Anne-Marie Hutchinson Memorial Lecture

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Two words: courage and fun

I have been given the great honour today of talking about my friend and colleague, the late Anne-Marie Hutchinson, OBE QC (Hons).

Speaking at the tail end of this meeting, I have to keep this interesting!

I am not going to talk at first about Anne-Marie, but two other inspirational women in my first law job, when I was young and green. I'm doing so because they offer parallels with Anne-Marie. One of those women has spoken at this conference. She was a young mum, passionate, caring about clients, concerned about domestic violence (which did not have that name back then), a bit of a perfectionist, a very stylish dresser, took steps to end forced marriage, and a top class family lawyer. On one occasion that lawyer was refused the ability to appear by an old dinosaur of a judge- because she wore culottes. Thankfully, due to continued advocacy by women lawyers and male colleagues- and

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critically in my view the appointment of women to the bench, those days hopefully are behind us. It is no surprise that she was appointed to the bench- twice. That woman is Justice Purdon-Sully.

The other woman came to the law late, having worked first as a legal secretary and then law clerk. She was of Irish extraction, was passionate, beloved by her clients, would hector anyone who disagreed with her, and drank and smoked. That woman was the late Carmel Murray, who received the nickname of the Duchess of Divorce.

Each of these strong women showed how women can lead, their clients in the right direction, in the profession and personally, and that the practice of law could help real people, as opposed to corporations. In acting for real people, each of us - as they showed - is capable of changing the world, even if it is only in that family, and sometimes systemically, and of making a difference. It was because of their influence, that way back in 1988 I decided to specialise in family law.

The styles of these passionate female family lawyers were quite different- one being polite, deferential, and to the point, the other being very much in your face- but both were passionate about caring for their clients- about caring for people including the children whose parents had split up, and when their clients were the oppressed party- commonly the wives- going into bat to ensure that they (and the children) were safe and that they (and the children) were protected.

Both these women took a child centred approach – because as a good family lawyer, that is what you must do. Whatever mistakes you make as a lawyer may be visited upon those children, and their children.

I mention both these women in that first workplace of mine here in Brisbane, because each of them, in their different ways, remind me of Anne- Marie Hutchinson, someone born in Ireland and practising in England as a world leading family lawyer. Anne-Marie drank and smoked, liked to party, was passionate about her clients and those she saw as oppressed, had one line zingers expressing her view, a razor sharp wit, and had a vision about how the world can be a different place. As a family lawyer who specialised in children's matters, she saw the impact on children of separation and divorce. She took work seriously, but did not take life too seriously.

Anne-Marie took with her that practical, child centred perspective honed from years of litigating in children's cases. That child centred approach was applied by her, critically in my view, when it came to surrogacy matters. There is in my view a real advantage in family lawyers like Anne-Marie, or me, then undertaking surrogacy work. Having been tested in adversarial litigation about children makes one wiser, in my view, about the risks, benefits and limitations of family formation. There is a greater perspective as to what can go wrong- and hopefully how to avoid it. Being in family law for a long time hopefully makes one focus on what decisions one has made as a lawyer when trying to resolve family law disputes- and what impact those decisions – good or bad- have had on the children.

Anne-Marie was a leader in the law, both locally and globally. If you are in any doubt, Anne-Marie ended up with a Wikipedia article about her[2]:

[2] https://en.wikipedia.org/wiki/Anne-Marie_Hutchinson .

*"**Anne-Marie Hutchinson** OBE QC (Hon) (1 August 1957 – 2 October 2020) was an Irish lawyer known for her work in the UK concerning children's rights, particularly forced marriage and international child abduction.*

Anne-Marie was appointed an honorary Queen's Counsel by Her Majesty due to her work in stopping forced marriage.

Early life and education

Hutchinson was born on 1 August 1957 in Donegal in the Republic of Ireland. Her mother was a nurse and father ran a barbers. She was the third of six children. She moved to England when she was a child after her father got a job on a US airbase near Huntingdon.

She suffered from osteomyelitis, a bone condition, which caused her to miss the last two years of primary school. She also spent a year in Addenbrooke's Hospital where she had to relearn how to walk.

At which point I interrupt and say that they made Anne-Marie tough. She was no shrinking violet.

She left St Peter's School at 16 and worked as bank teller for two years. She then attended Huntingdon Technical College where she received 3 A-level qualifications. She graduated from the Leeds University with a degree in international history and politics and became a qualified solicitor in 1985.[3]

Career

Hutchinson joined the London law firm Dawson Cornwell in 1998 and became the head of its children's department.

She worked on the first English court case of forced marriage in 1999. She ensured the return of a Sikh girl who had been abducted by her parents to force her into marriage in India.

A 2005 case in which she represented a British-born Pakistani woman set a legal precedent when the High Court ruled forced marriages could be annulled due to lack of consent.

Hutchinson also worked to introduce the Forced Marriage (Civil Protection) Act 2007, which made it illegal for women and girls to be taken overseas to be forced into marriage.

The year after the act was brought in, she represented Humayra Abedin, a trainee GP, who had been sent to Bangladesh and forced to marry against her will. Despite the court order not being enforceable in Bangladesh, the judge ordered that Abedin be released.

