CONTRACTING THE NEW DELHI BELLY:

Responding to the Practice of International Surrogacy

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Table of Contents

Introduction

"Born in India, Nowhere to Belong" – These words were used to describe the infamous Balaz case, words which continue to haunt the practice of international surrogacy and words which underpin the very concerns of this paper.[1] The recent glamour surrounding the birth of Elton John's first child as a result of international surrogacy overshadows the complex nature of this cross-border practice. International surrogacy is not governed by international regulation nor do domestic laws exhibit coherency with regard to legal parenthood. Against this background conflicts of law arise and the result; a stateless child.[2]

Globalisation and technological advances have facilitated the practice of international surrogacy as internet access enables connections to be made between commissioning parents and willing surrogates.[3] As a result New Zealanders are not insulated from this increasingly popular phenomenon. This paper will respond to the reality that international surrogacy has reached our doorsteps as indicated by an article published in 2011 by One News "New Zealanders desperate to create a baby are heading overseas and paying up to $100,000 to hire a womb, unaware that their children could end up stateless."[4]

India forms the case study for this paper as the unprecedented growth of the Indian fertility market has resulted in it becoming a surrogacy hotspot.[5] In addition to this the laws determining parenthood in New Zealand starkly contrast with the approach taken in India.[6] With regard to surrogacy, the commissioning couple in India are recognised as the child's legal parents whereas in New Zealand the surrogate is considered the legal parent. Culminating from these two observations is the prediction that New Zealand citizens, desperate to fulfil their dreams of having a family will become embroiled in a lengthy legal battle to obtain citizenship for their child born to an Indian surrogate.

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[1] "Born in India, Nowhere to Belong" *The Times of India* (online ed, India, 18 September 2009); *Jan Balaz v Anand Municipality &6* HC Ahmedabad 11 November 2009.

[2] *Jan Balaz v Anand Municipality &6,* above n 1. In that case the Balaz twins were left in legal limbo for two years because they could not exit India. Eventually they obtained citizenship through the process of adoption in Germany.

[3] Permanent Bureau *A Preliminary Report on the Issues Arising from International Surrogacy Arrangements* (Hague Conference on International Private Law, March 2012) at 5.

[4] "Parents Warned Over International "Baby Farms" *TVNZ* (online ed, 20 August 2011).

[5] Margaret Ryznar "International Commercial Surrogacy and its Parties" (2010) 43 J Marshall L Rev 1009 at 1011.

[6] Chapter two outlines the surrogacy laws in New Zealand with particular reference to the Human Assisted Reproductive Technology Act 2004.

Consider for example the scenario where a child is born to a New Zealand couple with the help of an Indian surrogate. Upon the birth of the child, the Indian authorities will recognise the New Zealand couple as the child's legal parents by listing them on the birth certificate.[7] The child cannot therefore receive Indian citizenship because he/she is not legally the child of an Indian national.[8] Under the laws of New Zealand however the surrogate is considered the child's legal parent and thus the child cannot receive New Zealand citizenship upon the basis of descent.[9] In the worst case scenario the child will become stateless, he/she will not be able to exit nor enter either country, may become separated from his/her commissioning parents and forced to become a ward of the state.[10] It becomes clear that in such a case it is the child who is punished not the parents, despite their circumvention of domestic laws. As stated by Justice Hedley; "citizenship has sometimes been defined as the 'right to have rights'."[11] With this in mind the interests of these innocent children will form the basis of this paper's concerns.

Chapter one will explore the issues resulting from the practice of international surrogacy in India through the analysis of two cases; *Baby Manji Yamanda v Union of India & ANR* and *Jan Balaz v Anand Municipality &6.*[12] After concluding that New Zealand citizens will inevitably engage the services of these Indian surrogates, the adequacy of New Zealand laws in dealing with analogous scenarios will be assessed in chapter two. Upon the reflection of these laws it will be concluded that New Zealand's response would be inadequate. Chapter three therefore will consider the alternative options for reform. Against this background in chapter four consideration will be given to determining parenthood upon the basis of the contractual agreement. From this analysis chapter five will outline recommendations for reform.

International surrogacy tests both ethical and legal boundaries. However it can also produce miracles by allowing infertile couples to have a biological child of their own. Through legal

[7] Ministry of Health and Family Welfare, Government of India *National Guidelines for Accreditation, Supervision and Regulation of ART in India* (2005) at 3.5.4.
[8] Citizenship Act 1955 (India), s3.
[9] Citizenship Act 1977, s7; Status of Children Act 1969, s17.
[10] *Jan Balaz v Anand Municipality &6* HC Ahmedabad, above n 1. In that case Jan Balaz's visa was nearly at an end. Had an exemption not been made by Germany, the children would have had to have become wards of the Indian state.
[11] *Re: X & Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam), [2009] Fam 71 at [9].
[12] *Jan Balaz v Anand Municipality &6,* above n 1; *Baby Manji Yamanda v Union of India & ANR* [2008] INSC 1656.

reform and careful regulation New Zealand could facilitate the advantages of this practice whilst mitigating its implications and this paper will illustrate how this can occur.

Chapter One: International Surrogacy

I. Understanding Surrogacy

As defined in the Human Reproductive Technology Act 2004, a surrogacy arrangement is "an arrangement under which a woman agrees to become pregnant for the purpose of surrendering custody of a child born as a result of pregnancy".[13] The word surrogacy is derived from the Latin term "subrogare" which means "appointed to act in place of."[14] This terminology is consistent with the idea that the surrogate assumes the role of the mother in carrying the unborn child.[15]

In the case of traditional surrogacy, the surrogate mother is the child's biological mother. The biological father donates his sperm with the intention that the surrogate will relinquish all parental rights.[16] However, not all surrogacy arrangements take this traditional form. With the onset of improved reproductive technology, gestational surrogacy is also occurring.[17] In gestational surrogacy an embryo is formed from donated gametes and is transferred to the surrogate to gestate.[18] Gamete donations can be made from either anonymous individuals or by the intended parents and thus the child is not the genetic offspring of the surrogate.[19]

Whilst surrogacy arrangements can be differentiated on a medical basis, they can also take different contractual forms. There are two main types of surrogacy arrangements; altruistic and commercial.[20] Altruistic surrogacy arrangements involve the voluntary assistance of a surrogate who receives no financial reward for her services.[21] In altruistic arrangements payments can be made to reimburse the surrogate for reasonable expenses incurred during the pregnancy.[22] In the case of commercial surrogacy, the surrogate is paid in return for her role as the gestational carrier of the child.[23] Pursuant to the Human Assisted Reproductive Technology Act 2004, this would constitute a payment for valuable consideration and

[13] Section 5.
[14] *Baby Manji Yamanda v Union of India & ANR* [2008] INSC 1656 at [7].
[15] At [7].
[16] At [6].
[17] Law Commission *New Issues in Legal Parenthood* (NZLC R88, 2005) at 9.
[18] At 9.
[19] At 9.
[20] *Baby Manji Yamanda v Union of India & ANR*, above n 14, at [7].
[21] *Baby Manji Yamanda v Union of India & ANR*, above n 14, at [8].
[22] Law Commission, above n 17, at 7.12.
[23] *Baby Manji Yamanda v Union of India & ANR*, above n 14, at [9].

effectively entail a profit.[24] Commercial surrogacy is a contentious practice and is legalised in very few countries.[25] For instance it has been claimed that such a practice results in the commodification of children and exploitation of women.[26]

International surrogacy involves an agreement between intending parents in one country and a surrogate mother living overseas.[27] International surrogacy can be either gestational or traditional and the agreements entered into may be altruistic or commercial.[28] The most common reason for reproductive travel however is domestic prohibition and thus most international agreements are of a commercial nature.[29] Domestic restrictions such as the prohibition of commercial surrogacy feed the demand for international surrogacy, whilst permissive states respond to this demand through supply.[30]

II. An Indian Case Study

Artificial reproduction has become shaped by the contemporary globalised market.[31] The commercial market was once dominated by the United States however India is quickly emerging as the monopolist of fertility tourism.[32] India's economic strategy to outsource medical tourism has resulted in a lucrative fertility sector.[33] The surrogacy industry in particular is growing and the Indian Council of Medical Research has predicted that it will produce $6 billion per annum.[34] This paper predicts that India will be the most attractive

[24] Section 5, definition of "valuable consideration".
[25] *Baby Manji Yamanda v Union of India & ANR*, above n 14, at [9]. India, California and Ukraine are the most commonly referred to countries in which commercial surrogacy is legal.
[26] Margaret Ryznar, above n 5, at 1028.
[27] Internal Affairs and others "International Surrogacy Information Sheet"<http://www.cyf.govt.nz/documents/adoption/is-information-sheet-june2011.pdf>.
[28] Internal Affairs and others, above n 27.
[29] F Shenfield and others "ESHRE's Good Practice Guide for Cross-Border Reproductive Care for Centres and Practitioners" (2011) 26 Hum Reprod 1625. The prohibition of commercial surrogacy is largely responsible for reproductive travel as it reduces the number of women within the domestic sphere willing to partake in the practice.
[30] Yasmine Ergas "The Transnationalization of Everyday Life: Cross-Border Reproductive Surrogacy, Human Rights and the Revision of International Law" (paper presented to Deconstructing and Reconstructing "Mother" Workshop, Columbia University, March 2012).
[31] Eric Blyth and Abigail Farrand "Reproductive tourism – a price worth paying for reproductive autonomy?" (2005) 25 Crit Soc Policy 90 at 93.
[32] Margaret Ryznar, above n 5, at 1011.
[33] At 1016.
[34] Ruby lee "New Trends in Global Outsourcing of Commercial Surrogacy: A Call for Regulation" (2009) 20 Hastings Women's Law Journal 275 at 281. The 6 billion per annum prediction of earnings made by the Indian Council of Medical Research appears to be an exaggerated figure. Statistics vary as to the exact figure; however it is clear that it is increasing.

fertility destination for New Zealand citizens and therefore will be used as a case study to exemplify the issues involved with cross border surrogacy.

There are two predominant reasons for India's emergence as a fertility hotspot. The first is India's lack of regulation.[35] Although in 2005 the Indian Council of Medical Research issued guidelines for the practice of surrogacy, India lacks any substantive regulation.[36] The Indian Law Commission issued a report in 2009 calling for the regulation of reproductive technology.[37] However, apart from The Assisted Reproductive Technologies (Regulation) Draft Bill 2010 (India) no legal advancements have since occurred.[38] Thus India is an appealing destination for foreign nationals who wish to circumvent their domestic surrogacy laws.[39]

Secondly, unlike the phenomenal cost of surrogacy in the United States, an Indian surrogate is comparatively affordable.[40] The cost of surrogacy in the United States ranges from around US$70,000 to US$150,000.[41] A surrogate in India however earns only a third of that, with the average fee ranging between US$25,000 and US$30,000.[42] Therefore, the market price of surrogacy combined with the lack of regulation has resulted in India fast becoming a surrogacy hotspot.[43]

Although these are the two main reasons for India's popularity, there are other less prevalent reasons favouring India as a surrogacy destination. It has been claimed that surrogates in India are less likely to litigate and attempt to keep the child due to their impoverished position.[44] Furthermore, due to the commercial nature of the transaction and seldom contribution of genetic material, surrogates are more likely to be emotionally detached from

[35] Ruby lee, above n 34, at 281.
[36] At 281.
[37] Law Commission *The Need for Legislation to Regulate Assisted Reproductive Technology Clinics As Well As Rights and Obligations of Parties to a Surrogacy* (INCL 13 R228, 2009).
[38] The Assisted Reproductive Technologies (Regulation) Bill 2010 (India) aims to create a framework for the regulation of assisted reproductive technology. It proposed regulations which target the necessity for safe and ethical practices. Furthermore it pertains to legal issues such as surrogate parenthood.
[39] Anita Stuhmcke "The criminal act of commercial surrogacy in Australia: a call for review" (2011) 18 JLM 601at 609.
[40] Ruby lee, above n 34, at 278.
[41] At 278.
[42] Margaret Ryznar, above n 5, at 1019.
[43] At 1011.
[44] Margaret Ryznar, above n 5, at 1017.

the child and are again less likely to engage in a custody dispute.[45] However, the growing surrogacy market in India is not free from ethical and legal concern.

A. Ethical Concerns

The emergence of international surrogacy has become subject to contentious debate. Its occurrence in an undeveloped nation has intensified these concerns. Moralists contend that the practice exploits impoverished women as surrogacy is merely a means of survival, not a choice.[46] Cultural stigmas of surrogate mothers also exist in India forcing many women into hiding for the duration of the pregnancy.[47] This is a direct result of traditional attitudes towards sex and procreation and parallels have been drawn between the practice of surrogacy and sex work.[48] Furthermore, the disparity between the fees paid to Indian surrogates and those paid to American surrogates is arguably exploitative, entrenching the inequalities between the North and the South.[49]

India's market approach towards the surrogacy industry also gives cause for concern. Pregnancy is the main goal and thus multiple embryos are transferred increasing the risk of complication and premature birth.[50] The interests of the surrogate are also secondary to that of the commissioning parents, illustrated by the fact that most children are delivered by caesarean, ensuring that the birth coincides with the arrival of the intending parent(s).[51] Furthermore the treatment of the birth mother is subordinate to the unborn child, thus medical attention is drawn away from the vulnerable surrogate.[52] Finally, India is inundated by children requiring adoption. Some critics argue that before additional children are brought into the world, the needs of these orphans should first be met.[53]

Despite these concerns there are always two sides to every debate. The practice of surrogacy in India has arguably improved economic stability, enabling families to escape poverty,

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[45] Margaret Ryznar, above n 5, at 1018.
[46] Amrita Pande "Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker" (2010) 35 Signs 969 at 971.
[47] Ruby lee, above n 34, at 280.
[48] Usha Smerdon "Crossing bodies, crossing borders: International surrogacy between the United States and India" (2008-2009) 16 Cumb L Rev 17 at 56.
[49] Ruby lee, above n 34, at 281.
[50] F Shenfield and others, above n 29.
[51] Kishwar Desai "India's Surrogate Mothers Are Risking Their Lives. They Urgently Need Protection." *The Guardian* (UK, 5 June 2010).
[52] Kishwar Desai, above n 51.
[53] Margaret Ryznar, above n 5, at 1035.

purchase a home or educate their children.[54] The stigmas associated to the practice are also reduced as the economic success of surrogacy has become evident.[55] Furthermore, although, these women may receive less than those in America, it is this affordability that has brought the opportunity of surrogacy to their door steps. Finally, autonomous arguments are also relevant to the practice of surrogacy, given that it involves the use of a bodily function.[56] It has been claimed that the choice to become a surrogate is an individual choice and should not be subject to the result of an ethical debate.[57]

Aside from the exploitation debate, the commodification of children is another concern that has resonated throughout the history of commercial surrogacy. Commercial surrogacy arguably places a price tag on a child, undermining the entrenched belief that human life is invaluable.[58] However, one may argue that this practice does not entail the sale of a child, but instead the sale of service; after all the commissioning parents contribute to the child's creation.[59] Parallels can also be drawn between IVF and surrogacy given that both involve payment for the medical creation of a child but this payment is for the service provided not the child itself. The surrogate will be paid for her service even if the child does not survive just as a doctor will be paid for the IVF treatment even if a child is not created. Thus surrogacy should be treated as no different to IVF.[60]

From this discussion it is clear that the surrogacy debate is somewhat analogous to that of the abortion debate. Ethical contentions are inescapable and it is unlikely that a consensus will ever be reached. Although these ethical concerns cannot be ignored, focus must turn to the reality of the situation. Regardless of legal restriction individuals and couples are partaking in the practice of commercial surrogacy at an international level. Restricting the practice upon the basis of moral/ethical contingencies will only force the trade underground.[61] Therefore instead of discussing whether or not the practice should occur, this paper will respond to the issues which have arisen as a result of its occurrence. Focus will thus be given to the legal complexities involved in ascertaining citizenship for a child born as a result of surrogacy.

