

Surrogacy: A Comparative, Legal, Children's Rights Perspective

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Abstract : The last Australian Parliamentary inquiry into surrogacy took place in 2016. Since then, a number of countries have reviewed their surrogacy laws, including countries such as New Zealand and the United Kingdom, which traditionally have invoked similar legal approaches to Australia on a broad range of issues. The time is ripe to reform Australia's surrogacy laws with a view to putting in place a system that best protects the rights of all parties to a surrogacy arrangement, and especially the rights of the child. There are two specific, linked issues which tend to be particularly contentious in the surrogacy context. The first relates to legal parentage. There are questions around whether the surrogate or the intended parents should be deemed the legal parents of a child born through surrogacy and what should be the process for any transfer of parentage. The second key issue relates to compensation and whether a surrogate should be compensated for the reproductive labour inherent in conceiving, gestating, and birthing a child. This paper will invoke a comparative analysis with a view to considering how different countries are regulating surrogacy and which approach best protects the rights all parties involved in the surrogacy arrangement, especially the rights of the children born through surrogacy. The specific countries to be considered are Australia, Canada, and California (United States). I have selected these countries for the following reasons: Australia is the jurisdiction where the author is based, it is, therefore, the jurisdiction with which she has the most familiarity. It allows altruistic surrogacy only and post-birth parentage orders in favour of the intended parents of children born through altruistic surrogacy California, as a jurisdiction allowing for compensated surrogacy and pre-birth parentage orders in favour of the intended parents, sits at the other end of the spectrum to Australia thereby providing an interesting point of comparison. Canada sits somewhere in the middle; it ostensibly allows only altruistic surrogacy, but in practice, many aspects of the Canadian process resemble compensated surrogacy. In addition to conducting a comparative analysis with other countries, the paper will also consider international human rights law as its overarching framework for determining the approach that best protects the rights of a child born through surrogacy. Particular attention will be paid to the United Nations Convention on the Rights of the Child as the key children's rights treaty. The European Court of Human Rights will also be extensively considered as it has decided a number of cases relating to the rights of children born through surrogacy.

Keywords : surrogacy, children's rights, australia, compensation, parentage

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