She received an OBE in 2002 for services to international adoption and child abduction and was made an honorary QC in 2016.

Hutchinson won the UNICEF Child Rights Lawyer Award in 1999 and the International Bar Association Outstanding International Woman Lawyer Award in 2010.

In 2013, she became a commissioner on the Forced Marriage Commission.

Hutchinson's other work has concerned victims of "honour"-based violence, female genital mutilation, abandoned spouses, and potential parents in surrogacy arrangements.

She died on 2 October 2020 of cancer. She had two children, Catherine (born 1987) and Sam (born 1995)"

That entry does not reflect that Anne-Marie also received the President's Medal from the Academy. The obituary from the Academy says[3]:

"IAFL are deeply saddened by the profound loss of our European Chapter Fellow, recipient of the President's Medal and former Parliamentarian and Governor at Large, Anne-Marie Hutchinson OBE, QC (Hon). The day before her death the Legal 500 reflected that Anne-Marie had 'near legendary status'.

Anne-Marie became a Fellow of the IAFL in January 2003. She served as Governor at Large from 2010-2016 and Parliamentarian from 2016-2018. She represented the

[3] https://www.iafl.com/news/2020/anne-marie-hutchinson/ .

IAFL at Hague Conferences on the Malta Process in 2016 and Experts' Group on the Parentage and Surrogacy Project in 2017, 2018 and 2019.

Anne-Marie inspired and led the IAFL's work on Surrogacy / ARTS / Parentage and Forced Marriage and worked tirelessly on many of our committees. In 2014, IAFL President Cheryl Hepfer awarded her the President's Medal in recognition of her work in these areas, and in respect of her contributions to the (then) IAML and the world community at large.

Anne-Marie also encouraged and supported us to foster relations with other organisations such as the Council of the European Union, the HCCH, the Aire Centre, Tahirih Justice Center, LawAsia and the World Congress on Family Law and Children's Rights. She was unfailingly generous with her time, knowledge and contacts and shared her expertise at many IAFL open conferences, as well as our own Chapter and IAFL meetings - too many to name individually here.

There are many jurisdictions in which we now have Fellows only thanks to Anne-Marie. Whenever she came across a good practitioner (and her cases were legendary for covering every corner of the globe), she encouraged them to apply. She was an

incredible ambassador for the IAFL and we owe her an enormous debt of gratitude for all she did for us.

We send our condolences to her family, colleagues at Dawson Cornwell and friends throughout the world.

Rest in peace, our dear friend."

When I said to my husband Mitchell that I was speaking about Anne-Marie, I asked him to tell me what he thought of her. He said:

- Laser focused
- Thought strategically
- Compassionate
- Razor sharp wit
- Warm
- Loved to party

- A legend in her field
- A maverick

Anne-Marie was passionate about family law and how its various tools can make a difference throughout the world.

She did this in a number of ways, in addition to her file work:

- As Wikipedia noted, Anne-Marie championed to end forced marriage. I note that this remains an objective of the Academy. It is also the goal of at least one other international body- Zonta International, the leading women's networking group, but which is not in the list above. The scale of the problem cannot be underestimated. UNICEF estimates that more than 650 million women alive today were married as children. Every year, at least 12 million girls are married before they turn 18. That is 28 girls every minute. In least developed countries 40% of girls are married before they turn 18 and 12% before they turn 15. Both the World Bank and the OECD have sought to highlight this problem too.

- Teaching about the 1980 and 1996 Hague Conventions and how they can be implemented, in her travels throughout the world in Asia, Europe and Africa, including the use of alternative dispute resolution where appropriate. This included going to Russia in winter, where she obtained a magnificent warm fur hat.

- Championing change so that LGBTIQA+ people (like me) – and their children are protected in their relationships and parenting.

- Championing appropriate regulation of family formation, including through surrogacy.

Surrogacy

I dealt with Anne- Marie for ten years in the surrogacy space. I first came across Anne-Marie in 2010. That time was a turning point for how the world considered surrogacy. To set the scene, I have to go back a few years.

In 1978, Louise Brown was born via IVF in the UK. At that point the world changed. That moment meant greater possibilities with sperm donation, that egg donation was now possible, and that gestational surrogacy was now possible. Pandora's box was then opened.

Ten years later, in 1988, two events occurred that changed how Australians at least regulated surrogacy. The New Jersey Supreme Court, in the first litigated surrogacy case, concerning Baby M[4], decided that the surrogacy contract was void, but that it was in the best interests of the child that he live with the intended genetic father and his wife. In Victoria, Alice Kirkman was born. She was conceived from her mother Maggie's egg, and sperm from a donor, and carried by her aunt Linda.

Horrified, Australian governments acted. Australian States legislated to end surrogacy. Queensland led the world– to criminalise all forms of surrogacy- commercial, altruistic, gestational or traditional, in Queensland or anywhere else, if undertaken by Queensland residents. Brisbane is the birthplace of extra-territorial surrogacy laws. Welcome to ground zero.