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[54] Ruby lee, above n 34, at 279.
[55] At 280.
[56] Yasmine Ergas, above n 30.
[57] See Peter Gaffney "Why the "widespread agreement is wrong": contesting the non-harm arguments for the prohibition of full commercial surrogacy" (2009) 17 JLM 280.
[58] At 288.
[59] At 285.
[60] At 285.
[61] Jenni Millbank "The New Surrogacy Parentage Laws in Australia: Cautious Regulation or 25 Brick Walls?" (2011) 35 Melb U L Rev 165 at 197.

B. Legal Concerns

Legal uncertainties surround parenthood and citizenship as a result of international surrogacy agreements, particularly those entered into in India. Two contemporary cases demonstrate these issues; referred to by the media as the case of Baby Manji and the case of the Balaz Twins.

1. Baby Manji

Global attention was drawn to the practice of international surrogacy in India as a result of the birth of Baby Manji; a stateless orphan.[62] In the case of *Baby Manji Yamanda v Union of India & ANR* a Japanese couple had travelled to India to conceive a child through the process of surrogacy.[63] Dr Ifukumi was the biological father and the biological mother was an anonymous Indian donor.[64] Surrogacy however is prohibited in Japan and the Japanese Civil Code recognises only the birth mother as the legal mother.[65] Thus in order for Dr Ifukumi to be granted custody of the child, Baby Manji had to be adopted under Indian law. However during the period of pregnancy the couple divorced and the father was refused adoption as a single male, a prohibited act under Indian law.[66] To prevent Baby Manji from becoming a stateless orphan, both the Japanese and Indian authorities were forced to make legal exceptions. Emphasised as a rare case, India entrusted the child to the Dr Ifukumi by issuing a birth certificate identifying him as the child's father. The Japanese authorities in turn issued a visa on humanitarian grounds.[67]

2. Balaz Twins

Nikolas Balaz and Leonard Balaz, born on 4th January 2008 to a surrogate mother, became the centre of a two year legal battle. In accordance with the National Guidelines for Accreditation, Supervision and Regulation of Artificial Reproductive Technique Clinics in India, birth certificates were issued listing the commissioning couple as the legal parents.[68]

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[62] Dhanajay Mahapatra "Baby Manji's Case Throws Up Need for Law on Surrogacy" *The Times of India* (online ed, India, 25 August 2008).
[63] *Baby Manji Yamanda v Union of India & ANR*, above n 14.
[64] *Baby Manji Yamanda v Union of India & ANR*, above n 14, at [2].
[65] *Jan Balaz v Anand Municipality &6,* above n 1, at [14].
[66] Yasmine Ergas, above n 30.
[67] "Baby Manji gets birth certificate" *The Telegraph* (online ed, Calcutta, India, 10 August 2008).
[68] *Jan Balaz v Anand Municipality &6* HC Ahmedabad, above n 1, at [4].

However, surrogacy is prohibited in Germany and the German consulate refused to issue passports, given that under such laws, the Balaz's had no legal filiation to the children.[69]

Indian passports were instead sought. The passport petition named Jan Balaz as the father and the surrogate, an Indian national, as the mother. The applications were initially accepted; however the passports were later revoked by the Government of India, Ministry of External Affairs Passport Office upon the basis that the mother's name differed to that on the birth certificate.[70] Faced with the prospect of stateless children, the couple had no choice but to appeal the decision.

The Gujarat High Court considered the case and caused legal controversy by holding that the twins were Indian nationals, born to an Indian mother:[71]

> …the only conclusion that is possible is that a gestational mother who has blood relations with the child is more deserving to be called as the natural mother. She has carried the embryo for full 10 months in her womb, nurtured the babies through the umbilical cord.

This decision resulted in a significant step away from the prevailing position. Reluctant to recognise this decision due to the effect that it would have upon current surrogacy contracts, the Ahmadabad Passport Authority refused to issue the twins with passports until the decision was ratified by the Apex Court.[72] The case before the Apex Court however was fraught with delay and as the media drew attention to the issue, India and Germany began engaging in negotiations.[73] Furthermore, the Apex Court urged Indian authorities to resolve the issue via non-judicial means such as adoption.[74]

Under Indian law, the adoption must take place within the country before the child can exit India with his/her prospective parents.[75] However, restrictions exist concerning those children who are able be adopted in India. It must first be satisfied that the child is 'orphaned,

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[69] At [4].
[70] At [4].
[71] At [16].
[72] Yasmine Ergas, above n 30.
[73] Yasmine Ergas, above n 30.
[74] Hari Ramasubramanian "Supreme Court of India Directs CARA to Consider Adoption Plea of German's Surrogacy Case" (17 March 2010) India Surrogacy Law <http://blog.indiansurrogacylaw.com/tag/jan-balaz/>.
[75] Central Adoption Resource Authority *Guidelines for Adoption from India* (2006). Note that since this case an update has occurred; Central Adoption Resource Authority *Guidelines for the Adoption of Children* (2011).

abandoned or surrendered."[76] India is also a signatory to the Hague Convention on Inter-country Adoptions and must adhere to international requirements.[77] The Convention states that an adoption can only occur if the child is adoptable and if the possibility of placement within the state of origin has first been considered.[78] The Central Adoption Resource Authority therefore declined the application upon the premise that the children were not adoptable (they were not orphaned, abandoned or surrendered) and found the issue to be beyond their jurisdiction.[79] The Apex Court however issued a direction for reconsideration, reassuring the Authority that any decisions made would not be treated as having created a precedent.[80] Meanwhile the visa of Jan Balaz was coming to an end without any prospect of renewal. Reality soon dawned on the authorities that the children would have to become wards of the state.[81] As a result the children were finally issued with German visas and Indian exit documents and the couple were allowed to adopt the children under German laws.[82] The children exited India in May 2010, two years after their birth.[83]

C. A Lesson to be Learned

Both of these cases cannot be disregarded as isolated events. With the increasing prevalence of international surrogacy in India, it is likely that such issues will continue to arise in the absence of coherent international regulation. Although in time, both cases were satisfactorily resolved, attention must be drawn to the detrimental effect that it had on the children themselves. All three children were faced with the prospect of becoming stateless orphans, with their futures underpinned by legal uncertainty. The immediate settlement of a surrogate child with the intending parents is paramount; however this becomes difficult when the children are trapped in India, whilst their parents are subject to work obligations in their home countries and time restricting visas.[84] Furthermore, in the case of the Balaz twins, if resolution had taken just a few months longer, the children would have been forced to

[76] Central Adoption Resource Authority, above n 75 at 4.2.
[77] Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption 1870 UNTS 167 (opened for signature 29 May 1993, entered into force 1 May 1995).
[78] At art 4.
[79] "SC directs CARA to consider German couple's plea for adoption" *The Times of India* (online ed, India, 17 May 2010).
[80] "SC directs CARA to consider German couple's plea for adoption", above n 79.
[81] Yasmine Ergas, above n 30.
[82] Yasmine Ergas, above n 30.
[83] Hari Ramasubramanian "German Couple All Set to Take Twins to Homeland" (29 May 2010) India Surrogacy Law <http://blog.indiansurrogacylaw.com/tag/jan-balaz/>.
[84] In the telephone interview with Dr Richard Fisher, Fertility Associates Limited (6 July 2012) he stated that it is important for the child to be placed in the immediate care of the intending parents.

become wards of the Indian state. As will be discussed in chapter two this is the type of situation that a child commissioned by a New Zealand couple could become faced with and therefore from this perspective the issue should afford attention.

Chapter Two: New Zealand's Response to International Surrogacy

I. New Zealand Surrogacy Laws

Surrogacy can legally occur within New Zealand although it is subject to restriction.[85] IVF surrogacy is a relatively contemporary phenomenon as although it is assumed that private surrogacy (self-insemination) has a long history, non-commercial IVF surrogacy only received ethical approval in 1997.[86] Since then IVF surrogacy has become increasingly more common. Between 2005 and 2010 ECART (Ethics Committee on Assisted Reproductive Technology) received 104 surrogacy applications. One hundred applicants were approved and 26 births resulted.[87] Therefore, the practice of surrogacy is not uncommon. However, the extent of surrogacy in New Zealand is limited as a result of the strict laws governing its practice.

Pursuant to s 14(1) of the Human Assisted Reproductive Technology (HART) Act 2004, it is not illegal to enter into a surrogacy agreement in New Zealand. However the contract is not enforceable in the New Zealand courts.[88] The parties may utilise a contractual process to establish mutual understandings but neither party can rely upon the contract to enforce legal obligations.[89] Furthermore, surrogacy agreements can only be altruistic in nature. Commercial surrogacy is prohibited under s 14(3) of the HART Act.

Section 16 of the HART Act imposes further restrictions upon the practice. Under this provision, surrogacy as an assisted reproductive procedure cannot occur without the prior approval of the Ethics Committee on Assisted Reproductive Technology (ECART). Approval will only be granted where the applicant satisfies the guidelines for surrogacy arrangements.[90] Under these guidelines at least one of the intending parents must be the genetic parent of the child. Furthermore it must be satisfied that the intending mother has a medical condition

[85] Human Assisted Reproductive Technology Act 2004, s14.
[86] Law Commission *New Issues in Legal Parenthood* (NZLC PP54, 2004) at 4.20.
[87] Lynley Anderson, Jeanne Snelling and Huia Tomlins-Jahnke "The practice of surrogacy in New Zealand" (2012) 52 ANZJO 253 at 256.
[88] Section 14(1).
[89] Lynley Anderson, Jeanne Snelling and Huia Tomlins-Jahnke, above n 87, at 256.
[90] Advisory Committee on Assisted Reproductive Technology *Surrogacy Arrangements Involving Fertility Services* (November 2008).

preventing pregnancy or that she suffers from unexplained infertility.[91] When considering the suitability of the surrogate involved, among other factors, ECART must take into account whether or not the surrogate has completed her own family, whether the relationship between the parties safeguards their own well-being and the well-being of the child and the committee must consider whether an effective counselling process has occurred.[92] It can therefore be ascertained that the practice of surrogacy in New Zealand is strictly regulated.

If all requirements have been fulfilled, the surrogate will undergo the insemination process and carry the child. Once the child is born, legal parenthood must be transferred from the surrogate to the intending parent(s). However this transfer is not immediate under the laws of New Zealand. Surrogacy laws do not extend to the determination of legal parenthood, therefore cases of surrogacy remain subject to the Status of Children Act 1969. Pursuant to the Status of Children Act 1969, the birth mother is the legal mother regardless of whether the ovum is donated by another woman.[93] Furthermore, the intending father who contributed his genetic material is not the legal father of the child as he is not the surrogate's partner.[94] If the surrogate happens to be partnered at the time of the pregnancy and that partner gives consent to the procedure, he/she will be considered a legal parent.[95] Therefore, the commissioning couple have no legal rights to the child, regardless of their genetic contribution. Instead, they are merely treated as donors.[96] In order for the commissioning parent(s) to attain legal parenthood, they must adopt the child under the Adoption Act 1955. However, many commissioning parent(s) do not believe that they should have to adopt the child and thus choose to care for the child informally without undertaking this legal process of adoption.[97] Despite this contention, in general, fertility professionals consider the adoption process to be satisfactory.[98] It is also important to note that although these domestic provisions may be considered unsatisfactory by those partaking in the practice, in almost every case the child will remain in the care of the intending parents, be it through adoption or through the informal care of the child without legal recognition of parenthood. Such a

[91] Advisory Committee on Assisted Reproductive Technology, above n 90, at 2(a)(i) and 2(a)(ii).
[92] At 2(b)(i – vi).
[93] Section 17.
[94] Section 22.
[95] Section 18.
[96] Law Commission, above n 17, at 7.20.
[97] At 7.23. Enquiries undertaken by the Law Commission revealed that only one couple who had been consulted had chosen to legally adopt the child. This indicates that even at a domestic level there are policy issues which do not favour the current approach.
[98] Interview with Professor John Holland (Fertillity Associates Limited, 6 July 2012).

guarantee however cannot be attributed to cases of international surrogacy. If the child cannot receive New Zealand citizenship the child and the intended parent(s) may become separated.

There are no specific provisions under New Zealand law pertaining to the practice of international surrogacy. However, Immigration New Zealand has made it clear that if a couple intend to bring a surrogate child back to New Zealand, rights of entry and legal parenthood will be governed by New Zealand law. Therefore, consideration must be given to whether international surrogacy is of concern to New Zealand and if so, whether these laws requiring adoption provide an adequate framework for such an occurrence.

II. International Surrogacy: A New Zealand Concern?

There is little empirical evidence indicating how many New Zealand couples have engaged in international surrogacy agreements. Due to the legal anomalies involved in international surrogacy most cases remain hidden. However, since 2010 Child Youth and Family have received 63 inquiries into the matter.[99] With regard to India in particular at least two babies have been born to Indian surrogates and at least one had not been recognised as a citizen of either country at the initial stages.[100] Furthermore, communications with an international surrogacy agency in India suggested that dealings with New Zealand couples were already occurring.[101]

It can only be assumed that this trend will increase in response to India's global fertility fame. Furthermore, the restrictive laws within New Zealand will likely force couples overseas. As Stephen Franks MP stated when debating the HART Bill: [102]

> It will happen… New Zealanders will do it. They will go to the US, China or some Pacific Island country, somewhere where someone will carry a child for them and they will pay the women handsomely.

