<sup>148</sup> See Subramanian, *supra* note 134 (noting the action of Dr. Patel, a clinic owner).

<sup>149</sup> Jacobs, *supra* note 136.

<sup>150</sup> Leibowitz-Dori, *supra* note 138, at 344.

<sup>151</sup> See *Government Introduces Legislation on Assisted Human Reproduction Including the Creation of a Regulatory Agency*, CAN. NEWSWIRE, May 9, 2002 (quoting Anne McLellan, Minister of Health, as stating, "[the] proposed Act clarifies what we, as a society, find acceptable").

Mister Brian Mulroney, recommended that Parliament prohibit all types of surrogacy because of concerns over “the treatment of women as reproductive vessels and the potential for exploitation and coercion within families.”<sup>152</sup> However, the final version of the Assisted Human Reproduction Act prohibits only commercial surrogacy, conceivably because the Canadian Parliament agreed with the argument that commercializing surrogacy is immoral and can lead to the exploitation of women.<sup>153</sup>

Nations such as Canada that permit altruistic surrogacy arrangements may have a collective view that women are expected to be selfless, natural givers.<sup>154</sup> Additionally, it is argued that these societies tend to value a woman’s role as a childbearer more than her role as an employee.<sup>155</sup> Thus, it is natural for these societies to expect a surrogate mother to feel obligated to help another woman without expecting financial compensation.<sup>156</sup> Along this line of thinking, surrogacy can be analogized to organ donation, an act that is one of the greatest forms of selflessness when done without financial compensation but is vilified when financial compensation is involved.<sup>157</sup>

In contrast, not all nations that regulate forms of surrogacy prohibit commercial surrogacy while permitting altruistic surrogacy.<sup>158</sup> For example, Israel allows for commercial surrogacy so long as the surrogate mother is not related to the intended parents, and Indian national guidelines allow a surrogate mother to be compensated but forbid close friends or relatives from acting as surrogates.<sup>159</sup> Opponents of altruistic surrogacy argue that the

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<sup>152</sup> Ruparelia, *supra* note 120, at 22.

<sup>153</sup> See Andre Picard, *Reproduction Watchdog Overdue for Delivery*, GLOBE & MAIL (Toronto), Apr. 20, 2006, at A19 (arguing that as a Canadian citizen, he feels commercialization of assisted human reproduction serves only “a few unscrupulous quasi-scientific entrepreneurs” and government intervention is a welcome solution to problem).

<sup>154</sup> Cf. Ruparelia, *supra* note 120, at 29 (discussing ways in which society expects women to be inherently altruistic).

<sup>155</sup> *Id.* at 27–28 (quoting G. COREA, *THE MOTHER MACHINE* 222 (1985)).

<sup>156</sup> See *id.* at 30 (arguing that “[w]omen are not only expected to embrace the opportunity to become a mother[, but] . . . they should also help other women attain this noble role as well”).

<sup>157</sup> See *id.* at 22 (quoting Health Canada’s view that altruistic surrogacy is in keeping with Canada’s tradition of donating, rather than selling, organs for use by those in need).

<sup>158</sup> *Id.* at 23–25 (discussing restrictive countries like Germany and Sweden, more liberal countries like the United States and unique approaches by Israel and India).

<sup>159</sup> *Id.* at 24–25 (noting that both countries prohibit family members from acting with surrogates and that India requires compensation); see KINDREGAN & MCBRIEN, *supra* note 6, at 185–86 (discussing Israel’s prohibition of surrogacy within familial bloodlines); *Outsourcing Life Itself: What India Teaches Us*, *supra* note 137 (noting Israel’s ban on familial surrogacy and India’s permissive view on commercial surrogacy).

process is just as reprehensible, if not more so, as commercial surrogacy because family members and close friends are more likely to be coerced into serving as surrogate mothers against their wishes.<sup>160</sup> Professor Rakhi Ruparelia points to the same reasons that advocates use to support altruistic surrogacy as the main reason why it can lead to the exploitation of women.<sup>161</sup> Ruparelia argues that because women are expected to be naturally altruistic and are often financially dependent on their families, they are more susceptible to being coerced into serving as a surrogate for a family member than for a stranger.<sup>162</sup> Opponents also say that altruistic surrogacy should not be analogized to organ donation because surrogacy is not a life-saving service.<sup>163</sup> Further, opponents argue that because only women, and not men, can serve as surrogates, potential surrogates—women—are more vulnerable to the risk of coercion into surrogacy without pay by patriarchal society.<sup>164</sup>