My first surrogacy case was in 1988, concerning traditional surrogacy. I first learnt what surrogacy was when a woman came to see me. She had been a traditional surrogate. A couple wanted to have a child. Pregnancy had occurred at home. No IVF clinic had been involved.

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[4] https://en.wikipedia.org/wiki/Baby_M .

My client wanted to keep both the money and the baby. And she did. By the time she saw me, what had been done was illegal- but it still happened. The matter never went to court. I don't know if that child, if they are still alive, was ever told the truth about how they were conceived.

By 2005, Australian governments started to liberalise surrogacy laws. This was in reaction to an Australian politician Senator Stephen Conroy and his wife, Paula Benson, living in Victoria, who were unable to undertake surrogacy at home, and had to do so in New South Wales. There was then a push to liberalise Australian surrogacy laws.

2010, at least in Australia, was a turning point. Western Australia's *Surrogacy Act* had commenced in March 2009. In 2010, surrogacy laws commenced in Victoria in January, in Queensland in June, in South Australia in November, and enacted in New South Wales, but commenced in March 2011[5].

Back in 2010, those who needed to undertake surrogacy in order to become parents- and could not do so at home - often did so overseas. That still happens. Although Australia allows

[5] For the sake of completeness, the Australian Capital Territory had surrogacy laws since 2004, Tasmania from 2012 and the Northern Territory from 2022.

surrogacy, for every child born in Australia via surrogacy, about three are born overseas[6]. At that time, there were two jurisdictions dominating the scene- one was longstanding- the United States, and the other was new, and in a few years already had a billion dollar surrogacy industry- India.

Queensland and New South Wales had, along with the Australian Capital Territory, made it illegal to engage in commercial surrogacy overseas. Queensland and New South Wales politicians told me that this was done out of concern for the potential exploitation of Indian surrogates. Hong Kong has enacted similar laws. A bill to similar effect is before the Italian Senate. Similar laws are being considered in Ireland. These laws do not work[7]. No one in any of the ACT, NSW, Queensland or Hong Kong has ever been prosecuted for engaging in commercial surrogacy overseas. My best estimate is that 1500 children have been born via

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[6] Sources: 1. Australian gestational surrogacy births through IVF clinics: Australia and New Zealand Assisted Reproductive Database annual reports, University of New South Wales, New Zealand ART annual reports, University of New South Wales. 2. Department of Home Affairs, applicants for Australian citizenship by descent born overseas through surrogacy- obtained by the writer under Freedom of Information.

[7] Not one person has been prosecuted ever for undertaking commercial surrogacy overseas in any of ACT, Qld, NSW or Hong Kong. It is likely that over 1500 children have been born via overseas surrogacy to residents of the ACT, Qld and NSW- see source 2 in footnote 6. Between 2009 and 2023, 2779+ children have been born overseas to Australian intended parents via surrogacy. On a per capita basis, the ACT, NSW and Qld are 54% of the Australian population. Once NSW announced that it would criminalise those undergoing surrogacy overseas, the number of overseas births via surrogacy jumped from <10 in 2010 to 266 in 2012. Of those births in 2012, 227 were in India. The number of overseas births has remained typically above 200 since then, being 223 in 2021, 213 in 2022 and 236 in 2023.

overseas surrogacy to residents of the ACT, NSW and Queensland between 2009 and 2023. New Zealand researchers described these laws as a "failed experiment"[8], an apt description.

Stories started coming out in the media raising concerns about potential exploitation of surrogates, egg donors, children and intended parents in India, or a failure by countries to recognize the parentage of children. Some of these stories were frankly alarming. One from 2010 concerned Norwegian woman, Kari Ann Volden. Unable to undertake surrogacy at home, she underwent surrogacy in India, where twins were born. For two years after they were born, the children were stuck in India[9]. Norway refused to issue passports for the children- because it said that the surrogate was the parent. India refused to recognize the children, as it said that Volden was the parent.

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[8] Footnote 7 of the New Zealand Law Commission, *Review of Surrogacy*, 2021: https://www.lawcom.govt.nz/assets/Publications/IssuesPapers/NZLC-IP47.pdf : Debra Wilson and Julia Carrington "Commercialising Reproduction: In Search of a Logical Distinction between Commercial, Compensated, and Paid Surrogacy Arrangements" (2015) 21 NZBLQ 178 at 186. See also South Australian Law Reform Institute Surrogacy: A Legislative Framework – A Review of Part 2B of the Family Relationships Act 1975 (SA) (Report 12, 2018) at [12.3.1]; and House of Representatives Standing Committee on Social Policy and Legal Affairs Surrogacy Matters: Inquiry into the regulatory and legislative aspects of international and domestic surrogacy arrangements (Parliament of the Commonwealth of Australia, April 2016) at [1.70]–[1.71] and [1.112]–[1.113].

[9] For example, https://timesofindia.indiatimes.com/city/mumbai/stateless-twins-live-in-limbo/articleshow/7407929.cms .

Another, from 2008 concerned a Japanese couple who had split up[10]. Unable to do surrogacy at home, they did so in India. After they had split up, neither wanted the child, Baby Manji. Just imagine the fate of a stateless child of Japanese descent ending up in an Indian orphanage. One of the grandmothers then sought that the child live with her in Japan- a quest that was originally refused by Indian authorities- sparking multiple court cases and an international media storm. The child eventually went to live in Japan.