This is because without extraterritorial laws, international surrogacy remains attainable.[103] Australian cases exemplify this contention as according to media reports 69 surrogacy arrangements have occurred overseas and 44 of those were undertaken simply to avoid

[99] "Parents Warned Over International "Baby Farms", above n 4.
[100] "Parents Warned Over International "Baby Farms", above n 4.
[101] Email contact with Indian Surrogacy Agencies.
[102] (6 October 2004) 620 NZPD 15899.
[103] Wannes Van Hoof and Guido Pennings "Extraterritorial Laws for Cross Border Reproductive Care: The Issue of Legal Diversity" (2012) 19 EJHL 187 at 189.

domestic laws or to access donor gametes.[104] It can only be a matter of time before more New Zealand couples follow suit. Furthermore, with the increasing prevalence of international surrogacy in India it is a feasible prediction that more New Zealand couples will seek the help of Indian surrogates. Therefore the adequacy of New Zealand laws in dealing with such an occurrence must be considered.

III. Problematic Legal Framework

Internal Affairs, Child Youth and Family and Immigration have stated:[105]

> In all cases of international surrogacy, where you arrange for a child to be born to a surrogate mother overseas and you intend to bring the child back to live with you in New Zealand, New Zealand Law will apply.

Therefore, if a child is born to a surrogate mother in India, the New Zealand commissioning parent(s) will not receive recognition as the legal parent(s) within New Zealand.[106] This could have severe implications upon the citizenship of the child. A child born outside New Zealand is only eligible for citizenship if they descend from a mother or father who is a citizen of New Zealand.[107] If the child is born to an Indian surrogate, they will not receive New Zealand citizenship nor will they receive a New Zealand passport.[108] Even if the commissioning parents attempted to resolve the issue by bringing the surrogate to New Zealand for the birth, the child would not receive citizenship. A child can only receive citizenship by virtue of birth, if at the time of the birth at least one parent was a New Zealand citizen.[109] The only legal parent in such a case would be an Indian national. Therefore in order for the child to return to New Zealand, the commissioning parents would need to either obtain a visa for the child or legally adopt.[110]

There are two major issues with this approach. The first is that legal uncertainties underpin the process and in the worst case scenario, analogous to the Balaz twins and Baby Manji, the child could end up stateless. Secondly, this paper contends that international surrogacy

[104] Jenni Millbank, above n 61, at 191.
[105] Internal Affairs and others, above n 27.
[106] Internal Affairs and others, above n 27.
[107] Citizenship Act 1977, s7.
[108] Status of Children Act, s17.
[109] Citizenship Act 1977, s6(1)(b).
[110] Internal Affairs and others, above n 27.

agreements do not fundamentally undermine the laws of New Zealand and therefore exclusion cannot be justified upon the basis of public policy.

A. Issue One: Legal Uncertainties

As discussed, a child born to an Indian surrogate will not be considered a New Zealand citizen by descent.[111] Furthermore, under the laws of India, it is unlikely that the child will be issued with an Indian passport.[112] The genetic parents will be named as the parents on the birth certificate which in most cases will be the commissioning parent(s).[113] For the interim, pending the decision of the Apex Court and legislative reform, it appears that the child will not be recognised as an Indian citizen and therefore the ability of the commissioning parent(s) to return the child with them to New Zealand will depend upon the decision of the Minister of Immigration (New Zealand).[114]

New Zealand does not have an immigration policy governing this contemporary practice.[115] This raises two issues; firstly, discretion resides in the Minister as to whether a visa will be granted, thus offering no guarantee.[116] Secondly, the process may take time which could result in the separation of the child and parent. The delay will largely derive from the visa requirement for DNA evidence which could take up to 6 – 8 weeks.[117] DNA evidence is a factor that the Minister will take into account when exercising his/her discretion in granting a visa. Presumably DNA evidence indicates the validity of the connection between the commissioning parents and child. Even with a positive DNA result, the Minister will give consideration to the intention to adopt the child, relevant information from CYFs and criminal records.[118] Depending upon the stance taken by the Minister, the child may not be granted a visa, therefore the ability to return a surrogate child to New Zealand is impinged with uncertainty.[119]

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[111] Status of Children Act, s17.
[112] Citizenship Act 1955 (India), s3.
[113] Ministry of Health and Family Welfare, Government of India, above n 7, at 3.5.4. Most Indian surrogates only undergo gestational surrogacy and therefore do not contribute their genetic material. Thus they will not be named on the birth certificate.
[114] Internal Affairs and others, above n 27. It is likely that India will continue with this approach as The Assisted Reproductive Technologies (Regulation) Draft Bill 2010 (India) indicates that the commissioning parent(s) will be recognised as the legal parents.
[115] Internal Affairs and others, above n 27.
[116] Internal Affairs and others, above n 27.
[117] Internal Affairs and others, above n 27.
[118] Internal Affairs and others, above n 27.
[119] Internal Affairs and others, above n 27.

1. Visa is granted

If a visa is granted, it is likely only to be that of a visitor visa; allowing time for the formal adoption process to take place.[120] Determination must then be given to the process by which the child will be adopted. The Adoption (Intercountry) Act 1997 gave force to the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption 1993 of which India ratified in 2003. As a result in the case of an intercountry adoption both the Central Authority of New Zealand (CYFS) and the Central Authority of India (CARA) must approve the adoption in accordance with the principles and goals of the Convention.[121] However, in order for the Convention to apply the child must be habitually resident in one contracting state with the intention to be moved to another.[122] It is this requirement of "habitual residence in one contracting state" which is ambiguous.[123] Although it appears that determination will depend upon a case by case basis, it is likely that the child will be considered a habitual resident of New Zealand if the child has already been transferred back to New Zealand with the intention of adoption.[124] Although this remains a contentious issue, in a case of surrogacy the habitual residence of the child is likely to be New Zealand as Judge Ryan stated:[125]

> … from her birth S had lost any habitual residence or perhaps more properly she never had habitual residence until she had, in company of the applicants, settled into their house with them in New Zealand.

In the case of *Re Adoption of P*, Judge Somerville held that if at the relevant time of the adoption the child was habitually resident in New Zealand the adoption could occur under domestic laws.[126]

Therefore, the adoption will take place under the domestic process and the couple will simply need to make an application to the Family Court for legal adoption. The adoption will occur in two stages with an interim order initially being made.[127] For the order to be granted the

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[120] Internal Affairs and others, above n 27.
[121] ICANZ <http://www.icanz.gen.nz>.
[122] Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, above n 77, at art 2.
[123] *Family Law Service* (online looseleaf ed, Lexis Nexis) at [6.715].
[124] At [6.715].
[125] *Re applications by KR* [2011] NZFLR 429 (FC) at [11].
[126] *Re Adoption of P* [2005] NZLFR 865, (2005) 24 FRNZ 846 (FC) at [33]. In that case it was held that the child was in New Zealand for the settled purpose of adoption.
[127] Adoption Act, s5.

adoption must be considered in the best interests of the child.[128] It is likely that, in a surrogate case, placement with the commissioning parent(s) would be in the best interests of the child. However there is no guarantee of this outcome. [129] If the couple attempting to adopt are gay or unmarried heterosexuals, they may not be able to adopt the child as s3 of the Adoption Act 1955 limits adoption to spouses, subject to the court's discretion. Furthermore, a single male cannot adopt a female child unless special circumstances prevail.[130] The question thus arises; if a situation analogous to that of Baby Manji arose would surrogacy constitute a special circumstance? There is no precedent pertaining to this issue and therefore it remains uncertain. What will happen to the child if the adoption is opposed and the child does not receive citizenship? This is a question for which the laws of New Zealand provide no answer.

2. Visa is not granted

If, however no visa is granted by the Minister, the child will have to remain within India, until citizenship is gained some other way. As was indicated by the Balaz case, India at present will not give citizenship to a child born through surrogacy.[131] Thus the child would need to be adopted prior to leaving India through the intercountry process.[132] However, as illustrated in both the case of Baby Manji and the Balaz twins, the process may become problematic.

An adoption can only take place if the child is adoptable in their country of origin.[133] This is where difficulties arose in the Balaz case. The Indian Central Authority found the case to be outside its jurisdiction because a surrogate child is not abandoned, orphaned or surrendered and is therefore not adoptable.[134] Furthermore, under Indian law there are restrictions upon who can adopt.[135] If a New Zealander fell within any of the restricted categories they would not be able to adopt the child.

New Zealand as the receiving country would also need to be satisfied that the adoptive parents are eligible and will apply the best interests approach. Once again problems may arise. Firstly,

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[128] Adoption Act, s11.
[129] Adoption Act, s4(1).
[130] Adoption Act, s4(2).
[131] Yasmine Ergas, above n 30.
[132] Internal Affairs and others, above n 27.
[133] Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, above n 77, at art 2.
[134] "SC Directs CARA to Consider German Couple's Plea for Adoption", above n 79.
[135] ICANZ, above n 121. To adopt a child from India, the parents must have been married for at least two years and must not have divorced more than once. The parents must be healthy and not have a combined age of more than 90 years if adopting a child who is under the age of three. Furthermore the respective parents cannot be gay or lesbian.

the courts will need to receive a home study report issued by the Indian Central Authority. However, it appears that India is failing to supply such reports.[136] Furthermore, a Family Court Judge in determining the application would need information ensuring that the consent of the surrogate had been given. Such consent should be witnessed and a certificate must ensue confirming that the surrogate has been informed of the effect of such consent. However, once again if the Central Authority fails to issue such a certificate, it will prove difficult to adopt the child through this intercountry process.[137] If no adoption can proceed, the innocent surrogate child may remain without a passport or citizenship. Even with adoption being granted, the process takes a significant amount of time, whereby which the commissioning parent(s) may not be able to remain in India with the child.[138] The child would need to be issued a special visa on humanitarian grounds to return to New Zealand with the parent(s).[139] As illustrated, the laws of New Zealand do not adequately deal with the occurrence of international surrogacy despite the likelihood that New Zealand citizens will become increasingly involved in the practice.

B. Issue Two: Public Policy

At present Indian guidelines require that the genetic parent(s) be registered on the birth certificate.[140] As discussed this conflicts with the parentage laws of New Zealand giving rise to an issue of international private law.[141] Even if it is contended that the Indian position is absent of legislative clarity, the issue should be considered from a pre-emptive point of view. The Assisted Reproductive Technologies (Regulation) Draft Bill 2010 (India) indicates that the commissioning parent(s) in India will be recognised as the child's legal parent(s).[142] Therefore, a conflict of laws is evident, if not already present. In the event of a conflict such as this New Zealand laws will dictate the result as outlined by the Department of Internal Affairs, Child Youth and Family and Immigration New Zealand.[143] This paper will critique

[136] Acting Principal Family Court Judge Paul Dadelszen "A New Adoption Act for the New Millennium" (paper presented to Families in Transition Seminar, Roy McKenzie Centre, August 2009).
[137] Acting Principal Family Court Judge Paul Dadelszen, above n 136. It is important that the court is convinced that the surrogate has given informed consent to the adoption as was stated by Judge Ryan in *Re applications by KR*, above n 125, at [16].
[138] ICANZ, above n 121.
[139] Internal Affairs and others, above n 27.
[140] Ministry of Health and Family Welfare, Government of India, above n 7, at 3.5.4.
[141] Status of Children Act, s17.
[142] Clause 35.
[143] Internal Affairs and others, above n 27.

this approach because it acts to effectively exclude foreign law and such exclusions should only occur where public policy is fundamentally undermined.

If foreign law governs a case, that law should be applied in New Zealand unless it is contrary to public policy.[144] The leading text on international private law; *Dicey and Morris on the conflict of laws,* recognises that this public policy exception should be confined to proper limits.[145] Furthermore English case law warns that the use of the public policy exception should be subject to strict limits.[146] Such cases have been adopted in New Zealand and the approach is clearly outlined in *Reeves v One World Challenge* where it was stated that foreign law should be applied when: [147]

> …such enforcement would not shock the conscience of a reasonable New Zealander, be contrary to New Zealand's basic morality or a violation of essential principles of justice or moral interest in New Zealand.

The case of *Ross v Ross* echoed this approach by emphasising the narrow precincts of the public policy exception.[148] That case considered whether the enforcement of a maintenance order made by the Supreme Court of New York would be contrary to public policy. It was stated that:[149]

> The mere existence of a coherent legislative scheme underpinned by certain moral assumptions is insufficient to bring the case within the narrow confines identified in recent authorities.

The authorities referred to in this case emphasised the rarity in using the public policy exception. The high level of the exception will only be met if the enforcement of foreign law is so repugnant to the moral principles of domestic law.[150]

In the realm of international private law the public policy exception is most evident in cases of marriage. Yet even in cases of polygamy, incest and marriage below the age of consent,

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[144] *Family Law Service,* above n 123, at [11.63].
[145] Lawrence Collins and others *Dicey & Morris, The Conflict of Law* (13th ed, Sweet & Maxwell, London, 2000) at 81.
[146] *Qureshi v Quershi* [1971] Fam 173, [1971] 2 WLR 518 (Fam).
[147] *Reeves v One World Challenge LLC* [2006] 2 NZLR 184 (CA) at [67].
[148] *Ross v Ross* [2010] NZCA 447, [2011] NZFLR 440.
[149] *Ross v Ross,* above n 148.
[149] At [37].
[150] *Stern v National Australia Bank* [1999] FCA 1421; *Reeves v One World Challenge LLC,* above n 147.

the exception is not automatically applied.[151] In fact, New Zealand courts will apply foreign law in such cases and refrain from regarding the marriage as null or void if it has taken place under foreign law.[152] One such justification for recognising foreign law is premised upon the notion that exclusion may disturb family relations.[153] Therefore if polygamy is not excluded upon the basis of public policy why should New Zealand retain the discretion to refuse recognition of legal parentage in India?

However, contrary to most marriage cases, at the time a surrogacy agreement is entered into, the commissioning parent(s) will be domiciled in New Zealand. Therefore more weight will be given to the circumvention of domestic laws. Furthermore, it is not the immediate transfer of parenthood that is most controversial but the commercial nature of the contract. Therefore the courts would need to consider whether the payments made as a result of the agreement undermine public policy.