Canada views altruistic surrogacy as a beneficial solution to infertility and thus altruistic surrogacy is not prohibited under the Assisted Human Reproduction Act.<sup>165</sup> Health Canada, “the Federal department responsible for helping Canadians maintain and improve their health . . . ,”<sup>166</sup> specifically analogizes altruistic surrogacy with organ donation, stating that it “is in keeping with . . . the practice whereby human organs or tissues are donated, rather than sold or purchased, for the use of those in need.”<sup>167</sup> While the Assisted Human Reproduction Act was intended to protect women,<sup>168</sup> Parliament clearly thought that women who meet the standards required by the Act need not be protected from their own altruistic nature.<sup>169</sup>

Australians can be thought to have similar views on surrogacy as Canadians, specifically a slow growing acceptance of altruistic surrogacy.<sup>170</sup>

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<sup>160</sup> See Ruparelia, *supra* note 120, at 35–43 (discussing how a women’s role within her family and society leaves her susceptible to coercion by family members).

<sup>161</sup> *Id.* at 13.

<sup>162</sup> *Id.* at 35–36.

<sup>163</sup> *Id.* at 38.

<sup>164</sup> See *id.* at 37 (arguing that women are more motivated by perceived family obligations, feelings of guilt, and a need to rectify past wrongs to the family than are men).

<sup>165</sup> Assisted Human Reproduction Act, 2004 S.C., ch. 2, § 12(1) (Can.).

<sup>166</sup> About Health Canada, <http://www.hc-sc.gc.ca/ahc-asc/index-eng.php> (last visited Mar. 19, 2009).

<sup>167</sup> Ruparelia, *supra* note 120, at 22.

<sup>168</sup> Assisted Human Reproduction Act, 2004 S.C., ch. 2, § 2(c) (Can.).

<sup>169</sup> See *id.* § 12(1) (providing restriction on altruistic surrogacy but allowing it).

<sup>170</sup> Cf. Stuhmcke, *supra* note 28, at 8 (noting a slow, growing legislative approval of altruistic surrogacy).

This view is evidenced by some of the recent changes in Australian state and territory laws on surrogacy that show a growing support for altruistic surrogacy but a continued skepticism for commercial surrogacy.<sup>171</sup>

#### IV. THE EFFECTS OF CANADA'S ASSISTED HUMAN REPRODUCTION ACT ON SURROGACY ARRANGEMENTS WITHIN CANADA AND WORLDWIDE

Even three years after Canada passed the Assisted Human Reproduction Act, the true effects of the Act have yet to be seen.<sup>172</sup> The absence of any true effect of the law may be due to the burdensome and time-consuming process of creating regulations.<sup>173</sup> Some of the additional regulations the Agency is developing include regulations on the licensing of medical professionals who will provide the assisted reproduction procedures listed under the Act<sup>174</sup> and regulations on any possible counseling requirements for those seeking reproduction services.<sup>175</sup> Members of the Agency claim that the required regulations will take time to develop because the government wants to make sure that Canadians have a say in the area of assisted reproduction.<sup>176</sup>

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<sup>171</sup> See SCAG PROPOSAL 2009, *supra* note 49, at 24–32 (discussing recent changes and the current status of surrogacy laws in Australian states and territories).

<sup>172</sup> See *Law Against Paying Egg Donors Drives Couples to U.S.*, CBC NEWS, Apr. 30, 2007 (describing how Canadians are still unsure about what acceptable assisted reproduction practices are in Canada).

<sup>173</sup> Gloria Galloway, *Fertility Board Officer Wards Off Criticism*, GLOBE & MAIL (Toronto), May 22, 2007, at A4; cf. Health Canada, Healthy Living, Regulatory Development Process, <http://www.hc-sc.gc.ca/hl-vs/reprod/hc-sc/legislation/reg-eng.php> (last visited Mar. 19, 2009) (listing the main steps of the regulatory process).

<sup>174</sup> Assisted Human Reproduction Act, 2004, c. 2, § 10 (2004); see HEALTH CANADA, MEETING REPORT, WORKSHOP ON LICENSING AND REGULATION OF CONTROLLED ACTIVITIES UNDER AHR ACT AND THE OBLIGATIONS OF LICENSEES REGARDING HEALTH REPORTING INFORMATION (2007) (discussing workshops held by Health Canada to gather information on A activities to support the development of regulations under the Assisted Human Reproduction Act), available at [http://www.hc-sc.gc.ca/hl-vs/alt\\_formats/hpb-dgps/pdf/reprod](http://www.hc-sc.gc.ca/hl-vs/alt_formats/hpb-dgps/pdf/reprod). Controlled activities include obtaining, semen and sperm clinically retrieving sperm, processing semen and sperm, controlled ovarian hyperstimulation, oocyte retrieval, oocyte processing, *in vitro* fertilization (IVF) with insemination, IVF with intracytoplasmic sperm injection, *in vitro* embryo culture and assessment, and *in vitro* embryo transfer. *Id.* at 3. Topics discussed included the licensing of controlled activities and licensing administration. *Id.* at 16–20, 22–24.