In 2018 then Chief Justice John Pascoe AC CVO described some surrogacy operators in developing countries as the "Wild West"- an apt description and talked of "reproductive trafficking"[11].

His predecessor, and Fellow, Diana Bryant AO KC described in 2014 how a couple from Sydney had gone to India for surrogacy[12]. Twins had been born. There had been a report that the couple had rejected one of the children because it was the "wrong" gender. She said that if the reports were true then this amounted to child trafficking.

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[10] https://timesofindia.indiatimes.com/india/baby-manjis-case-throws-up-need-for-law-on-surrogacy/articleshow/3400842.cms?from=mdr .

[11] https://www.actlawsociety.asn.au/article/sleepwalking-through-the-minefield--commercial-surrogacy-and-the-global-response .

[12] https://www.abc.net.au/news/2014-10-08/high-commission-knew-of-surrogacy-case-in-india/5799438 .

Among the many examples of cowboy operators was the story of Babies Gammy and Pypah[13]. They were born in 2013 in Thailand via surrogacy to an Australian couple, Mr and Mrs Farnell. The Farnell's lived in Bunbury in southern Western Australia. The Farnell's did not know that they may well have committed offences in Western Australia in undertaking surrogacy abroad.

Mr Farnell did not mention to the IVF clinic in Bangkok or the surrogate that he had been convicted multiple times of child sex offences. Nor did the IVF clinic ask.

The Thai surrogate, Mrs Chanbua, did not tell the IVF clinic (or the Farnell's) that she had falsely put her age up, nor that she always wanted a boy. Nor did the IVF clinic ask.

Two embryos were implanted into Mrs Chanbua[14]. Twins were conceived. The Farnells' evidence was that when the doctor told them that the male unborn child had Down syndrome, they should procure an abortion- not in Thailand where it was illegal, but in China, where with money, anything was possible. They refused. Two children were born- Gammy, male,

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[13] *Farnell & Chanbua* [2016] FCWA 17.

[14] By contrast with the practice in Australia, aimed at minimising risk to the woman and children, of implanting one embryo.

with Down syndrome and congenital heart issues, and Pypah, female. Mrs Chanbua kept Gammy, as she always wanted a son.

Mr and Mrs Farnell returned home to Western Australia with Pypah, where the court, alarmed at what occurred in the case, ultimately determined that it was in Pypah's best interests that she live with the Farnell's, under the eagle eyed scrutiny of child protective services and the world's media[15].

At about the same time, a Dr Pisit in Bangkok[16], who trained as an embryologist in Melbourne, had enabled the son of a Japanese dot com billionaire to become a father to 16 children born to 11 Thai and Cambodian women in parallel journeys[17].

The news from Thailand led to a clampdown there. There have been similar clampdowns on surrogacy in India (2012, 2014- for Australians, 2016 and finally in 2021), Nepal (2014), Thailand (2014), Cambodia (2016), Mexico (2016), Russia (2022) and Georgia (announced to take effect from the beginning of this year).

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[15] Mr Farnell died in 2020: https://www.news.com.au/lifestyle/real-life/news-life/david-farnell-father-of-baby-gammy-and-convicted-sex-offender-dies/news-story/5be57b260503c8445f18e168f6ab82e5 .

[16] https://www.placidway.com/doctor-detail/57563/Dr-Pisit-Tantiwattanakul-IVF-Doctor-in-Bangkok-Thailand .

[17] For example, https://www.bbc.com/news/world-asia-43169974 .

The Thai baby farm was repeated in Georgia in 2020 to 2021 when Kristine Ozturk, 24, from Russia and her husband Galip Ozturk, a convicted murderer from Turkey, had 21 babies through surrogacy. The couple had 16 nannies. Mrs Ozturk's desire was to have 105 children[18].

It is right to be concerned about the possible implications of surrogacy arrangements. We cannot be blind to the possible risks. Anne-Marie was always firmly of the view, expressed to me many times, that surrogacy needs to be properly regulated and that there needed to be the right form of an international legal framework for international surrogacy arrangements. There must not be a Wild West when it comes to surrogacy.

HCCH

It is no wonder, then that back in about 2010-2011, the Hague Conference on Private International Law (HCCH) decided to look at international surrogacy arrangements, and consider whether there should be a convention of some kind governing international surrogacy arrangements. Whether a proposed convention concerned what was in those arrangements, or the parentage of the resultant children, was unclear.

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[18] For example https://www.dailymail.co.uk/femail/article-10128323/Russian-woman-24-welcomed-TWENTY-ONE-surrogate-babies-just-year.html .

Soon after this HCCH process commenced, a conference was held in Aberdeen in 2011, at which two academics suggested that there should be an international convention concerning international surrogacy arrangements, and that the method of regulating international surrogacy arrangements should be similar to that of the *1993 Hague Intercountry Adoption Convention*- namely that there should be a pre-approval process in both countries- the place of habitual residence of the intended parents, and that in which the child is expected to be born, before the surrogacy arrangement could proceed[19].