Under New Zealand law commercial surrogacy arrangements are prohibited.[154] It is clear that money cannot be exchanged for the child specifically.[155] Section 14(3) of the HART Act states:

> Every person commits an offence who gives or receives, or agrees to give or receive, valuable consideration for his or her participation, or for any other person's participation, or for arranging any other person's participation in a surrogacy arrangement.

However, this is not to say that no payments can be made as this section is qualified by s14(4)(3) which allows for the surrogate to be reimbursed for the expenses incurred for the storing, transportation and use of a human embryo or gamete, counselling, insemination and pregnancy tests. There is nothing to suggest however that the exceptions are limited to those listed in s14(4)(3). Therefore it may be that maintenance payments will also constitute an exception although not expressly stated.

The use of the term "valuable consideration" in s 14(3) suggests that no person can profit or benefit from the agreement.[156] However, maintenance payments are not made for profitable

[151] *Laws of New Zealand* Conflict of Laws: Choice of Law (online ed) at [13].
[152] At [13].
[153] David Mclean *Morris: The Conflicts of Law* (15th ed, Sweet v Maxwell, London, 2000) at 48.
[154] Human Assisted Reproductive Technology Act, s14.
[155] Zainab Al-Alawi *Brookers Family Law – Child Law* (online loosefleaf ed, Brookers).
[156] *Commercial Law in New Zealand* (online looseleaf ed, LexisNexis) at [3.2].

purposes but are instead intended to assist the surrogate with the pregnancy. It would seem unlikely for the courts to consider it a breach of s 14(3) if for example the commissioning parent(s) recompensed the surrogate for her loss of income. Furthermore although the New Zealand case of *Re Adoption of C* was not determined upon the basis of the HART Act, it deals with a case of surrogacy and provides some insight into whether maintenance payments would be allowed.[157] That case was determined upon the basis of the Adoption Act 1955 given that the HART Act was not yet in force.[158] The surrogate in that case was paid $375 per week for 40 weeks and the court had to decide whether this payment breached s 25 of the Adoption Act 1955.[159] It was held that the adoption order could be made because there was no element of profit as the payments were made incrementally for the purpose of maintenance. This indicates that the courts are primarily concerned with payments made in consideration for the child specifically and that maintenance payments are likely to be permitted.

This paper will argue that if maintenance payments are allowed in New Zealand, international surrogacy contracts do not fundamentally undermine public policy. This is because the degree of difference between legal maintenance payments and commercial payments is inconsequential. The arbitrary nature of maintenance payments is illustrated in the case *Re: X & Y (foreign surrogacy).*[160] In this case Justice Hedley had to decide whether the sum paid to the surrogate was disproportionate to reasonable expenses with regard to a parenting order.[161] The surrogate in that case was paid £200 per month along with a final payment of £23,000 upon the birth of the child. It was held that these expenses were not disproportionate to "reasonable expenses" despite the payment contributing to the surrogate's deposit on an apartment.[162] That case indicates the arbitrary nature of this prohibition and illustrates the difficulties involved in determining where the line should be drawn when differentiating between maintenance payments and payments which are prohibited. Without a strict framework regulating these payments it would not shock the public if a contract for the

[157] *Re Adoption of C* [1990] NZFLR 385, (1990) 7 FRNZ 231(FC).
[158] *Re Adoption of C,* above n 157.
[159] Adoption Act, s25 provides that: "Except with the consent of the court, it shall not be lawful for any person to give or to agree to give or receive any payment or reward in consideration of the adoption or proposed adoption of a child or in consideration of the making of arrangement for an adoption or proposed adoption".
[160] *Re: X & Y (Foreign Surrogacy),* above n 11.
[161] *Re: X & Y (Foreign Surrogacy),* above n 11.
[162] Lucy Theis, Natalie Gamble and Louis Ghevaert "Re X and Y (foreign surrogacy): 'A trek through thorn forest'" (2009) 39 Fam Law 239 at 241; see also *Re: X & Y (Foreign Surrogacy),* above n 11, at [4] which indicates that the payment covered expenses, loss of earnings and a house deposit.

payment of the services was upheld in New Zealand. Furthermore although the sale of a child would be morally condemned it would not shock the public if a woman who has endured 9 months of hard labour out of consideration for a couple unable to have a child, is paid for this service.[163] Therefore New Zealand should not exclude foreign law upon the basis of the public policy exception given its narrow confines.

It is clear that there are two key issues with New Zealand's surrogacy laws. The exclusion of foreign law upon the basis of public policy is unjustified and secondly, legal uncertainties will ensue when New Zealand couples inevitably enter into contracts with Indian surrogates. Both issues could be overcome if parenthood was recognised upon the basis of India's parenthood laws. However despite these criticisms it has been made clear by Internal Affairs, Child Youth and Family and Immigration New Zealand, that New Zealand law will prevail in a case of International surrogacy. Reform is needed as it is only a matter of time before a New Zealand couple is implicated in another Balaz twin or Baby Manji saga. Based upon that prediction, this paper will now consider the alternative options available for reform.

[163] (6 October 2004) 620 NZPD 15913. The speech given by Stephen Franks MP supports this contention as he stated: "A woman who goes through all those months of pregnancy fully deserves to be paid for the time, the investment, the weariness and all the other costs that relate to pregnancy. She should absolutely be paid for surrogacy."

Chapter Three: Alternative Approaches to International Surrogacy

I. New South Wales Approach

As alluded to in chapter one, a pressing concern for international surrogacy is that the laws regulating its practice lack coherency and thus children are becoming stateless. For a complete analysis of the available alternatives consideration must also be given to the prohibition of international surrogacy as a means by which such an outcome can be avoided. New South Wales, Australia has recently enacted a law criminalising the practice of international surrogacy.[164] This approach will be considered so as to determine whether this is a viable alternative to the status quo in New Zealand.

In 2010, the Surrogacy Act was passed which prohibited commercial surrogacy arrangements in NSW.[165] Section 11 of the Act makes the prohibitions extraterritorial. This was done with the intention that it would prevent the circumvention of domestic law and actively protect surrogates from exploitation.[166] Hypothetically this removes any issues of statelessness and legal uncertainty. However, reality indicates otherwise. Since domestic criminalisation did not prevent couples from evading the laws and seeking surrogates overseas, extraterritorial criminalisation is therefore unlikely to inhibit maternal desperation either.[167] Furthermore extraterritoriality may give rise to an underground trade, further perpetuating the existing risks associated with the practice and raising greater concerns for exploitation.[168] Extraterritorial laws also raise policy issues as commercial surrogacy has not been internationally condemned and thus presents itself as a form of moral radicalism.[169] Therefore such an approach cannot be considered as a viable alternative to New Zealand's present approach.

II. French Approach

The French response to international surrogacy illustrates an alternative to extraterritoriality. In 1994 France banned the practice of surrogacy in all its forms and thus is a prohibitionist

[164] Surrogacy Act 2010 (NSW), s11.
[165] Surrogacy Act.
[166] (10 November 2010) NSWPD at 27890.
[167] Jenni Millbank, above n 61, at 197.
[168] At 197.
[169] Wannes Van Hoof and Guido Pennings, above n 103, at 190.

state.[170] As discussed, prohibitionist laws force couples across borders in search for surrogates in permissive states and as a result there are hundreds of children living in France that have been born to gestational surrogates abroad.[171] Prohibitionist states are responsible for the demand generated for surrogates whilst permissive states respond to this demand through the establishment of lucrative reproductive markets.[172] It is for this reason that a mutual recognition arises between countries which enforce differing positions.[173] This approach has been recognised and outlined by Ergas:

> But prohibitionist states could also – either implicitly or explicitly – use permissive states as a "safety valve" for their internal demand, just as permissive states could profit from satisfying that demand, capitalizing on higher prices associated with a limited supply. Somewhat analogously to the ways in which states strategically deploy arms dealers who operate in flagrant violation of international strictures or preserve repressive abortion legislation while turning a blind eye to women who cross borders to access services, states may decide to maintain prohibitionist stances while not actively or only selectively enforcing them.

The French courts have recognised the existence of maternal and paternal filiation arising from international surrogacy agreements but have refused to grant the resulting children citizenship upon public policy grounds.[174] In 2011 the Cour de Cassation considered an appeal by a couple known as the Mennessons.[175] The Mennessons contracted a surrogate in California (United States) where the practice of surrogacy is legal and paid the surrogate US$10,000 for her services.[176] The twins born to the surrogate were issued birth certificates in California recognising the Mennessons as their legal parents. Upon returning to France the birth certificate transcripts were cancelled and applications for French citizenship have continually been denied. The children however are able to remain in France with their parents

[170] Art 16-7 du code civil.
[171] Richard Storrow "The Phantom Children of the Republic: International Surrogacy and the New Illegitimacy" (2011-2012) 20 Am UJ Gender Soc Poly's & L 561; see generally Yasmine Ergas, above n 30.
[172] Yasmine Ergas, above n 30.
[173] Yasmine Ergas, above n 30.
[174] Richard Storrow, above n 171.
[175] See Judgment no.370 of the 6 April 2011 (910-19.053) Cour de Cassation first civil chamber available at <http://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/370_6_19628.html>.
[176] See Judgment no.370 of the 6 April 2011 (910-19.053) Cour de Cassation first civil chamber available at <http://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/370_6_19628.html> .

and thus the Cour de Cassation concluded that the decision does not violate Article 8 of the European Convention of Human Rights under which everyone has a "right to respect his private life, his home and correspondence."[177] The Court believed that they had struck a balance between facilitating the right to a family whilst not undermining the principles of French laws through the denial of citizenship.[178]

Although on the surface this approach seems reasonable, this paper does not advocate in its favour because it punishes the innocent child, the subject to which policy laws pertain to protect. Despite being able to live with their parents, the Menneson twins are denied access to many publicly funded amenities, access to which in some cases would be considered a human right.[179] The Mennesson twins as non-citizens have been denied access to free health care and education and at the age of 18 they will not be able to remain in France without a visa and will have no legal right to work there.[180] Therefore, this approach cannot be considered a favourable one as it is the children who are being punished for their parents' circumvention of domestic laws.

III. Contract Approach

Chapter three gave recognition to the reality of international surrogacy in New Zealand. It is occurring and will increasingly occur with Indian surrogates. Thus reform should reflect a pragmatic response to this growing phenomenon. Determining parenthood upon the basis of the contractual agreement would do just that. As discussed in chapter two, status laws confer legal parenthood upon the surrogate not the commissioning parents in New Zealand, a result which does not reflect the intentions of the parties involved. If New Zealand were to shift from a status law approach to a contract based approach to parenthood, not only would this pertain to the practical reality of surrogacy but it would allow for compatibility with India's current and proposed approach to surrogate parenthood.

Although the current approach in India is not a direct result of regulation, recognition of the commissioning parent(s) as the legal parent(s) continues to prevail in practice. Under the

[177] Convention for Protection of Human Rights and Fundamental Freedoms CETS No.005 (opened for signature 4 November 1950, entered into force 1953), art 8.
[178] See Judgment no.370 of the 6 April 2011 (910-19.053) Cour de Cassation first civil chamber available at <http://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/370_6_19628.html> .
[179] See the reaction to this decision in Emmanuelle Chavalereau "Surrogate Motherhood: Our girls will always remain ghosts under French law" *Monde.fr* (online ed, 6 April 2011).
[180] Emmanuelle Chavalereau, above n 179.

proposed Assisted Reproductive Technologies (Regulation) Draft Bill 2010 (India) the commissioning parent(s) will receive legal recognition subject to no exception.[181] Therefore, if New Zealand were to reform its laws through the recognition of contractual parenthood the primary concern of this paper would be resolved; innocent children born to New Zealand commissioning parent(s) would not be left stateless.

Against these considerations the contractual determination of parenthood in a case of surrogacy presents itself as a feasible solution to a pressing problem. This raises the question; should contract law govern the practice of surrogacy in New Zealand? Some academics have advocated for a complete shift from status law to contract law, allowing for surrogacy to be regulated entirely upon the basis of the contract, free from state control. Under this approach the parties would be able to establish the terms of their own bargain, whether it is altruistic or commercial and would be able to rely upon contract law remedies in the case of a breach.[182] However other academics stress the importance of status laws in protecting the parties involved.[183] This paper will therefore proceed by traversing the possibility of a shift from status to contract law in governing the practice of surrogacy in New Zealand.

[181] Clause 35.
[182] Denise Lascarides "A plea for the enforceability of gestational surrogacy contracts" (1997) 25 Hofstra L Rev 1221.
[183] Yasmine Ergas, above n 30.

Chapter Four: A Contract Law Approach to Surrogacy

I. Status Law vs. Contract Law

Status laws pertain to the rules imposed upon society by legislative bodies unalterable to the individual.[184] Contract law on the other hand posits itself upon the notions of freedom of choice and autonomy, allowing the individual to enter into their own bargain, free from state control.[185] Sir Henry Maine, in his work 'Ancient Law' was the first to lay claim to the proposition that societies had and would continue to progress from status law to contract law:[186]

> The movement of the progressive societies has been uniform in one respect. Through all its course it has been distinguished by the gradual dissolution of family dependency, and the growth of the individual obligation in its place. The individual is steadily substituted for the family, as the unit of which civil law takes account… Nor is it difficult to see what is the tie between man and man which replaces by degrees those forms of reciprocity in rights and duties which have their origin in the family. It is contract.

Maine justified this contention through the illustration of the changing family form.[187] According to Maine, in an ancient family, the father was superior to his wife and the children were in turn his subordinates.[188] Familial connections were also only reflected through blood ties.[189] Societies evolved however according to Maine, with the focus changing towards the individual as opposed to the family unit.[190] The individual was perpetuated through the mechanism of contract law.[191] There is ample scholarly support for Maine's predictions as the shift from status to contract is evident in many forms of contemporary family law.[192] This shift can be most clearly viewed through the illustration of marriage.

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[184] Jill Hasday "The Cannon of Family Law" (2004) 57 Stan L Rev 825.
[185] Jill Hasday, above n 184.
[186] Sir Henry Sumner Maine *Ancient Law* (9th ed, Spottiswoode and Co, London, 1988) at 168.
[187] Russell Versteeg "From Status to Contract: A contextual Analysis of Maine's Famous Dictum" (1988-1989) 10 Whittier L Rev 669 at 674.
[188] At 674.
[189] At 674.
[190] At 674.
[191] At 674.
[192] Jill Hasday, above n 184.