<sup>175</sup> See HEALTH CANADA, WORKSHOP REPORT, PATIENT COUNSELING QUESTIONNAIRE SUMMARY (2006), available at [http://www.hc-sc.gc.ca/hl-vs/alt\\_formats/hpb-dgps/pdf/reprod/April-avril\\_28-06-counsel-eng.pdf](http://www.hc-sc.gc.ca/hl-vs/alt_formats/hpb-dgps/pdf/reprod/April-avril_28-06-counsel-eng.pdf) (discussing general preferences, intent, and concern shared by various parties regarding counseling requirements under the Act).

<sup>176</sup> Galloway, *supra* note 173.

The Assisted Human Reproduction Act has created a great deal of uncertainty in Canadian law.<sup>177</sup> For instance, while it is clear that compensating egg donors is prohibited in Canada,<sup>178</sup> it is unclear whether a Canadian couple may purchase an egg in a foreign country and bring it back for implementation in Canada.<sup>179</sup> Some Canadians feel that although the Act is a national law, it is not going to stop infertile couples from doing almost anything necessary to have a child of their own.<sup>180</sup> For example, because intended parents are unsure of what constitutes "an expenditure incurred . . . in relation to . . . surrogacy,"<sup>181</sup> some intended parents chose to make payments to the surrogate mother in cash to avoid a paper trail and subsequent prosecution.<sup>182</sup> Intended parents are also choosing to go without surrogacy contracts for the fear of prosecution under the Assisted Human Reproduction Act and as a result, con-artists posing as potential surrogate mothers have the opportunity to defraud the intended parents.<sup>183</sup>

Some research on the effects of Canada's Assisted Human Reproduction Act suggests that because Canada is one of the few countries to have national regulations on surrogacy, it has become a destination for infertile couples, especially those from countries where the practice is prohibited such as France, Italy, Sweden, and parts of Australia.<sup>184</sup> Joanne Wright, owner of Canadian Surrogacy Options, Inc., a Canadian business that helps intended parents

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<sup>177</sup> See *Law Against Paying Egg Donors Drives Couples to U.S.*, *supra* note 172 (stating "[n]o one is sure how far the Canadian law reaches"); see also *Canada AM* (CTV Television television broadcast Sept. 19, 2007) (interviewing a Canadian couple and a surrogacy attorney who describes the uncertainty of legal barriers surrounding the surrogacy process).

<sup>178</sup> Assisted Human Reproduction Act, 2004 S.C., ch. 2, § 7(1) (Can.).

<sup>179</sup> See *Law Against Paying Egg Donors Drives Couples to U.S.*, *supra* note 172 (discussing the experience of one couple).

<sup>180</sup> See Scott Tracey, *Surrogates Will Continue, with or Without Government Endorsement*, GUELPH MERCURY (Ontario), Apr. 29, 2004, at A3 (interviewing a Canadian surrogate mother who thinks the Act will do nothing to stop surrogacy agreements).

<sup>181</sup> See Assisted Human Reproduction Act, 2004 S.C., ch. 2, 12(1)(c) (Can.) (prohibiting such an expense).

<sup>182</sup> See *Gazze*, *supra* note 24 (stating Canadians are not sure what is an acceptable expense and some surrogates accept cash to earn more money than allowed by law); *Paid Surrogacy Driven Underground in Canada: CBC Report*, CBC NEWS, May 1, 2007 (discussing how Canadian couples want to pay their surrogates and do so with cash and gifts despite the risk of prosecution).

<sup>183</sup> Cf. *Paid Surrogacy Driven Underground in Canada: CBS Report*, *supra* note 182 (discussing anecdotal accounts of couples forgoing contacts and being "ripped off").

<sup>184</sup> *Gazze*, *supra* note 24.



connect with potential surrogates,<sup>185</sup> estimates that from 2002 to 2007, the number of international couples traveling to Canada to enter into surrogacy arrangements has more than doubled.<sup>186</sup> According to MAIA, a French association that supports infertile couples in France, between 200 and 400 couples from France have traveled to either the United States or Canada for surrogacy arrangements.<sup>187</sup> Some of those couples chose a Canadian surrogate mother over an American for social or political reasons. For example, one French couple stated that they chose Canada over the United States because the Canadian “mentalities are more similar to [theirs].”<sup>188</sup> A second reason why international couples suffering from infertility travel to Canada to enter into surrogacy arrangements is the benefit of the Canadian health care system.<sup>189</sup> In Ontario, the cost of prenatal care and the cost of delivery are paid for by the province, and if the surrogate mother is a resident and meets the ministry’s eligibility requirements for health insurance coverage, the intended parents will not have to pay these expenses.<sup>190</sup>