Anne-Marie attended that conference. So did her then junior associate, and now Fellow, Colin Rogerson. Anne-Marie told Colin that despite his being so junior he had, by virtue of private practice, much more *"boots on the ground"* experience than any of the academics who attended.

At about the time of that meeting, Anne-Marie acted strategically. She created a website- International Surrogacy Forum[20], and named everyone around the world she could think of who did surrogacy work.

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[19] See for example https://www.tandfonline.com/doi/abs/10.5235/jpil.v7n3.627 .

[20] http://www.internationalsurrogacyforum.com/ .

She then magically enabled the Academy to have observer status at HCCH in its project of discussing a Hague surrogacy convention. In her words to me, to achieve observer status was *"difficult"*, *"tricky"* and *"political"*. There were *"lots of manoeuvres"*. However, what Anne-Marie saw clearly was that the Academy was international in scope and representation. It could properly say it was the elite of the planet's family lawyers and could demonstrate leadership in this space. The more representative the Academy was across the globe, of course, the more legitimacy it had and has.

Anne-Marie was by nature a people person. She knew how to network, which included recruiting umpteen Fellows to the Academy from her travels around the globe. One of those was me. I had previously applied for membership, been refused, and was despondent as a result. Until Anne-Marie nagged me and pushed me, seemingly incessantly, to apply again. *"There aren't enough surrogacy lawyers in the Academy"*, she said. "*There need to be more. You need to join."* I did so- and voila! I became a Fellow.

Anne-Marie then became the IAFL observer at the HCCH experts group, which under the guidance of the Council has steered the process. An advantage that she had over the 20 members of that group- with the exception of the Australian representative John Pascoe, and

the New Zealand representative Fellow Margaret Casey KC, was that she had boots on the ground experience, and knew what would work and what would not. Most of the members of the experts group were either from academia or government. They did not have boots on the ground experience.

In those days, about a dozen years ago, Anne-Marie and I both reached the same conclusion about international surrogacy arrangements. The current gaps in the law were failing the legitimate interests of intended parents, surrogates and above all the children- whose parentage was left in limbo, granted in one country but not recognised in another.

This was particularly pressing from an Australian viewpoint. We are a land of migrants. Many children born via surrogacy are entitled to multiple citizenships. The highest I have seen was seven. The idea that this child might have to undertake an adoption style process in up to seven jurisdictions in order to obtain recognition of its parents was abhorrent.

Both of us thought it was a good idea for there to be a convention- but only if the convention was an improvement on the lack of laws currently. There was a real risk that if the convention was not drafted right, that it could make matters worse. Both she and I were of the view that

it was preferable to have the right type of convention, but having no convention was preferable to one that made things worse.

At about this time, in 2011, there was a meeting of the minds between Anne-Marie, myself and the then chair of the ART Committee of the American Bar Association, Steve Snyder. It is one of those quirks that Anne-Marie came out here- to the Gold Coast- to talk on a panel with me about surrogacy, within a short space of time of me travelling to Las Vegas, where I went to present to the American Bar Association family law conference. The ABA held the first international conference in 2011 about surrogacy- and I was fortunate to be a speaker.

Steve Snyder was the colleague who had set up that conference. On the sidelines of the conference, Steve told me that he had taken the view that there were inherent difficulties between the US position on surrogacy , which recognised the right to procreate (and therefore in broad terms recognised the intended parents as the parents, and the European position, which was generally anti-surrogacy, and recognised the surrogate as the mother.

Steve and I had a discussion in which we agreed that the Aberdeen position was essentially unworkable, that the proposal would freeze the legitimate desires of intended parents to be

parents, and that the obvious way of recognizing the parentage of children born abroad through surrogacy was by the recognition of foreign judgments to that effect. Simple, cheap, quick, portable.

Anne-Marie separately came to the same conclusion.

In 2011, the American Bar Association was asked by the State Department to write a policy concerning a prospective Hague surrogacy convention. I was the principal advocate of that policy. When I was asked by Steve Snyder if I wanted to take part, I said:

> *"The American Bar Association is the biggest, richest and most powerful group of lawyers on the planet. When it speaks, everyone has to listen, whether they like it or not. It cannot be ignored."*

As Anne-Marie reminded me at the time, however, the American Bar Association is American. It is not, unlike the Academy, international.

It was about this time that Anne-Marie said to me that the process of writing this Hague Convention, given the controversy involved, was a very slow one, and in all likelihood it

would only be written after we were both dead. Anne-Marie is lost to us, but I am 60, so hopefully there is still time.

My co-author of the ABA policy was Bruce Hale, a fertility and family lawyer from Boston, who is now a Fellow. Bruce and I spent hundreds if not a thousand hours writing it, editing it, sending it to colleagues, such as Steve, who then made changes, and on and on. To navigate the hills and dales of the American Bar Association is not an easy feat. To have a policy approved required the consent of the initial sponsoring body, in this case the Family Law Section, and then seek the sponsorship at best, or at worst lack of opposition of other elements within that body.