Contract law plays a significant role in the contemporary institution of marriage, evident in the enforcement of prenuptial agreements and the court's recognition of property division settlements.[193] This exemplifies a shift away from state control as it recognises individual rights and their autonomous choices. However, status law still plays a prominent part in the regulation of marriages and thus the extent of the shift is not as overt as Maine first contended.[194] Divorce litigation is still subject to family law regulations and case precedents.[195] Furthermore, status laws continue to exclude certain agreements from the institution of marriage such as polygamous marriages, underage marriages and same sex marriages.[196] Therefore, the shift from status to contract is not a complete shift but one which has enabled the integration of both such approaches; one which does reflect a growing recognition of the individual whilst retaining protection of societal interests through status laws.[197]

Although the institution of marriage is commonly used as an example of this shift, the shift is also evident in the family law context of parenthood.[198] In cases of adoption for example contracts have been entered into to determine visitation rights.[199] However it is in the realm of reproductive technology that this shift is particularly evident.[200] Parental status determined upon the basis of individual choice is apparent through the recognition of legal parenthood with respect to a child born as a result of medical intervention, such as IVF.[201] In New Zealand for example the legal parent may not be married to the legal mother, nor genetically connected to the child. If a child is born through the process of assisted human reproduction, and the partner of the child's legal mother consents to her insemination, for all legal purposes he/she will be regarded as the child's other parent.[202] The legalisation of altruistic surrogacy also reflects the growing recognition of individual maternal choice and is indicative of the

[193] Janet Halley "Behind the Law of Marriage (1): From Status/Contract to the Marriage System" (2010) 6 Harvard Journal of the Legal Left 1, at 18.
[194] At 18.
[195] At 18.
[196] Jill Hasday, above n 184.
[197] Janet Halley, above n 193, at 18. A complete status law approach to marriage would regulate exactly who could marry who and would determine all the legal consequences of the marriage and dissolution, if dissolution of the marriage was allowed at all. It is clear that society has moved away from this model to one which perpetuates equal rights within the marriage and one where the male is no longer recognised as the superior member of the family. Individual rights are recognised through the ability to enter into agreements which reflect personal choice.
[198] Carol Sanger "Great Contract Cases" (2000) 44 St Louis ULJ 1443 at 1461.
[199] At 1461.
[200] At 1461.
[201] Yasmine Ergas, above n 30.
[202] Status of Children Act, s18(2).

reduced emphasis on biological connection.[203] Evidently the shift from status to contract law is already occurring and for this reason it does not seem obtuse to suggest that New Zealand should allow contract law to govern the practice of surrogacy.

With regard to surrogacy this shifting notion from status to contract has been met with a mixed response.[204] Arguments against a contract approach emphasise that surrogacy agreements unlike marriage contracts, involve the interests of a third party; a child.[205] As a result the parties cannot simply terminate the agreement as they wish because a child must be guaranteed familial security.[206] Contentions have also arisen claiming that contracts treat the child as a commodity and therefore place value upon human life. As a result children are arguably brought into this world upon the basis of market forces not love.[207] Status laws instead maintain the ideal of a child as a gift which gives rise to a non-exchangeable bond between parent and child.[208] Alternative arguments however contend that it is not the child that is being purchased but the services of a voluntary surrogate.[209] Furthermore, biological ties do not necessarily protect the interests of the child and the practice of adoption indicates that successful child-parent relations do not have to stem from a connection at birth.

These conflicting viewpoints indicate that there is validity in each approach. [210] This arguably explains why the state has remained a key player in parenthood processes despite giving increased recognition to reproductive choice.[211] For example, adoption requires an agreement for the relinquishment of parental rights however this parental transfer is still subject to state regulated processes.[212] Furthermore, even in states where surrogacy contracts are legally enforceable, parenthood is still subject to the final determination of the state.[213] Against that

[203]Yasmine Ergas, above n 30. For a case where the contract was held to be invalid on the grounds of public policy see generally *Matter of Baby M* 537 A 2d 1227 (NJ 1998).
[204] Janet Dolgin "Status and Contract in Surrogate Motherhood: An Illumination of the Surrogacy Debate" (1990) 38 Buff Law Rev 515 at 519.
[205] At 522.
[206] At 522.
[207] At 522.
[208] At 522.
[209] Denise Lascarides, above n 182, at 1244.
[210] Janet Dolgin, above n 204, at 524.
[211] Yasmine Ergas, above n 30.
[212] See Adoption Act 1955.
[213] Yasmine Ergas, above n 30. Israel exemplifies this contention as although surrogacy contracts are enforceable strict regulation still exists and parental orders must be sought to recognise this contractual parenthood. For a discussion on the laws of Israel see Rhona Schuz "Surrogacy in Israel: An Analysis of the Law in Practice" in R Cook and others (ed) *Surrogate Motherhood, International Perspectives* (HART publishing, Oregon, 2003) 35.

background, this paper will consider the extent to which contract law can govern the practice of surrogacy and where status laws must be integrated in order to provide additional protections for the child and the contracting parties. Consideration will be given to the benefits and weaknesses of the contract law approach in order to establish a model for reform which not only pertains to the issue of statelessness but which also adheres to the interests of society as a whole.

II. Contract Type

In order to assess the extent to which contract law should govern the practice of surrogacy this paper will first consider how the courts will likely interpret a surrogacy contract. When faced with a surrogacy dispute the courts will be guided by the contract's type and therefore this analysis will indicate the remedies that are likely to be available.

A. Sale of Goods Contract

Analogous to a sale of goods contract, surrogacy agreements involve a form of exchange. However, this is the only similarity that these agreements share. A surrogacy agreement does not simply involve a cash transaction. In most situations the commissioning father will also contribute his sperm and therefore the exchange involves much more than the single receipt of goods and money alone.[214] All parties are instead deeply involved in the entire reproductive process and all share in the desire to contribute to the conception of a child.[215] Additionally the baby is not a good which can be returned to the seller if the buyers are unhappy with the final product. Most importantly the baby is not a commodity despite the existence of such contentions. The payments made are for a service and resemble little difference to the types of payments made for IVF treatment.[216] IVF treatment also results in the conception of a child yet the payments are given in consideration for the service not the result, reflective in the fact that a fee will be charged regardless of whether the woman falls pregnant.[217] Similarly, in the case of surrogacy, if a baby does not result due to an act of god the commissioning couple will still be required to pay the surrogate for her services.

[214] Richard Epstein "Surrogacy: The Case for Full Contractual Enforcement" (1995) 81 Va L Rev 2305 at 2317.
[215] At 2317.
[216] Sarah Mortazavi "It Takes a Village to Make a Child: Creating Guidelines for International Surrogacy" (2012) 100 The Geo LJL 2249 at 2283.
[217] At 2283.

From a purely legal perspective a child cannot be interpreted as a good either. Pursuant to s 2 of the Sale of Goods Act 1908 the definition of a good is:

a) All chattels personal other than money or choses in actions and;

b) Emblements, growing and things attached to or forming part of the land that are agreed to be severed before sale or under contract of sale and;

c) Computer software

A human being does not fit within any of these categories. Additionally the so called "good" cannot exist at the time of the agreement as the child is yet to have been conceived.[218] The baby would have to be considered a future good. Once again however in order to sell a future good, the seller must have a vested right to do so.[219] At the time of agreement a baby will not have been conceived thus the surrogate will have no rights over the "child" and cannot pertain to sell a good that she has no present right to.[220] Therefore, upon these grounds it would be unlikely that a surrogacy agreement would be regarded as a sale of goods contract.

B. Contract for the Relinquishment of Parental Rights

Epstein, 1995 contended that a surrogacy agreement should be considered a contract for the relinquishment of parental rights.[221] Epstein stated that "Money only converts the transaction from a voluntary donation of parental rights to a sale of parental rights."[222] However this approach is only applicable to cases where the surrogate has a legal right to the child to begin with.[223] Pursuant to India's current guidelines the genetic parents are named on the birth certificate. In the case of gestational surrogacy the surrogate has no genetic connection to the child. In this situation commissioning parent(s) would already retain legal rights to the child and the surrogate would have no such rights to sell.[224] Furthermore, under The Assisted Reproductive Technologies (Regulation) Bill 2010 (India) the commissioning parent(s) will be regarded as the legal parents subject to no exception.[225] Therefore both present and future

[218] Denise Lascarides, above n 182, at 1241.
[219] At 1242.
[220] At 1242.
[221] Richard Epstein, above n 214, at 2333.
[222] At 2333.
[223] Denise Lascarides, above n 182, at 1242.
[224] Ministry of Health and Family Welfare, Government of India, above n 7, at 3.5.4.
[225] Clause 34(10) states: "The birth certificate issued in respect of a baby born through surrogacy shall bear the name(s) of individual/individuals who commissioned surrogacy, as parents." Clause 35(1) states: "A child born to a married couple through the use of assisted reproductive technology shall be presumed to be the legitimate child of the couple, having been born in wedlock and with the consent

surrogacy contracts formed in India will not be able to be regarded as a contract for the relinquishment of parental rights. For this reason it would be highly unlikely for the courts to adopt an approach which is limited in scope and which does not respond to contracts formed in all jurisdictions.

C. Employment Contract

An employment contract could form the basis of a surrogacy agreement as the surrogate may be considered to be under the employment of the commissioning couple for nine months.[226] Arguably a surrogate is no different to a nanny who cares for a couple's children when they cannot. However, employment contracts are voluntary contracts under which each party enters into upon the knowledge that they can voluntarily terminate the agreement with notice. Termination however is not an option in this case. The surrogate cannot give notice half way through the pregnancy indicating that she no longer wishes to be employed, nor can the intending parent(s) terminate the agreement upon the basis that they are unsatisfied with the surrogate's performance.[227] Therefore, surrogacy contracts will not be governed by the law of employment.

D. Contract for Services

A surrogacy contract is likely to be considered a contract for the provision of services. This is because a surrogate is offering a service for a limited period of time for which she freely and voluntary agrees to undertake.[228] Her body is not sold but her services are hired, namely the carrying of an unborn child.[229] It is not unusual for a service contract to result in a product. For example, an artist may provide a service but that service may result in a painting.[230] The common method of payment in current surrogacy contracts is also indicative of service

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of both spouses, and shall have identical legal rights as a legitimate child born through sexual intercourse." Clause 35(2) states: "A child born to an unmarried couple through the use of assisted reproductive technology, with the consent of both the parties, shall be the legitimate child of both parties." Clause 35(3) states: "In the case of a single woman the child will be the legitimate child of the woman, and in the case of a single man the child will be the legitimate child of the man."

[226] Flavia, Berys "Interpreting A Rent-a-Womb Contract: How California Courts Proceed When Gestational Surrogacy Arrangements Go Sour" (2005-2006) 42 Cal W L Rev 321 at 343.

[227] At 323.

[228] Sheila McLean "Is Surrogacy Exploitative?" in Sheila Mclean (ed) *Legal Issues in Human Reproduction* (Gower Publishing Company Limited, Aldershot, 1989) 164 at 170.

[229] At 170.

[230] Denise Lascarides, above n 182, at 1244.

contracts as incremental payments are made for each stage of the pregnancy.[231] Therefore, the courts are likely to treat a surrogacy agreement as a service contract when applying the law.

Against this background it is likely that the court will interpret a surrogacy contract as a contract for the provision of services. This analysis will be taken into account when considering the adequacy of contract law in governing the practice of surrogacy and in protecting the parties involved.

III. Contract Law and the Protection of the Parties Involved

A. The Child

In the case of surrogacy, arguments continue to exist surrounding the commodification of children. Therefore advocating for a contract law approach to surrogacy continues to be inhibited by this moral contention. As discussed, reservations regarding the contractual determination of parenthood are founded upon the belief that contract law posits the child as a commodity whilst status laws consider the child a gift.[232] However, as stated, a surrogacy agreement cannot constitute a sale of goods contract and therefore it is not the child that is being sold it is a service. Furthermore it cannot be claimed that the best interests of the child are not protected simply because money was exchanged for the services provided by the surrogate.

In the case of surrogacy, the child will never be an accident requiring the support of unprepared and in some cases unwilling biological parents.[233] Commissioning parent(s) are in fact more likely to be committed to the child from its inception and are in a position to support and raise the child.[234] As stated by Gamble:[235]

> Families created through surrogacy are, virtually by definition, much-wanted, and this creates a recipe for loved children born into families which will cherish and nurture them.

[231] Example of a surrogacy contract received from an Indian Agency provided evidence of this payment scheme.
[232] Janet Dolgin, above n 204, at 521.
[233] June Carbone "The Role of Contract Principles in Determining the Validity of Surrogacy Contracts" (1998) 28 Santa Clara L Rev 581 at 591.
[234] At 596.
[235] Natalie Gamble "Surrogacy: Creating a sensible national and international legal framework" [2012] IFL 308 at 308.

Furthermore if contractual parenthood is recognised once the child is born, the parents are under the same legal requirements to provide for the child in the long term, just as the surrogate would have been.[236] A shift from status to contract law in the case of surrogate parenthood would therefore perpetuate the best interests of the child.

However, it is not simply parenthood that a contract can determine. A contractual approach to surrogacy would give the party's free reign to establish the terms of their own bargain and such terms may not always be in the interests of the child.[237] In that sense status laws premised upon communitarianism values justify constraint on contractual freedom.[238] For example, it may be that the contracting parties do not consider the child's rights to identity as paramount. In fact under contract law alone the parties have the freedom to enter into any arrangement they wish. Thus they may choose to conceal the identity of the surrogate through a privacy provision.[239] At both domestic and international level this is not considered to be in the best interests of the child. The New Zealand Law Commission recognised the importance of a child's right to identity referring to evidence which indicated that a failure to provide the child with access to information about their genetic heritage can result in feelings of loss, disappointment and resentment.[240] Furthermore, there are strong medical reasons for retaining information about genetic heritage.[241] At an international level the importance of a child's right to identity has been recognised through article 7(1) of the UN Convention on the Rights of the Child which acknowledges a child's right to know of their origin.[242] Contract law would fail to protect these rights.