Adding to the grey area surrounding surrogacy in Canada, is the Assisted Human Reproduction Act’s failure to address the questions of presumed parenthood and custody of the child.<sup>191</sup> Because the Act fails to regulate these matters, they are left up to individual province or territorial regulation.<sup>192</sup> The presumption of parenthood is an issue under a surrogacy arrangement because of the current legal convention to register the woman who gave birth as the child’s mother.<sup>193</sup> Being listed as the child’s parent on the birth registration is important in Canada because those listed can enroll the child in school, obtain a passport for the child, and assert other parental rights under the law, unless the intended parents go through the formal adoption process.<sup>194</sup> If the surrogate mother is listed as the mother of the child, the intended parents have

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<sup>185</sup> Tracey, *supra* note 180.

<sup>186</sup> Gazze, *supra* note 24.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> Angela Campbell, *Conceiving Parents Through Law*, 21 INT’L J.L. POL’Y & FAM. 242, 248 n.21 (2007).

<sup>192</sup> *Rypkema v. British Columbia*, [2003] B.C.J. No. 272, 2003 BC.C. LEXIS 4820, at \*4–8 (B.C.S.C. Nov. 28, 2003) (discussing four Canadian cases from various provinces involving parental rights over children born from surrogates before concluding that the British Columbia court has jurisdiction to make binding declarations of maternity).

<sup>193</sup> Campbell, *supra* note 191, at 251.

<sup>194</sup> *Rypkema*, BC.C. LEXIS 4820, at \*12.

to go through the lengthy and costly process of adoption to obtain legal rights to the child.<sup>195</sup>

In *Rypkema v. British Columbia*, a case decided while legislation for the Assisted Human Reproduction Act was pending but before the Act was passed, the Director of the Vital Statistics Agency refused to list the intended parents as the legal parents of a child born out of a gestational surrogacy arrangement.<sup>196</sup> The surrogate mother consented both before and after the birth of the child that the intended parents should be the legally recognized parents.<sup>197</sup> The court concluded that because this was not a case where the parental rights of the intended parents were being questioned by the surrogate mother, it was appropriate for the intended parents to be listed as the parents of the child on the birth registration of the Vital Statistics Agency.<sup>198</sup> The intended parents were therefore not required to go through the process of adopting the child.

Similarly, the Ontario Superior Court of Justice in *J.R. v. L.H.* declared that the intended parents who were also the genetic parents in an uncontested gestational surrogacy arrangement were the legal parents of the child.<sup>199</sup> Because the Assisted Human Reproduction Act makes no mention of a presumption of parental status, *Rypkema* and *J.R.* are, presumably, still good law. In *Re M.D.*, a case filed after the issuance of the Assisted Human Reproduction Act, the Ontario Superior Court of Justice granted custody to the intended parents, declared the intended parents to be the mother and father of the child, and directed the Deputy Registrar to amend the registration of the birth of the child to show that the intended parents were the mother and father.<sup>200</sup>

However, it must be noted that the decisions in *Rypkema* and *J.R.* are very limited; neither of these cases involved a dispute between the surrogate mother and the intended parents, and the arrangements were for gestational surrogacy, so the surrogate mothers were not genetically related to the children.<sup>201</sup> In fact, the *J.R.* court noted that if the status of the intended parents was opposed by

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<sup>195</sup> See *id.*

<sup>196</sup> *Id.* at \*1.

<sup>197</sup> *Id.* at \*2-3.

<sup>198</sup> *Id.* \*11-12.

<sup>199</sup> *J.R. v. L.H.* [2002] O.J. No. 3998, 2002 ON. C. LEXIS 799 (O.S.C.J. Sept. 3, 2002).

<sup>200</sup> *Re M.D.* [2008] O.J. No. 07, 2008 ON. C. LEXIS 1147, at \*1, 36 (O.S.C.J. Mar. 10, 2008).