By early 2016, the policy[21] was adopted by the House of Delegates of the American Bar Association on behalf of its 400,000+ members. In the period between 2012 and 2016, from when the policy started to be written to when it was adopted, Anne-Marie was kept abreast of developments with the policy.

The key points of that policy were:

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[21] https://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/2016_hod_midyear_meeting_electronic_report_book.authcheckdam.pdf

1. Any Convention should focus on the conflict of laws and comity problems inherent in international citizenship and parentage proceedings and that any such collective international approach should allow for cross-border recognition of parentage judgments so that the parental relationship and citizenship status of all children, no matter the circumstances of their birth, will be certain.

2. Any such collective international approach allows individual member countries to regulate surrogacy within their own borders as deemed appropriate by that country without imposing new international restrictions on surrogacy arrangements.

3. A Central Authority model to regulate surrogacy arrangements is not an appropriate model for any collective international approach regarding surrogacy arrangements.

4. The *1993 Hague Intercountry Adoption Convention* is not an appropriate model for any Convention regarding surrogacy.

5. Rather than requiring a genetic link, an intent-based parentage analysis is the most appropriate parentage doctrine for surrogacy.

6. Human rights abuses are not necessarily inherent to or exclusive to surrogacy arrangements, and, therefore, should be addressed separately.

You may wonder why human rights were left off the list. The reason was simple- a clash of cultures so great that it was seen that by the policy going down the human rights road would distract from the need to protect the children's parentage to be protected. The US has a strong belief in upholding procreative rights. This is in part due to the past, where forced sterilization was practiced, in the name of eugenics. In many parts of the US, the view is taken that the natural parents are those who intended to be the parents. The surrogate is not a parent[22].

By contrast, the broad European approach is opposed to surrogacy, and is of the view that the surrogate is the mother. In this model, the child's rights attach to the person who gave birth, not those who are the intended or in at least some cases the genetic parents.

It was realised by my American colleagues that the gulf between the American approach and the European approach was too great to be bridged when it came to addressing what human

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[22] For example, in California: *Johnson v Calvert* (1993) 5 Cal. 4th 87; *In re marriage of Buzzanca* (1998) 61 Cal. App. 4th 1412. A similar approach has been taken in Mexico: Supreme Court of Mexico, *Protection in Review 553/2018*; and by the Inter-American Court of Human Rights: *Murillo v Costa Rica* (2012) https://www.corteidh.or.cr/docs/casos/articulos/seriec_257_ing.pdf .

rights should be covered. If the focus was on the clear differences, an international convention would never result.

Instead, the view was taken that individual countries would continue to regulate surrogacy (via prohibition of all surrogacy, prohibition of certain forms of surrogacy, regulation of certain forms of surrogacy, or liberal or a lack of regulation), and that the focus should be on the recognition of parentage of children who move from one jurisdiction to another.

It was seen that the simplest, cheapest and most efficient manner of that recognition was the recognition of overseas orders that established parenthood. Of course, most parentage does not involve the making of an order. It may occur by operation of law, as happens with a child born in Australia who has an Australian citizen parent[23]. Or a child born via an artificial conception procedure to a couple[24]. Or a child born via surrogacy in the Ukraine[25].

There was at that point, and remains, no international instrument to that effect. International surrogacy arrangements or indeed who is a parent are not specifically recognised under the *1980 Hague Child Abduction Convention*, nor by the *1989 UN Convention on the Rights of*

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[23] *Australian Citizenship Act 2007* (Cth), s.12.

[24] *Family Law Act 1975* (Cth), s.60H(1).

[25] *Family Code of Ukraine*, art. 123.

the Child, nor by the *1993 Intercountry Adoption Convention*, and in the case of surrogacy specifically excluded from recognition under the *1996 Hague Child Protection Convention*.

Up until the 70's there were two types of children in the world: legitimate and illegitimate. Much of the world junked that view in the 70's, removing the distinction between legitimate and illegitimate. Now there seem to be two kinds of children in the world- those conceived through sexual intercourse, where the parentage of the children is generally clear, and seemingly recognised, and those born through some form of assisted reproductive treatment, of which international surrogacy is the most complex form, where their parentage is often unclear. Whatever one's views of what the parents have done, it is the vulnerable children's interests which have to be protected- as Anne-Marie used to tell me.

While the parentage of children conceived through ART is not confined to same sex couples, same sex couples are disproportionately represented as parents of these children, due to evident biological necessity.

What stood out to me during my discussions with Anne-Marie was her view about practicality. She was a lawyer in private practice who dealt with real people, some of whom

wished to be parents. She realized that surrogacy existed, as did same sex relationships- and that some of those in same sex relationships wanted to and did become parents. Whatever qualms one might have about surrogacy, it exists, and will continue to exist. The lid of Pandora's box has opened. It was better, in Anne-Marie's view, that surrogacy was properly regulated, so that the human rights of all concerned- the donors of genetic material, would be surrogates, their partners and children, the intended parents, and above all the children born through surrogacy, are able to be protected.

That regulation, in her view, had to be practical, fair and efficient.

IAML surrogacy forum

By 2015, the Academy held a surrogacy symposium in London, which brought lawyers from around the globe to set the scene for how surrogacy was regulated – what research said about how surrogacy turned out for all concerned- and future directions.