Furthermore, although in most cases surrogacy agreements will result in circumstances favourable to the best interests of the child, contract law alone cannot guarantee this. Contracts by their very nature are not designed to lock parties into an agreement although they do provide a level of security as the contractual remedies provide incentives for

[236] June Carbone, above n 233, at 593.
[237] Yasmine Ergas, above n 30.
[238] Yasmine Ergas, above n 30.
[239] For a discussion regarding the freedom of the contracting parties with regards to surrogacy agreements see generally Yasmine Ergas, above n 30.
[240] Law Commission, above n 17, at 10.23. See also Adult Adoption Information Act 1985.
[241] Law Commission, above n 17, at 10.23.
[242] United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990), art 7(1) states: "The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and as far as possible, the right to know and be cared for by his or her parents."

commitment.[243] Contracts are premised upon notions of freedom of choice, which must be interpreted to also include the freedom to withdraw from an agreement.[244] If this were not the case few people would enter into agreements.[245] However, in the case of surrogacy, a couple's freedom to withdraw would result in the abandonment of an innocent child. Furthermore, the courts will rarely impose an equitable remedy of specific performance in the case of service contracts because such contracts are premised upon relationships and thus it is often impossible for a court to compel parties to maintain relationships if they do not wish to.[246] In the case of surrogacy, specific performance would effectively force unwilling parents to take the child, an outcome which cannot be viewed as desirable. Therefore, there are no contractual remedies capable of compensating the child in such a case of abandonment.

With regard to the child's interests it is clear that contract law cannot adequately respond to deviations from the terms of the agreement. Status laws must regulate for such scenarios. For example, in a case of abandonment where the surrogate decides to keep the child, the commissioning parents should be made liable to pay child support.[247] Furthermore contract law allows parties to freely enter into agreements, whereas the current laws restrict this freedom. However, such restrictions are necessary to protect the interests of the child. In order to receive ECART approval at least one intending parent must be genetically linked to the child.[248] This requirement protects the child from abandonment as it is less likely that a parent genetically linked to the child will renege on the agreement.[249] ECART also requires that the parent(s) undertake counselling and receive medical advice.[250] As a result of this

[243] John Smillie "Is Security of Contract Worth Pursuing? Reflections on the Function of Contract Law" (2000) 16 JCL 148 at 154.
[244] At 155.
[245] At 155.
[246] John Burrows, Jeremy Finn and Stephen Todd *Law of contract in New Zealand* (3rd ed, LexisNexis, Wellington, 2007) at 12.4.
[247] Flavia, Berys, above n 226, at 351. See also *In re Marriage of Buzzanca* (1998) 61 Cal App 4th 1410. In that case the commissioning couple John and Luane Buzzanca divorced during the surrogate's pregnancy. Luane retained custody of the child however sought child support from John. John claimed that he was not genetically related to the child and therefore had no legal obligations to fulfil. In this situation the only person providing for Jaycee was her intended mother despite John's promise upon entering into the contract. The Superior Court of California enforced the contract and deemed John the legal father of Jaycee thus enforcing his child support responsibilities.
[248] Advisory Committee on Assisted Reproductive Technology, above n 90.
[249] *In re Marriage of Buzzanca*, above n 247. In that case the child was not genetically related to the surrogate mother nor the intending parents. Therefore the father felt that he was not unjustified in abandoning the child because biologically the child was not his.
[250] Advisory Committee on Assisted Reproductive Technology, above n 90, at 2(2)(i) –(vi).

process the parents will be made aware of all the possible complications that may arise.[251] Therefore, if for example the child is born with a birth defect it could be argued that they are less likely to abandon the child having been adequately prepared for this possibility. The ECART committee also protects the child in other respects. For example ECART requires surrogacy applicants to be either infertile or suffering from a medical condition preventing pregnancy.[252] This prevents surrogacy from becoming a market trade and ensures that the parent(s) commissioning the child are committed to loving and caring for them.[253] Under this regulation the child will also be protected from an individual with sinister or ill-founded motives. The current requirement for ECART approval also acts to screen the applicants thus the child is protected through what is essentially a vetting process which ensures the suitability of the commissioning parent(s).[254] Against this background, status laws are needed to restrict the freedom to which parties can enter into contracts in order to adequately protect the child.

From this analysis it is clear that an integrated approach is needed of contract and status laws to adequately protect the child. Contract law should determine the basis of parenthood, however status laws should restrict the freedom to which parties can enter into surrogacy contracts and should deal with cases of abandonment.

B. The Surrogate

Reproductive freedom is the primary argument made on behalf of surrogates when considering a contract based approach to surrogacy.[255] A persons' use of their own body should arguably not be subject to governmental restrictions.[256] Women should be free to autonomously engage in actions upon the basis of their own reproductive choices.[257] Arguments against contractual surrogacy are made in light of concerns for the vulnerable women however it has been claimed that this presents females as incapable of making their

[251] Advisory Committee on Assisted Reproductive Technology, above n 90.
[252] At 2(a)(ii).
[253] Natalie Gamble, above n 235, at 308. See generally Mary Warnock *A Question of Life: The Warnock Report on Human Fertilisation and Embryology* (Basil Blackwell, Oxford, 1985) at 46.
[254] The need for the implementation of a vetting process was raised by Gamble in her article Natalie Gamble, above n 235.
[255] Melissa Lane "Ethical Issues in Surrogacy Arrangements" in R Cook and others (ed) *Surrogate Motherhood, International Perspectives* (HART publishing, Oregon, 2003) 121 at 130.
[256] Yasmine Ergas, above n 30.
[257] Yasmine Ergas, above n 30.

own decisions, diminishing their equal position in society as was considered in *Johnson v Calvert*:[258]

> The argument that a woman cannot knowingly and intelligently agree to gestate and deliver a baby for intending parents carries undertones of the reasoning that for centuries prevented women from attaining equal economic rights and professional status under the law.

Furthermore, it cannot be said that surrogates do not benefit both economically and psychologically as a result of becoming a surrogate. In many cases these surrogates are not only engaging in the practice solely for the money but also for the self-worth and the satisfaction that comes with being able to assist another couple.[259] Furthermore, in third world countries surrogacy elicits notions of mutual gain, where the surrogacy payments have helped families rise up from their poverty whilst the surrogate receives satisfaction in being able to help another family in return.[260] Some of the most reputable clinics in India also provide the women with a permanent home for nine months where they receive around the clock medical care, food and plenty of rest. These are things that many impoverished Indian women would not receive otherwise.[261] Therefore, a contract based approach to surrogacy would allow for these benefits to be experienced.

While reproductive choice should be recognised, there are justifiable reasons for its limitations.[262] Although in most cases, surrogacy agreements may not harm the surrogate, it cannot be convincingly claimed that no harm results in every case and thus restrictions are justifiable upon the basis of societal interest.[263] In light of these arguments consideration must not simply be given to domestic surrogates but also Indian surrogates whose services are likely to be sought by New Zealand citizens. Many of these Indian women are engaging in surrogacy contracts as a result of extreme poverty.[264] Therefore, it has been argued that these women are susceptible to exploitation as their desperation for money may result in their

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[258] *Johnson v Calvert* 851 P 2d 776 (cal 1993) at [97].
[259] Natalie Gamble, above n 235.
[260] Natalie Gamble, above n 235.
[261] Amrit Dhillon "Mothers for hire" *The Age* (online ed, Australia, 7 September 2012). See also The Online NewsHour "Indian Surrogacy Helps Lift Some Poor, But Raises Ethical Issues" (2010)<http://go.galegroup.com/ps/i.do?id=GALE%7CCT3208606099&v=2.1&u=otago&it=r&p=LT&sw=w?>.
[262] Yasmine Ergas, above n 30.
[263] Melissa Lane, above n 255, at 131.
[264] Amrit Dhillon, above n 261. See also The Online NewsHour, above n 261.

entering into unfavourable and unconscionable bargains.[265] Contentions have also been made that their impoverished positions deprive them of choice and in some cases their decision is subject to their husband's coercion.[266] The surrogate's literacy level may also deprive them of accurate knowledge of the contractual terms and their unequal bargaining power may leave their beliefs as to issues such as termination subservient to the commissioning parents' beliefs.[267] Finally there are no guarantees under this approach that the surrogate would receive advice from an independent lawyer. A lawyer representing both parties who is paid for by the commissioning parent(s) is more likely to advance their interests over the surrogates interests.[268] In light of these contentions consideration must be given to the adequacy of contractual mechanisms in protecting the surrogate.

It could be argued that a contract based approach would mitigate these concerns to some degree. For example, under contract law, the surrogate could raise a defence in order to invalidate the contractual terms. Such a defence could include; duress, undue influence and unconscionable bargains. However if a surrogate is financially impaired so too will be her access to justice. How for example can an Indian surrogate defend her claim without having to pay for a lawyer or without knowledge of her rights to begin with? And what if the contract expressly states that disputes are to be governed by the commissioning couple's foreign jurisdiction?[269] The ability to enforce her rights becomes theoretical not realistic.

In addition to this is the concern that contract law does not account for the surrogate changing her mind.[270] These women are arguably incapable of predicting the emotions that may arise as a result of carrying a child.[271] Furthermore it has been claimed that once the child is born the surrogate may feel a natural attachment to them which she may not have pre-empted prior to entering into the agreement.[272] Such contentions indicate that the contract cannot be overriding and therefore a contract law approach to surrogacy is inappropriate in this regard. The contract should form the basis for parenthood and should be influential in reaching this

[265] Amrit Dhillon, above n 261. See also The Online NewsHour, above n 261.
[266] Amrit Dhillon, above n 261. See also The Online NewsHour, above n 261.
[267] "Mothers for hire" *The Age* (online ed, Australia, 7 September 2012).
[268] Kelly Anderson "Certainty in an Uncertain World: The Ethics of Drafting Surrogacy Agreements" (2008) 21 Geo J Legal Ethics 615 at 622.
[269] *Laws of New Zealand*, above n 151, at [117]. Under the law of contract the parties can determine the jurisdiction to govern the contract.
[270] June Carbone, above n 233, at 597.
[271] At 597.
[272] At 597.

determination. However if the surrogate changes her mind, the ultimate decision should lie with the courts in recognition of the child's best interests.[273]

The vulnerability of surrogates, especially those in India, also gives rise to a requirement for additional state regulation. Minimum standards imposing requirements for independent legal and medical advice by the legislator should be satisfied before the contract can be relied upon to determine parenthood. The medical advice given should include information about the risks associated with the pregnancy and about the possibility of the child suffering from a birth defect. The legal advice given should ensure that the surrogate is aware of the all of the possible consequences of entering into such an agreement, the specific terms of the contract and her rights as to issues such as termination. This would ensure that the surrogate's decision to enter into the agreement is not coerced by the commissioning couple and that the surrogate is fully acquainted with the legal consequences of entering into such an agreement. Furthermore, for the commissioning parent(s) to rely upon the contract and receive legal parenthood upon this basis, it should be required that the contract adheres to fair trade regulations. Fair trade regulations would address the issue of the surrogate's unequal bargaining power, ensuring that the bargain does not exploit the services of the surrogate.[274]

Therefore, surrogacy in New Zealand should not be governed by contract law alone. Once again an integrated approach is needed. Whilst the contract should form the basis of parenthood, contractual agreements should also be subject to state regulations requiring independent legal and medical advice and fair trade payments.

C. The Commissioning Parent(s)

With regard to the commissioning parent(s), a contract based approach to surrogacy would have several benefits. Status laws which prohibit commercial surrogacy limit the number of surrogates' available thus preventing couples/individuals from being able to share in the joy of creating a biological family.[275] In many debates surrounding international surrogacy the

[273] See Law Commission, above n 17, at 7.64. The Commission indicated concern for the immediate transfer of parenthood upon the basis that it may involve a surrogate having to hand over a child against her will. This is a valid concern particularly when it involves a rare case of traditional surrogacy. For a case which determines custody with regard to the child's best interests see generally *Re Evelyn & quot* [1998] FamCA 2378, [1998] FamCA 55 (15 May 1998).
[274] Casey Humbyrd "Fair Trade International Surrogacy" (2009) 9 Dev World Bioeth 118.
[275] Natalie Gamble, above n 235, at 308. For examples of families who have benefited from surrogacy see Clarissa Ward "More Americans Now Traveling to India for Surrogacy Pregnancy" *ABC World News* (online ed, USA, 27 April 2010) and for a local example see Jarod Booker "Surrogates: Delivering the Ultimate Gift" *The New Zealand Herald* (online ed, Auckland, 28 April 2012).

commissioning parent(s) are often presented as criminals engaging in exploitative practices, when in fact they are maternally desperate, unjustifiability discriminated against simply because they are unable to have a child of their own.[276] If the laws were governed by contract law, more couples and individuals would be able to engage in the practice of surrogacy as the number of willing surrogates would increase if they were paid for their services. Furthermore the contractual determination of parenthood would give recognition to maternal choice and would also facilitate gender equality as in most cases the commissioning father is also likely to be genetically linked to the child. If the father is capable of supporting and caring for the child, why should he be stripped of parental recognition under status law simply because he did not give birth to the baby?[277] He may in fact prove to be a better parent. From this perspective, a shift to a contract law approach to surrogacy has huge advantages for those incapable of having children naturally.

With regard to a breach of the agreement the current status laws provide the commissioning parent(s) with little opportunity for redress, other than the opportunity to pursue a parenting order.[278] However it is unlikely that contract law would be able to provide the commissioning parents(s) with redress either. For example, in a case where the surrogate wishes to abort the child the commissioning parent(s) cannot specifically enforce her to carry through with the pregnancy.[279] Nor would expectation damages be awarded as the expectation of the plaintiffs is that they would receive a child. In the case of abortion, expectation damages cannot be awarded as no monetary value can be placed upon the receipt of a child.[280] Furthermore reliance damages would not respond to the emotional loss of the child. In addition to this reliance damages would not be appropriate because as is the case with IVF, the payment is made whether or not a child results, otherwise the service provider would not be compensated for their time and labour. Therefore contract law cannot provide the commissioning parent(s) with redress in the case where an abortion is sought by the surrogate. If on the other hand the commissioning parent(s) wish to rely upon the contract and abort the child in the event of a

[276] Richard Epstein, above n 214, at 2319. The women engaging the services of surrogates are not women with excessive amounts of cash who would rather not endure the nine months of pregnancy. Instead it is a last resort. In an interview with Professor John Holland, Fertillity Associates Limited (6 July 2012), Professor Holland stated that he had never had a female seeking a surrogate who was not incapable of having children.
[277] June Carbone, above n 233, at 582.
[278] Care of Children Act 2004, s47(e). The commissioning parents would be able to pursue a parenting order as "any other" person under this section.
[279] John Burrows, Jeremy Finn and Stephen Todd, above n 246, at 21.2.2.
[280] Denise Lascarides, above n 182, at 1253.

medical defect, they cannot. Pursuant to s 11 of the New Zealand Bill of Rights Act 1990 every person has a right to refuse medical treatment and therefore the surrogate cannot be forced to undertake an abortion. Finally, as already discussed, if a custody dispute were to arise the contractual terms cannot be specifically enforced. Therefore, contract law would not be able to provide redress for the commissioning parent(s) in such scenarios.