<sup>201</sup> See Campbell, *supra* note 191, at 251.

the surrogate mother, whether the court could award legal parental status to the intended parents would be unclear.<sup>202</sup>

When the surrogate mother objects to the intended parents becoming the legal parents of the child, at least one Canadian court did not recognize a presumption of parental status for the intended parents.<sup>203</sup> The case of *H.L.W. and T.H.W.* involved a traditional surrogacy arrangement where the surrogate mother's own egg was used for conception.<sup>204</sup> After the child had lived with the intended parents for three months, the surrogate mother contested the adoption of the child by the intended mother and requested custody of the child.<sup>205</sup> In an interim decision to determine custody prior to trial, Master Donaldson of the Supreme Court of British Columbia stated that the test for determining who had parental rights and custody of the child is to ask what is the best for the child.<sup>206</sup> In applying this test, the court subordinated the disputed terms of the surrogacy arrangement between the intended parents and the surrogate mother to the best interests of the child.<sup>207</sup> The court also notes that there is not an overriding presumption that the genetic mother should be granted sole custody.<sup>208</sup> Applying the best interests of the child test, the court granted interim sole custody to the intended parents until the impending trial could take place, wherein a clinical psychologist could establish which household, or both, would be best for the child.<sup>209</sup> As of July 2008, there has been no other case law regarding the parental status of similarly situated intended parents.

Because Canada's Assisted Human Reproduction Act makes no mention of the parental rights of intended parents, Canadian attorneys have had to attempt to foresee which provisions in surrogacy contracts will be upheld by courts. Larry Kahn, a lawyer from Richmond, British Columbia, is one of a few

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<sup>202</sup> See *J.R.* 2002 ON. C. LEXIS. 799, at \*8–9 (stating that the Judge would have to consider whether Children's Law Reform Act would allow declaration that there is more than one mother).

<sup>203</sup> See *H.L.W. & T.H.W.*, [2005] B.C.J. No. 2616, 2005 BC.C. LEXIS 3326, at \*7 (B.C.S.C. Nov. 29, 2005) (subordinating the terms of the surrogacy arrangement to the best interest of the child). In its interim opinion, the court did grant sole custody to the intended parents, but not due to a presumption. *Id.* Subsequent research could not locate the court's final order.

<sup>204</sup> *Id.* at \*2.

<sup>205</sup> *Id.* at \*1, 11.

<sup>206</sup> *Id.* at \*7.

<sup>207</sup> *Id.* at \*10–11.

<sup>208</sup> *Id.* at \*18–19.

<sup>209</sup> *Id.* at \*19–21.

lawyers in Canada who drafts surrogacy contracts.<sup>210</sup> All of Kahn's surrogacy contracts include a requirement that the surrogate mother receive appropriate medical testing such as testing for sexually transmitted diseases and psychological testing; a requirement that the surrogate mother follow the advice of her obstetrician; a statement of the maximum number of children the intended parents want from the pregnancy and a requirement that any embryos above the desired number will be removed; a requirement that diseased embryos will be removed; and a statement that although the surrogate mother will be the legal mother at birth, she will give up custody and parental rights to the intended parents.<sup>211</sup> Kahn's surrogacy contracts cost up to \$2,500 Canadian to be drafted, adding to the already expensive price tag of surrogacy arrangements.<sup>212</sup>

While the Canadian courts have not yet decided cases under the Assisted Human Reproduction Act, the Act will certainly help the individual Canadian courts to make uniform decisions regarding surrogacy arrangements.

#### V. THE EFFECTS OF AUSTRALIA'S INDEPENDENT STATE REGULATION ON SURROGACY ARRANGEMENTS IN AUSTRALIA AND WORLDWIDE

The individual state regulation of surrogacy in Australia has lead to the adoption of non-uniform regulations.<sup>213</sup> Adding to Australian citizens' confusion about surrogacy laws is the jurisdiction of the federal government to decide parental status under the Family Law Act during the time between birth and the adoption of the child by the intended parents.<sup>214</sup> While surrogacy and adoption are both governed by state law, if the state law fails to recognize the intended parents as the parents at birth, the time between birth and adoption will be governed by federal law under the Family Law Act.<sup>215</sup> This is problematic because under the Family Law Act neither of the intended parents would be considered the child's parents until they complete the adoption process.<sup>216</sup>

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<sup>210</sup> *Gazze, supra* note 24.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> See Stuhmcke, *supra* note 28, at 8-18 (discussing individual state's regulations on surrogacy).

<sup>214</sup> Cf. Harrison, *supra* note 45, at 27 (noting the interplay between the several state laws and the federal surrogacy law).