I was fortunate to be one of the speakers. And the guiding hands on the tiller? It is no surprise that one of them was that of Anne-Marie. The others included Presidents of the Academy, Nancy Zalusky Berg and William Longrigg.

That conference was held on the Monday and Tuesday. On the Saturday and Sunday immediately beforehand, there was a much smaller conference, also in London, held around the corner. This was the first meeting of the UK and Ireland chapter of the LGBT Family Institute. The LGBT Family Law Institute is a joint venture of the US LGBT Bar Association, and the San Francisco based National Center for Lesbian Rights. The LGBT Family Law Institute has expanded internationally, in Europe, Latin America, UK and Ireland, and Australia. I was fortunate enough to be the only Australian to attend the London meeting. Of the small group of family lawyers there, Anne-Marie was of course also present, as was Rachel Kelsey. As happens at these events, afterwards I was tapped on the shoulder- and then founded the Australian version.

Hague acts

The experts group met for the first time in 2016, shortly after the ABA policy was announced. The experts group stated[26]:

[26] https://assets.hcch.net/docs/f92c95b5-4364-4461-bb04-2382e3c0d50d.pdf .

"The Group acknowledged the diversity of approaches of States with respect to the recognition of foreign public documents such as birth certificates or voluntary acknowledgements of parentage, and noted that there is more congruity of practice with respect to the recognition of foreign judicial decisions.

The Group was of the view that it would be useful to have further discussions on the feasibility of unifying the rules on the recognition of foreign public acts and judicial decisions on parentage, taking into account public policy concerns, including those stipulated in domestic law.

The Group noted the potential benefits of channels of co-operation between State authorities as a means of alleviating the significant problems aforementioned.

The Group noted that surrogacy arrangements are prohibited in some States, permitted in other States and unregulated in others. The Group recognised concerns at the international level regarding the public policy considerations of all those involved with surrogacy arrangements, including, for example, the uncertain legal

status of children and the potential for exploitation of women, including surrogate mothers."

By 2017, the Experts Group had moved to recommend recognise foreign judicial decisions establishing parentage[27]:

"The majority of the Group expressed the view that the recognition, by operation of law, of foreign judicial decisions on legal parentage in a multilateral instrument would be feasible.

Indirect grounds of jurisdiction (or "jurisdictional filters") were considered necessary to support recognition by operation of law. The Group generally favoured having a broad list of alternative grounds of jurisdiction and, where appropriate, having sufficient proximity between the State where the decision was rendered and the parties. The Group agreed that further consideration should be given to specific connecting factors.

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[27] https://assets.hcch.net/docs/ed997a8d-bdcb-48eb-9672-6d0535249d0e.pdf .

Regarding temporal requirements, it was suggested that any mutable connecting factor(s)for indirect grounds of jurisdiction should, for example, be satisfied at the time of the initiation of the proceedings that led to the judicial decision.

The Group agreed that, in order to be recognised, the foreign judicial decision must be final and must have legal effect in the State where it was delivered."

By 2018, the Experts Group talked of "limping parentage":

"The Group recalled that the absence of uniform [private international law] rules on legal parentage can lead to limping parentage across borders in a number of cases and can create significant problems for children and families. The Group further recalled that uniform [private international law] rules can assist States in resolving these conflicts and can introduce safeguards for the prevention of fraud involving public documents, while ensuring that the diverse substantive rules on legal parentage of States are respected. Any new instrument should aim to provide predictability, certainty and continuity of legal parentage in international situations for all persons involved, taking into account their fundamental rights, the UN

Convention on the Rights of the Child and in particular the best interests of children.

The Group agreed that any international instrument would need to be developed with a view to complementing the existing Hague Family Conventions and to attracting as many States as possible.

The Group confirmed that the three primary methods of establishing legal parentage across most States are: (1) by operation of law; (2) following an act of (an) individual(s); and (3) by decision of a State authority (usually judicial).

As in the majority of cases legal parentage is not established by a judicial decision, the Group discussed possible methods to facilitate the continuity of legal parentage when it arises by operation of law or following an act of (an) individual(s). Any method considered in a possible future instrument should be kept as simple as possible in order to be of added value for families and easy for States to implement.

The Experts also agreed that a combination of different approaches might be most effective."

Anne-Marie continued to be active in the Experts Group until her death.

Since that time, HCCH has not agreed as to the form of the convention. Recognising the differences between the United States and Europe, it had been suggested by way of compromise that the convention focus on private international law concerning children, and that there be an optional protocol concerning surrogacy.

Most recently, HCCH has rejected that approach[28] (because in essence the gulf between the US and Europe is too wide- as the Americans did not see that children should be discriminated against, so would not sign on to the optional protocol, and it was likely that many European countries would not sign on to the optional protocol- because they were opposed to surrogacy), and it is back to the drawing board for the new working group- of which President Rachel Kelsey is the Academy's observer, and Margaret Casey KC is the member from New Zealand.

UN blowback

By 2015, I had heard that there were efforts within the United Nations, seeking to ban all international surrogacy.