Status laws provide little opportunity for redress also, however if they were used to restrict the freedom to which parties can enter into contracts, the possibility of a breach occurring would be reduced. For example, to gain the approval of ECART counselling must be undertaken.[281] Counselling has been regarded as integral to the surrogacy process.[282] Counselling prepares the parents for the rare case where the child is not handed over and prepares them for complications.[283] It also ensures the compatibility of the relationship between the surrogate and the commissioning parents and generates a discussion as to how the parties would react in a case where birth defects are detected prior to the birth.[284] Of course this does not protect the parties entirely from disagreement but it would mitigate the chances of such an occurrence. Counselling also acts to screen the parents and surrogates to ensure that they are emotionally strong enough to engage in a surrogacy agreement.[285]

Once again it is clear that contract law alone cannot govern the practice of surrogacy with regard to the interests of the commissioning parent(s). Status laws must continue to play an integral role in the process by restricting the freedom to which parties can enter into contracts. One such restriction should require that the parties undertake counselling.

[281] Advisory Committee on Assisted Reproductive Technology, above n 90, at 2(a)(vi).
[282] Tim Appleton "Emotion Aspects of Surrogacy: A Case for Effective Counselling and Support" in R Cook and others (ed) *Surrogate Motherhood, International Perspectives* (HART publishing, Oregon, 2003) 199 at 203.
[283] At 203.
[284] At 203. See also Robert Edelmann "Psychological Assessments in 'Surrogate' Motherhood Relationships" in R Cook and others (ed) *Surrogate Motherhood, International Perspectives* (HART publishing, Oregon, 2003) 143 at 155.
[285] At 203.

Chapter Five: Recommendations for Reform

Upon assessing the surrogacy laws in New Zealand and the rising occurrence of international surrogacy in India, it became clear that a child commissioned by a New Zealand couple could become the next Baby Manji. Such an occurrence could be prevented if parenthood was determined in New Zealand primarily upon the basis of the surrogacy agreement. The question thus ensued; should contract law govern the practice of surrogacy in New Zealand and if so to what extent?

From the analysis undertaken in chapter four it is clear that an integrated contract and status law approach to surrogacy would have two key benefits. Firstly, it would allow for parties to freely engage in contracts upon the basis of their own terms. Therefore, recognition is given to the reproductive choice of both the commissioning parent(s) and the surrogate. Furthermore the freedom to engage in commercial contracts has benefits for both parties. This financially benefits poor surrogates whilst also increasing the number of surrogates available to assist commissioning couples/individuals.[286] The second key benefit pertains to the primary concern of this paper. This approach would allow for parenthood to be determined upon the basis of the agreement and thus the laws of New Zealand would not conflict with those in India, preventing children from becoming stateless.

Through the analysis undertaken in chapter four it became clear that the integration of status laws is needed as contract law alone would fail in two regards. Firstly, contractual remedies proved to be incompatible with the practical reality of surrogacy. For example, in the case of abandonment, the court could not impose an order for specific performance as this would result in an unwilling relationship between the parents and the child, yet no other remedies are available.

Secondly, a contract law approach is individualistic. Thus it does not account for those who cannot protect themselves, such as the poor and vulnerable surrogates in India and the innocent children born through surrogacy. For example, vulnerable surrogates may be exploited as a result of their unequal bargaining power. In addition to this, although in most cases the intentions of the commissioning parents are honourable, freedom of contract allows any person to engage the services of a surrogate and it cannot be guaranteed that in every case the commissioning parent will prove to be worthy parents.

[286] Natalie Gamble, above n 235.

Against the background of these conclusions this paper will propose reform through the integration of both contract and status law. Contracts, both altruistic and commercial should be allowed in New Zealand. However, the freedom to enter into such agreements should be subject to restriction. The degree to which the contract governs each case should also be limited to the primary determination of parenthood and custody disputes should continue to be governed by the courts with regard to the child's best interests. Upon this basis the following recommendations are made.

A fast track system should be implemented through which the court can grant legal parenthood upon the basis of the contract. However, parenthood should only be determined on this basis if the contract meets all legal regulations, whether domestic or international, and where the surrogate is not disputing the agreement. The freedom to which parties can engage in surrogacy contracts domestically, should also be restricted. Thus, as a prerequisite to entering into a contract, approval from a regulatory body such as ECART should be obtained. Under the current ECART guidelines at least one of the commissioning parents must be genetically linked to the child, the commissioning mother must be medically incapable of having a child and both parties must have received independent legal advice and counselling.[287]

The certainty provided by this fast track approach would encourage adherence to these legal requirements; however there is always the possibility that a surrogacy agreement does not observe these regulations. In such a scenario the commissioning parent(s) should not be refused legal parenthood solely upon this basis. Instead the court should determine parenthood with regard to the child's welfare and best interests.[288] This will ensure that the child's welfare is not compromised as a result of the commissioning parent's ignorance of the law.[289] The Australian case of *Ellison and Anor & Karnchanit* exemplifies the type of approach that should be taken if the surrogacy agreement does not adhere to legal requirements.[290] The child's best interests should be regarded as paramount; however the outcome should be subject to the court's discretion with regards to the individual circumstances of the case. Consideration, for example, should be given to a range of factors

[287] Advisory Committee on Assisted Reproductive Technology, above n 90, at 2(2)(i) –(vi).
[288] *Re: X & Y (Foreign Surrogacy)*, above n 11, at [24].
[289] At [24].
[290] *Ellison and Anor & Karnchanit* [2012] FamCA 602 (1 August 2012).

such as those set out by ECART.[291] However in the majority of cases, adherence is likely and thus the integrated approach will prove effective.

For this integrated approach to work effectively there must also be cooperation at an international level. As discussed, additional regulations are necessary if parenthood is to be determined upon the basis of the contract. However, domestic requirements will not protect the vulnerable Indian surrogates with whom New Zealand citizens will contract. Nor can a regulatory body such as ECART dictate who can enter into surrogacy agreements if the process is being undertaken in India. Therefore, this paper proposes that reform should only occur at a domestic level once international regulations are implemented. Such regulations are foreseeable as international surrogacy received consideration by the Council of General Affairs and Policy of the Hague conference in April 2010.[292] As a result the Permanent Bureau is to continually review the international practice.[293] This paper therefore will proceed by making suggestions as to the form and content of such regulations.

International regulation in the form of a convention should require adherence to minimum legal and medical standards. Those countries who permit surrogacy and who are signatories to the convention should be required to ensure that all surrogacy clinics are bound by medical guidelines reflective of those issued by ESHRE.[294] As outlined by ESHRE particular restriction should be given to multiple embryo transplantation.[295] In India for example the current practice often involves multiple embryo transfers because pregnancy is the main goal.[296] However this can result in increased medical risk for both the surrogate and the unborn children as multiple pregnancies increase the dangers of complication and premature birth.[297] Regulations should also impose requirements upon each state to eradicate any risk of HIV transfer or the transfer of other threatening diseases.

As analysed in this paper there are further key issues upon which cooperation is needed. Firstly, the convention should require that the convention countries restrict surrogacy to cases where at least one of the intending parents is genetically linked to the child. This is not only

[291] *Ellison and Anor & Karnchanit*, above at 290, at [132].
[292] Council on General Affairs and Policy of the Conference *Conclusions and Recommendations Adopted by the Council of the Council of General Affairs and Policy of the Conference* (Hague Conference on Private International Law, 17-20 April 2012).
[293] At 21.
[294] F Shenfield and others, above n 29.
[295] F Shenfield and others, above n 29.
[296] F Shenfield and others, above n 29.
[297] F Shenfield and others, above n 29.

to prevent abandonment as discussed, but because adoption should be the primary mode by which parents can form a family with a child who is not genetically theirs.[298] This is because there are already many orphaned or abandoned children in need of a home and therefore these children should be given priority before any more are created.[299] Secondly, the convention should give recognition to the child's right to identity for reasons already discussed.[300] The convention countries should be bound by an obligation to record the origins of the child on a national registry where possible. Finally, the convention should emphasise the importance of fair trade payments. If contractual payments do not reach fair trade standards, convention countries should impose sanctions upon the commissioning parent(s) and surrogacy agencies involved.

To facilitate these standards a Central Authority should be established in each country. In order for a surrogacy procedure to occur involving parties from two different domiciles, the requirement of each Central Authority should be satisfied.[301] For example, before commencement, the commissioning parent's Central Authority should be satisfied that the surrogate has been fully informed through an adequate consent process and that the surrogate is a suitable candidate as a result of counselling and medical screening.[302] The Central Authority of the surrogate should be satisfied as to the fitness of the intending parent(s) ensuring that at least one parent is genetically linked to the child and that the commissioning mother suffers from a medical condition preventing pregnancy.[303]

With the implementation of international regulations such as those suggested above, the proposed reform of New Zealand's surrogacy laws would be successful in not only preventing the statelessness of children, but it would adequately protect the interests of all the parties involved. However, given that this paper has predicted that New Zealanders will increasingly engage in international surrogacy agreements in India, it is imperative that India is a signatory to an international convention of this nature. It would however be in India's interests to do so because if the market is regulated, more individuals are likely to seek the services offered in India as a result of this reassurance. Furthermore, if India adheres to such regulations fewer countries are likely to implement extraterritorial surrogacy laws in the way

[298] Katrina Trimmings and Paul Beaumont "International Surrogacy Arrangements: An Urgent Need for Legal Regulation at the International Level (2011) 7 J Priv Int L 627 at 641.
[299] At 641.
[300] See discussion in chapter four.
[301] Katrina Trimmings and Paul Beaumont, above n 298, at 642.
[302] At 642.
[303] At 643.

that New South Wales has done, retaining the demand in the international market. Therefore, not only is international regulation foreseeable it is likely that India would become a party to an international surrogacy convention.

As a result of domestic and international regulation, the benefits of determining parenthood primarily upon the basis of surrogacy contracts in New Zealand could be experienced. Children would not end up stateless and the integration of status laws would provide adequate protections for the parties involved and would ensure that all interests are accounted for. Therefore, this paper advocates for reform through the implementation of an integrated approach of status law and contract law.

Conclusion

The practice of surrogacy elicits moral contentions and thus legislators across the world have differed in their responses to the practice. Surrogacy has been prohibited by some, legalised by others and partially opposed to by those who have criminalised commercial surrogacy but not altruistic surrogacy. However, with the increasing prevalence of international surrogacy these divergent responses have given rise to conflicts of international private law. The effect of such conflicts can be exemplified through the following statement made by the Permanent Bureau:[304]

> Children may be "marooned, stateless and parentless" in the State of their birth, with their families resorting to desperate, sometimes criminal measures to attempt to take them "home". Further, if they are able to travel "home", children may be left with "limping" legal parentage, with the consequent child protection concerns that this involves.

In light of this statement the protection of innocent children born through international surrogacy has been the central motivation for this paper.

Upon recognising India's rising popularity as a fertility destination, this paper has used India as a case study to demonstrate the legal issues that may result if New Zealand citizens engage the services of an Indian surrogate. Particular reference has been made to the Indian cases of Baby Manji and the Balaz twins in an attempt to exemplify the reality of these issues and the vulnerability of the children involved. With regard to these potential scenarios, it has been concluded that New Zealand's laws are inadequate in dealing with cases of international surrogacy.

Chapter three of this paper considered several options for reform. Emphasis was placed upon the notion of maternal desperation and it was concluded that prohibition would have a limited effect. Approaches which recognised parental filiations but refused citizenship were also opposed upon the basis that the innocent child should not be punished for their parent's folly. Against these considerations this paper has proposed that in New Zealand parenthood should be determined primarily upon the basis of surrogacy contracts.

[304] Permanent Bureau, above n 3, at 1.

A contractual determination of parenthood would protect innocent children from becoming stateless, left without a nationality or an identity. However, it has not been suggested that contract law is to govern the practice of surrogacy free from the constraints of state regulation. Although contract law does give recognition to reproductive choice and perpetuates the best interests of the child as a result of intentional parenthood, it cannot guarantee the protection of all three parties in *every* case. Especially in the case of international law, regulation is needed to protect vulnerable Indian surrogates from exploitation.

In summary, the statelessness of children is a poignant issue in the realm of international surrogacy, one which cannot be ignored as it results in the unintentional punishment of innocent children. Under the current laws in New Zealand, if a child is born to a surrogate in India, there is no guarantee that that child will be able to return to New Zealand with his/her intended parent(s). Even if that child can return to New Zealand, there is no guarantee that he/she will be granted New Zealand citizenship. Clearly New Zealand's surrogacy laws inadequately respond to the prevalence of this international practice and therefore reform should occur in a way which reflects the recommendations outlined in chapter five.

Appendix I

I. Legislation: Selected Sections

Human Assisted Reproductive Technology Act 2004

Section 14: Status of surrogacy arrangements and prohibition of commercial surrogacy arrangements

(1) A surrogacy arrangement is not of itself illegal, but is not enforceable by or against any person.

(2) Subsection (1) does not affect the Part 2 of the Status of Children Act 1969.

(3) Every person commits an offence who gives or receives, or agrees to give or receive, valuable consideration for his or her participation, or for any other person's participation, or for arranging any other person's participation, in a surrogacy arrangement.

(4) Subsection (3) does not apply to a payment—

- (a) to the provider concerned for any reasonable and necessary expenses incurred for any of the following purposes:
    - (i) collecting, storing, transporting, or using a human embryo or human gamete:
    - (ii) counselling 1 or more parties in relation to the surrogacy agreement:
    - (iii) insemination or *in vitro* fertilisation:
    - (iv) ovulation or pregnancy tests; or
- (b) to a legal adviser for independent legal advice to the woman who is, or who might become, pregnant under the surrogacy arrangement.

(5) Every person who commits an offence against subsection (3) is liable on summary conviction to imprisonment for a term not exceeding 1 year or a fine not exceeding $100,000, or both.

Status of Children Act 1969

Section 17: Woman who becomes pregnant is mother even though ovum is donated by another woman

(1) This section applies to the following situation:

- (a) a woman (**woman A**) becomes pregnant as a result of an AHR procedure:
- (b) the ovum or embryo used for the procedure was produced by or derived from an ovum produced by another woman (**woman B**).