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

In addition, the confusion about which forms of surrogacy are permitted under the differing state laws, and the strict regulation of surrogacy, has led some Australians to engage in “surrogacy shopping,” where a couple travels to another state or country in order to legally enter into a surrogacy arrangement.<sup>217</sup> Notable Australians, such as Labor Senator Stephen Conroy and his wife Paula Benson, who live in Melbourne, Victoria, have traveled to different states in order to enter into surrogacy arrangements.<sup>218</sup> Some infertile Australian couples seeking to enter into surrogacy arrangements have traveled to the United States because commercial surrogacy contracts are legal in some states, such as California.<sup>219</sup> As early as 1996, an estimated ten children born from surrogacy arrangements facilitated by a California agency were living in Australia.<sup>220</sup>

While Queensland’s Surrogate Parenthood Act of 1988 criminalizes all forms of surrogacy, the Act has led to surrogacy shopping among its citizens and has failed to completely eliminate the practice in Queensland.<sup>221</sup> Residents of Queensland have nevertheless entered into surrogacy arrangements.<sup>222</sup> These acts have resulted in several prosecutions, but the punishments have been mild.<sup>223</sup> The first case decided under Queensland’s Surrogate Parenthood Act was tried in 1991.<sup>224</sup> The case involved two women who were accused of entering into a surrogacy contract for a fee of \$10,000 Australian.<sup>225</sup> The details of the case were kept from the media, but it is believed that neither

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<sup>217</sup> See *id.* (discussing a high profile case of surrogacy shopping).

<sup>218</sup> *Id.*; Phillip Coorey, *Secret’s Out but Mum’s the Word on Surrogacy*, SYDNEY MORNING HERALD (Austl.), Nov. 8, 2006, at 3; Phillip Coorey, *Surrogate Mothers for MP’s Baby*, SYDNEY MORNING HERALD (Austl.), Nov. 7, 2006, at 1.

<sup>219</sup> See EMMERSON, *supra* note 55, at 15–16 (stating that to get around the legal difficulties of surrogate motherhood in Australia, people go overseas and that surrogacy centers in California have helped Australians).

<sup>220</sup> *Id.* at 16.

<sup>221</sup> WOMEN AND THE CRIMINAL CODE, ch. 9, pt. 3 (2004), [http://www.women.qld.gov.au/\\_Documents/docs+prior+to+2004/Chapter\\_9.pdf.pdf](http://www.women.qld.gov.au/_Documents/docs+prior+to+2004/Chapter_9.pdf.pdf) (noting that in 1991 a child was born from an informal surrogacy arrangement and both the surrogate mother and intended mother were charged under the Act but were discharged without a recorded conviction). See generally EMMERSON, *supra* note 55, at 38–41 (discussing various charges of violating the law and public support for a change in the law).

<sup>222</sup> EMMERSON, *supra* note 55, at 15–17, 38–40.

<sup>223</sup> See, e.g., *id.* at 38–39 (noting a one hundred dollar fine and six month good behavior bond in one case, and a “dischard[ ] with no penalty and no conviction” in another).

<sup>224</sup> *Id.* at 38.

<sup>225</sup> *Id.*

woman was fined nor imprisoned.<sup>226</sup> In 1992, another two women were charged under the Surrogate Parenthood Act for arranging a surrogacy contract.<sup>227</sup> Both of the women pled guilty to the surrogacy charges and an additional charge of falsifying a birth certificate.<sup>228</sup> Even though the women pled guilty, the court discharged them on the surrogacy offenses and fined them only \$100 Australian dollars and placed them on six months good behavior bonds for falsifying the birth certificate.<sup>229</sup> In 1993, the first doctor was charged under the Surrogate Parenthood Act for assisting a surrogacy arrangement, but the doctor was only placed on a \$2,000, two-year good behavior bond, and no conviction was recorded.<sup>230</sup>

While Queensland's Surrogate Parenthood Act stands against the growing acceptance of surrogacy among Australians, little action has been taken to attempt to revise the Act.<sup>231</sup> The lack of action is perhaps due to expectations that there will soon be a national law regulating surrogacy.<sup>232</sup>

The Australian Capital Territory, which perhaps has the most surrogacy friendly laws in Australia, was the first Australian jurisdiction to have a legally registered surrogacy arrangement and birth.<sup>233</sup> In 1996, a child was born under an altruistic surrogacy arrangement and adopted by the intended parents.<sup>234</sup> Additionally, in 1996 alone, fourteen women from around Australia traveled to Canberra, located in the Australian Capital Territory, with surrogate mothers in order to begin surrogacy arrangements.<sup>235</sup>

Australians have devised methods other than traveling to foreign states or nations in order to engage in surrogacy arrangements. Such methods include having the surrogate mother enter the hospital under the name of the intended mother, thus falsifying the birth certificate, an illegal act.<sup>236</sup> The willingness of surrogate mothers and intended parents to face criminal prosecution

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<sup>226</sup> See *id.* at 38–39 (stating that the women were discharged unconditionally).

<sup>227</sup> *Id.* at 39.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> See *id.* at 37–41 (describing several requests to review Queensland's legislation on surrogacy with no changes being made).

<sup>232</sup> *Id.* at 40.

<sup>233</sup> Stuhmcke, *supra* note 28, at 16–17.

<sup>234</sup> *Id.* at 17.

<sup>235</sup> See EMMERSON, *supra* note 55, at 15–16 (noting statements by the Head of the Canberra Infertility Centre, Dr. Martyn Stafford-Bell).

<sup>236</sup> *Id.* at 15.

demonstrates the lengths Australians are willing to go to have a child through surrogacy.

The legal restrictions on surrogacy in place in many of the Australian jurisdictions have resulted in very little recorded information regarding the surrogacy arrangements that actually do occur.<sup>237</sup> This means that children born from surrogacy arrangements who may eventually wish to contact their surrogate mother or biological father, either for personal or medical reasons, may face difficulty in locating their genetic parents.<sup>238</sup> A fear of recording information about surrogacy arrangements may also mean that those interested in surrogacy may be denied beneficial counseling prior to and after fulfillment of the arrangement.<sup>239</sup>

The prohibition of surrogacy by some Australian jurisdictions and the lack of legislation on the topic by others has also led to confusion about the outcome of litigation arising out of surrogacy arrangements.<sup>240</sup> The first reported court decision on parental rights arising out of a surrogacy arrangement in Australia was *Re Evelyn*, which involved a dispute between the intended parents and the surrogate mother over custody and visitation rights of the child.<sup>241</sup> Specifically, the Family Court of Australia was forced to decide whether to grant custody of the child born out of a traditional, altruistic surrogacy arrangement to the intended parents (the biological father and his wife) or to the surrogate mother (also the biological mother) and her husband.<sup>242</sup> In this case, the child had been living with the intended parents for a period of time when the surrogate mother changed her mind and took the child from the intended parent's household.<sup>243</sup> In making the decision, the court noted that under a surrogacy arrangement there is "no presumption in favour of a biological parent."<sup>244</sup> Rather, the court relied heavily on expert testimony about the effects of living with each family would have on the child.<sup>245</sup> The court determined that the best situation would be for the child to live permanently with her biological mother (the surrogate mother) and have

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<sup>237</sup> *Id.* at 25.

<sup>238</sup> *See id.* (stating that information on the biological origins of the child, which could be important later in life, may not be collected because of legal restrictions).

<sup>239</sup> *Id.*

<sup>240</sup> *See generally* Stuhmcke, *supra* note 28, at 22–26 (describing Australian court decisions regarding surrogacy related issues).

<sup>241</sup> *Re Evelyn* (1998) 23 Fam. L.R. 53 (Austl.); Stuhmcke, *supra* note 28, at 22–23.

<sup>242</sup> *Re Evelyn* 23 Fam. L.R. 53 (Austl.).

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

some visitation with the intended parents.<sup>246</sup> The court relied on expert testimony that supported the idea that living with the biological mother would best help the child deal with the complicated situation of being born out of a surrogacy arrangement; specifically, dealing with issues of self-identity, feelings of rejection, and sexuality.<sup>247</sup> The most notable part of the decision was the court's careful rejection of the idea that any Australian law required the court to grant custody to the biological mother.<sup>248</sup> Rather the court was careful to note that their decision was solely based on the best interest of the child.<sup>249</sup>

In a second case concerning the adoption of a child born out of a surrogacy arrangement, *Re A and B*, the court recognized that altruistic surrogacy arrangements were permitted in New South Wales.<sup>250</sup> However, Judge Bryson explicitly stated that while he recognized that the court must allow the adoption under the current law, "[i]t would be incorrect to interpret this decision as expressing approval or endorsement of surrogate parenthood, or as expressing a general readiness to ratify surrogacy arrangements with adoption orders."<sup>251</sup> This disconnect between the court's holding and Judge Bryson's explicit disapproval of surrogacy only adds to the confusion surrounding the outcome of surrogacy litigation.

In dealing with parental rights arising out of surrogacy agreements, Australian courts have called for legislative reform to answer questions not yet addressed in legislation or case law.<sup>252</sup> In *Re Mark*, the court noted that further legislation was needed to decide the extent of parental rights that should be granted to an intended father when a child was born as a result of an overseas commercial surrogacy arrangement in which the intended parents were a homosexual couple.<sup>253</sup> Specifically, the court noted the need for an updated definition of the term "parent" in the Family Law Act of 1975 and in other acts that regulate adoption procedures, so as to assist courts in deciding who may

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<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> *Re A and B* (2000) 26 Fam. L.R. 317 (Austl.).

<sup>251</sup> Stuhmcke, *supra* note 28, at 23–24 (quoting *Re A and B*, (2000) 26 Fam. L.R. 317 (Austl.)).