(2) In that situation, woman A is, for all purposes, the mother of any child of the pregnancy.

Section 18: When woman's non-donor partner is parent, and non-partner semen donor or ovum donor is not parent

(1) This section applies to the following situation:

- (a) a partnered woman (**woman A**) becomes pregnant as a result of an AHR procedure:
- (b) the semen (or part of the semen) used for the procedure was produced by a man who is not woman A's partner or, as the case requires, the ovum or embryo used for the procedure was produced by, or derived from an ovum produced by, a woman who is not woman A's partner:
- (c) woman A has undergone the procedure with her partner's consent.

(2) In that situation, woman A's partner is, for all purposes, a parent of any child of the pregnancy.

Section 19: Partnered woman: ovum donor not parent unless mother's partner at time of conception

(1) This section applies to the following situation:

- (a) a partnered woman (**woman A**) becomes pregnant as a result of an AHR procedure:
- (b) the ovum or embryo used for the procedure was produced by, or derived from an ovum produced by, another woman (**woman B**).

(2) In that situation, woman B is not, for any purpose, a parent of any child of the pregnancy unless woman B is, at the time of conception, woman A's partner.

Section 21 Partnered woman: non-partner semen donor not parent

(1) This section applies to the following situation:

- (a) a partnered woman becomes pregnant as a result of an AHR procedure:
- (b) the semen (or part of the semen) used for the procedure was produced by a man (**man A**) who is not her partner.

(2) In that situation, man A is not, for any purpose, a parent of any child of the pregnancy.

Section 22: Woman acting alone: non-partner semen donor not parent unless later becomes mother's partner

(1) This section applies to the following situation:

- (a) a woman acting alone becomes pregnant as a result of an AHR procedure:
- (b) the semen used for the procedure was produced by a man (**man A**) who is not her partner.

(2) In that situation, man A is not, for any purpose, a parent of any child of the pregnancy unless man A becomes, after the time of conception, the woman's partner (in which case the rights and liabilities of man A, and of any child of the pregnancy, are determined in accordance with section 24).

Bibliography

1. Cases

1.1. New Zealand

Re Adoption of P [2005] NZLFR 865, (2005) 24 FRNZ 846 (FC)

Re applications by KR [2011] NZFLR 429 (FC)

Re Adoption of C [1990] NZFLR 385, (1990) 7 FRNZ 231(FC)

Reeves v One World Challenge LLC [2006] 2 NZLR 184 (CA)

Ross v Ross [2010] NZCA 447, [2011] NZFLR 440

1.2. Australia

Stern v National Australia Bank [1999] FCA 1421

Re Evelyn & quot [1998] FamCA 2378, [1998] FamCA 55 (15 May 1998)

Ellison and Anor & Karnchanit [2012] FamCA 602 (1 August 2012)

1.3. India

Baby Manji Yamanda v Union of India & ANR [2008] INSC 1656

Jan Balaz v Anand Municipality &6 HC Ahmedabad 11 November 2009

1.4. United States of America

Johnson v Calvert 851 P 2d 776 (Cal 1993)

In re Marriage of Buzzanca (1998) 61 Cal App 4th 1410

Matter of Baby M 537 A 2d 1227 (NJ 1998)

1.5. England

Qureshi v Quershi [1971] Fam 173, [1971] 2 WLR 518 (Fam)

Re: X & Y (Foreign Surrogacy) [2008] EWHC 3030 (Fam), [2009] Fam 71

2. Legislation:

2.1. New Zealand

Adoption Act 1955

Adult Adoption Information Act 1985

Care of Children Act 2004

Citizenship Act 1977

Human Assisted Reproductive Technology Act 2004

New Zealand Bill of Rights Act 1990

Sale of Goods Act 1908

Status of Children Act 1969

2.2. New South Wales, Australia

Surrogacy Act 2010

2.3. India

Citizenship Act 1955

The Assisted Reproductive Technologies (Regulation) Bill 2010

3. Treaties

Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption 1870 UNTS 167 (opened for signature 29 May 1993, entered into force 1 May 1995)

United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990)

Convention for Protection of Human Rights and Fundamental Freedoms CETS No.005 (opened for signature 4 November 1950, entered into force 1953)

4. Books and Chapters

Commercial Law in New Zealand (online looseleaf ed, LexisNexis)

David Mclean *Morris: The Conflicts of Law* (15th ed, Sweet v Maxwell, London, 2000)

Family Law Service (online looseleaf ed, LexisNexis)

John Burrows, Jeremy Finn and Stephen Todd *Law of contract in New Zealand* (3rd ed, LexisNexis, Wellington, 2007)

Lawrence Collins and others *Dicey & Morris, The Conflict of Law* (13th ed, Sweet & Maxwell, London, 2000)

Mary Warnock *A Question of Life: The Warnock Report on Human Fertilisation and Embryology* (Basil Blackwell, Oxford, 1985)

Melissa Lane "Ethical Issues in Surrogacy Arrangements" in R Cook and others (ed) *Surrogate Motherhood, International Perspectives* (HART publishing, Oregon, 2003) 121

Rhona Schuz "Surrogacy in Israel: An Analysis of the Law in Practice" in R Cook and others (ed) *Surrogate Motherhood, International Perspectives* (HART publishing, Oregon, 2003) 35

Robert Edelmann "Psychological Assessments in 'Surrogate' Motherhood Relationships" in R Cook and others (ed) *Surrogate Motherhood, International Perspectives* (HART publishing, Oregon, 2003) 143

Sheila McLean "Is Surrogacy Exploitative?" in Sheila Mclean (ed) *Legal Issues in Human Reproduction* (Gower Publishing Company Limited, Aldershot, 1989) 164

Sir Henry Sumner Maine *Ancient Law* (9th ed, Spottiswoode and Co, London, 1988)

Tim Appleton "Emotion Aspects of Surrogacy: A Case for Effective Counselling and Support" in R Cook and others (ed) *Surrogate Motherhood, International Perspectives* (HART publishing, Oregon, 2003) 199

Zainab Al-Alawi *Brookers Family Law – Child Law* (online loosefleaf ed, Brookers)

5. Journal Articles

Amrita Pande "Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker" (2010) 35 Signs 969

Anita Stuhmcke "The criminal act of commercial surrogacy in Australia: a call for review" (2011) 18 JLM 601

Carol Sanger "Great Contract Cases" (2000) 44 St Louis ULJ 1443

Casey Humbyrd "Fair Trade International Surrogacy" (2009) 9 Dev World Bioeth 118

Denise Lascarides "A plea for the enforceability of gestational surrogacy contracts" (1997) 25 Hofstra L Rev 1221

Eric Blyth and Abigail Farrand "Reproductive tourism – a price worth paying for reproductive autonomy?" (2005) 25 Crit Soc Policy 90

Flavia, Berys "Interpreting A Rent-a-Womb Contract: How California Courts Proceed When Gestational Surrogacy Arrangements Go Sour" (2005-2006) 42 Cal W L Rev 321

F Shenfield and others "ESHRE's Good Practise Guide for Cross-Border Reproductive Care for Centres and Practitioners" (2011) 26 Hum Reprod 1625

Janet Dolgin "Status and Contract in Surrogate Motherhood: An Illumination of the Surrogacy Debate" (1990) 38 Buff Law Rev 515

Janet Halley "Behind the Law of Marriage (1): From Status/Contract to the Marriage System" (2010) 6 Harvard Journal of the Legal Left 1

Jenni Millbank "The New Surrogacy Parentage Laws in Australia: Cautious Regulation or 25 Brick Walls?" (2011) 35 Melb U L Rev 165

Jill Hasday "The Cannon of Family Law" (2004) 57 Stan L Rev 825

John Smillie "Is Security of Contract Worth Pursuing? Reflections on the Function of Contract Law" (2000) 16 JCL 148

June Carbone "The Role of Contract Principles in Determining the Validity of Surrogacy Contracts" (1998) 28 Santa Clara L Rev 581

Katrina Trimmings and Paul Beaumont “International Surrogacy Arrangements: An Urgent Need for Legal Regulation at the International Level (2011) 7 J Priv Int L 627

Kelly Anderson “Certainty in an Uncertain World: The Ethics of Drafting Surrogacy Agreements” (2008) 21 Geo J Legal Ethics 615

Lucy Theis, Natalie Gamble and Louis Ghevaert “Re X and Y (foreign surrogacy): ‘A trek through thorn forest’” (2009) 39 Fam Law 239

Lynley Anderson, Jeanne Snelling and Huia Tomlins-Jahnke “The practice of surrogacy in New Zealand” (2012) 52 ANZJO 253

Margaret Ryznar “International Commercial Surrogacy and its Parties” (2010) 43 J Marshall L Rev 1009

Natalie Gamble “Surrogacy: Creating a sensible national and international legal framework” [2012] IFL 308

Peter Gaffney “Why the “widespread agreement is wrong”: contesting the non-harm arguments for the prohibition of full commercial surrogacy” (2009) 17 JLM 280

Richard Epstein “Surrogacy: The Case for Full Contractual Enforcement” (1995) 81 Va L Rev 2305

Richard Storrow “The Phantom Children of the Republic: International Surrogacy and the New Illegitimacy” (2011-2012) 20 Am UJ Gender Soc Poly’s & L 561

Ruby lee “New trends in global outsourcing of commercial surrogacy: a call for regulation” (2009) 20 Hastings Women’s Law Journal 275

Russell Versteeg “From Status to Contract: A contextual Analysis of Maine’s Famous Dictum” (1988-1989) 10 Whittier L Rev 669

Sarah Mortazavi “It Takes a Village to Make a Child: Creating Guidelines for International Surrogacy” (2012) 100 The Geo LJL 2249

Usha Smerdon “Crossing bodies, crossing borders: International surrogacy between the United States and India” (2008-2009) 16 Cumb L Rev 17

Wannes Van Hoof and Guido Pennings "Extraterritorial Laws for Cross Border Reproductive Care: The Issue of Legal Diversity" (2012) 19 EJHL 187

6. Parliamentary and Governmental Materials

6.1. New Zealand

(6 October 2004) 620 NZPD 15899

(6 October 2004) 620 NZPD 15913

Advisory Committee on Assisted Reproductive Technology *Surrogacy Arrangements Involving Providers of Fertility Services* (November 2008)

Law Commission *New Issues in Legal Parenthood* (NZLC R88, 2005)

Law Commission *New Issues in Legal Parenthood* (NZLC PP54, 2004)

6.2. New South Wales, Australia

(10 November 2010) NSWPD 27583

6.3. India

Central Adoption Resource Authority *Guidelines for Adoption from India* (2006)

Central Adoption Resource Authority *Guidelines for the Adoption of Children* (2011)

Ministry of Health and Family Welfare, Government of India *National Guidelines for Accreditation, Supervision and Regulation of ART in India* (2005)

Law Commission *The Need for Legislation to Regulate Assisted Reproductive Technology Clinics As Well As Rights and Obligations of Parties to a Surrogacy* (INCL 13 R228, 2009)

7. Internet Resources

Internal Affairs and others "International Surrogacy Information Sheet"<http://www.cyf.govt.nz/documents/adoption/is-information-sheet-june2011.pdf>

Hari Ramasubramanian "German Couple All Set to Take Twins to Homeland" (29 May 2010) <India Surrogacy Law <http://blog.indiansurrogacylaw.com/tag/jan-balaz/>

Hari Ramasubramanian "Supreme Court of India Directs CARA to Consider Adoption Plea of German's Surrogacy Case" (17 March 2010) India Surrogacy Law <http://blog.indiansurrogacylaw.com/tag/jan-balaz/>

ICANZ <http://www.icanz.gen.nz>

no.370 of the 6 April 2011 (910-19.053) Cour de Cassation first civil chamber available at <http://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/370_6_19628.html>

The Online NewsHour "Indian Surrogacy Helps Lift Some Poor, But Raises Ethical Issues" (2010)<http://go.galegroup.com/ps/i.do?id=GALE%7CCT3208606099&v=2.1&u=otago&it=r&p=LT&sw=w?>

8. Newspaper Articles

Amrit Dhillon "Mothers for hire" *The Age* (online ed, Australia, 7 September 2012)

"Baby Manji gets birth certificate" *The Telegraph* (online ed, Calcutta, India, 10 August 2008)

"Born in India, Nowhere to Belong" *The Times of India* (online ed, India, 18 September 2009)

Clarissa Ward "More Americans Now Traveling to India for Surrogacy Pregnancy" *ABC World News* (online ed, USA, 27 April 2010)

Dhanajay Mahapatra "Baby Manji's Case Throws Up Need for Law on Surrogacy" *The Times of India* (online ed, India, 25 August 2008)

Emmanuelle Chavalereau "Surrogate Motherhood: 'Our girls will always remain ghosts under French law'" *Monde.fr* (online ed, 6 April 2011)

Jarod Booker "Surrogates: Delivering the Ultimate Gift" *The New Zealand Herald* (online ed, Auckland, 28 April 2012)

Kishwar Desai "India's surrogate mothers are risking their lives. They urgently need protection." *The Guardian* (online ed, UK, 5 June 2010)

"Parents Warned Over International "Baby Farms" *TVNZ* (online ed, 20 August 2011)

"SC directs CARA to consider German couple's plea for adoption" *The Times of India* (online ed, India, 17 May 2010)

9. Papers Presented at Conferences and Seminars

Acting Principal Family Court Judge Paul Dadelszen "A New Adoption Act for the New Millennium" (paper presented to Families in Transition Seminar, Roy McKenzie Centre, August 2009).

10. Interviews

Interview with Professor John Holland, Fertility Associates Limited (6 July 2012)

Telephone Interview with Dr Richard Fisher, Fertility Associates Limited (6 July 2012)

11. Other

Council on General Affairs and Policy of the Conference *Conclusions and Recommendations Adopted by the Council of the Council of General Affairs and Policy of the Conference* (Hague Conference on Private International Law, 17-20 April 2012)

Permanent Bureau *A Preliminary Report on the Issues Arising from International Surrogacy Arrangements* (Hague Conference on International Private Law, March 2012)

Laws of New Zealand Conflict of Laws: Choice of Law (online ed)

Yasmine Ergas "The Transnationalization of Everyday Life: Cross-Border Reproductive Surrogacy, Human Rights and the Revision of International Law" (paper presented to Deconstructing and Reconstructing "Mother" Workshop, Columbia University, March 2012)