<sup>252</sup> *Id.* at 24; see *Re Mark* (2003) 179 F.L.R. 248, 260 (Austl.) (observing that "[t]he rights and responsibilities . . . which arise from particular artificial conception procedures are a matter for legislatures").

<sup>253</sup> *Re Mark*, 179 F.L.R. at 260.



become the legal parent of a child born under a surrogacy arrangement.<sup>254</sup> After a lengthy discussion on the definition of the term “parent,” the court decided to grant parental rights to the intended father, whose sperm was used for the conception of the child even though the Family Law Act of 1975 had been interpreted in other cases to specify that sperm donors should not be considered the legal parents of children born as a result of their donation.<sup>255</sup> The court also went on to grant legal parental rights to the homosexual partner of the genetic father because the court recognized that if the genetic father were to die, the child would be left without a legal parent and therefore it is in the child’s best interest to have two legal parents.<sup>256</sup>

## VI. CONCLUSION

This Note addressed the policy behind and the effects of Canadian and Australian legislation on surrogacy. In conclusion, when comparing Canada’s national act regulating surrogacy to Australia’s independent state regulation of surrogacy, Canada’s Assisted Human Reproduction Act, while not without its own problems, has better recognized its citizens’ acceptance of altruistic surrogacy arrangements. Moreover, Canada’s Assisted Human Reproduction Act is better at both regulating surrogacy and avoiding confusion amongst citizens than Australia’s independent state and territory regulations.

While Canada’s Assisted Human Reproduction Act is in need of additional regulations on matters such as the licensing of medical professionals,<sup>257</sup> counseling services,<sup>258</sup> monetary payments to egg donors beyond Canadian borders,<sup>259</sup> and parental rights,<sup>260</sup> the Act is a step in the right direction by providing Canadian citizens with the information they need in order to legally enter into surrogacy arrangements. Similar to the Canadian mentality, Australian citizens are expressing a growing acceptance of surrogacy as a solution to infertility,<sup>261</sup> and in response, many Australians have called out for national legislation on the practice.<sup>262</sup> Therefore, Australia would be best

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<sup>254</sup> *Id.*

<sup>255</sup> *Id.* at 255–60.

<sup>256</sup> *Id.* at 262–63.

<sup>257</sup> See *supra* note 174 and accompanying text.

<sup>258</sup> See *supra* note 175 and accompanying text.

<sup>259</sup> *Law Against Paying Egg Donors Drives Couples to U.S.*, *supra* note 172.

<sup>260</sup> See Campbell, *supra* note 191, at 248–59 (discussing the varying definition of parenthood under Canadian law).

<sup>261</sup> Stuhmcke, *supra* note 28, at 26 (analyzing Australia’s “steady acceptance of surrogacy”).

<sup>262</sup> See, e.g., Janelle Miles, *Carrying Her Hopes — Surrogacy Is Only Way for CF Patient*,

served by implementing national legislation on surrogacy similar to Canada's Assisted Human Reproduction Act.

Noting that most Australian jurisdictions show a growing acceptance of altruistic surrogacy but a continued skepticism of commercial surrogacy,<sup>263</sup> Australia would benefit most from national legislation which permits altruistic surrogacy but prohibits commercial surrogacy. Learning from the loopholes in Canada's Assisted Human Reproduction Act, Australian legislation should include specific provisions on what types of payments may be made to surrogate mothers and specific methods for tracking and reporting such payments. Furthermore, the Australian legislation should include specific requirements for who may serve as a surrogate mother, such as only women who have previously given birth. Additionally, the Australian legislation should provide specific qualifications for determining who may enter into surrogacy arrangements as the intended parents. These qualifications need to address issues such as whether to allow only those couples who are clinically infertile and whether to allow homosexual couples to enter into surrogacy arrangements. The Australian legislation should also provide for specific requirements for the surrogate mother and the intended parents prior to and during the surrogacy arrangement such as counseling and medical testing and specific methods for making sure these requirements are met. Finally, perhaps the most significant ambiguity in the Canadian legislation, parental rights, should be addressed in Australian national legislation. Specifically, the legislation should either grant the intended parents legal rights to the child at the time of birth or the legislation regulating adoption should be amended to provide specific methods for the intended parents in a surrogacy arrangement to adopt the child. In sum, the Australian Parliament, in crafting surrogacy legislation, would greatly benefit from the study of the effects of Canada's Assisted Human Reproduction Act.

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COURIER MAIL (Austl.), June 16, 2007, at 3 (discussing the story of a would-be-parent).

<sup>263</sup> See Stuhmcke, *supra* note 28, at 26 (noting the growing trend in Australia to accept altruistic surrogacy, but not necessarily arguing for its legalization).