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[28] https://assets.hcch.net/docs/5f9999b9-09a3-44a7-863d-1dddd4f9c6b8.pdf .

Those efforts commenced to materialise in 2018 when Dutch judge Maud de Boer-Buquicchio, in her role as the then UN Special Rapporteur on the sale of children, child prostitution and child pornography, wrote a report[29] that was highly critical of international commercial surrogacy, and of the 2016 American Bar Association paper. The Special Rapporteur, who rightly raised human rights concerns about surrogacy, was also critical of HCCH efforts in not promoting human rights with surrogacy in its deliberations, and said:

1. When a court order was made before the birth of the child establishing the parentage of the intended parents, that amounted to the sale of the child in breach of the optional protocol to the *UN Convention on the Rights of the Child*. This was because the surrogate was, at all times, the mother. She should have the right to decide, post-birth, whether or not to relinquish the child.

2. When a surrogate was paid more than her reasonable expenses, that amounted to the sale of children.

3. When a woman entered into a binding surrogacy contract, that amounted to the sale of children.

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[29] https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/007/71/PDF/G1800771.pdf?OpenElement .

4. There was no right to procreate recognised under international law.

5. The recognition of the intended parents as parents without any transfer of parentage from the surrogate, as happened in several US jurisdictions, such as California was an artifice.

When I read this report, I was outraged. If that analysis of the law was right, then that meant that many judges - and lawyers - were complicit in the sale of children, such as:

- much of the United States (where pre-birth orders[30], compensated surrogacy and binding contracts are common, and auto-recognition[31] of the intended parents as the parents was also common, typically by virtue of case law, but in some cases due to statute, and in one state, Virginia, where pre-conception orders are made, the effect of which is that the intended parents are the parents upon birth),

[30] An order before the birth of the child identifying the intended parents as the parents, consistent with the approach in *Johnson v Calvert*, footnote 22, as occurs in many US states, such as California.

[31] Such as Illinois.

- Canada- an altruistic regime where contracts are generally considered binding, with one province (British Columbia) then having auto recognition of the intended parents upon birth[32],

- Argentina- an altruistic regime where auto-recognition occurred for intended parents where the children were born in Buenos Aires,

- South Africa and Greece- where altruistic surrogacy is required but pre-conception orders are made, the effect of which is that the intended parents are the parents upon the birth of the child,

- Israel- where a State committee must give pre-conception approval to surrogacy, but the effect is that the intended parents are parents upon the birth of the child.

The idea of non-binding contracts also did not work. We have seen in Australia and the UK that on occasion surrogates have acted to not relinquish the child, including in one case seeking to adopt out the child immediately after birth, instead of handing the child over to the intended parents. The child was the genetic child of the intended parents[33].

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[32] And now there are three: British Columbia, Manitoba and Ontario.

[33] *Lamb & Shaw* [2018] FamCA 629.

In my view, there needed to be an intellectual response to the Special Rapporteur's position, otherwise the contents of the report would be the perceived, unchallenged wisdom, and would lead inevitably to a ban on international surrogacy in all forms- whether well regulated or not. The legitimate desires of many who were childless to become parents through surrogacy would be denied.

Trying to move the American Bar Association in a timely manner to respond to this attack on its policy was much like me trying to push an A380. It could not be done.

I complained to Anne-Marie. She agreed that there needed to be an intellectual response. She said: *"What about holding a conference?"* I agreed.

2018 in Nashville

Thus Anne-Marie, Colin, Margaret and I found ourselves speaking at the American Bar Association family law conference in Nashville, drinking beer and whiskey, eating fried chicken, boot scootin' (badly in my case) and meeting with colleagues to set up what became the International Surrogacy Forum. It was no coincidence that the name was the same earlier used by Anne-Marie.

It was agreed that the Forum needed to be held in surrogacy skeptical Europe, and that it needed to be held at a university that had significant intellectual heft in this area. Cambridge was the obvious choice, given the valuable research by Dr Susan Golombok and others at the Centre for Family Research, carrying out research about “alternative” families- those children born to lesbian couples, born through surrogacy, born to single women out of choice, including via posthumous use and so on.

Once under way by the organizing committee, the job of running the Forum fell on the shoulders of the wonderful Dr Jens Scherpe. In her inimitable manner, much like a steamroller, Anne-Marie voluntold Jens that he would be running it.

2019 International Surrogacy Forum

The University, the Academy and the American Bar Association were sponsors.

The point of the Forum was to bring surrogacy experts from around the world who were able to inform opinion about the state of surrogacy around the world- what did the research tell us, for example, about how surrogates and children turned out from the surrogacy journey- and how should surrogacy be regulated? It was recognised that there were four types of countries

that regulated surrogacy- those that prohibited it, such as Italy or France, those that had a liberal regime- such as much of the United States, or little regulation if at all- often post-Soviet or developing countries, and those that allowed some surrogacy but not all- such as the UK and Australia.

The Forum was held at Cambridge in June 2019. In early 2019, the Special Rapporteur sought submissions from government and civil society, before she reported to the General Assembly in October 2019, with the apparent aim of there being a United Nations convention to ban international surrogacy.

That apparent intention did not materialise.

The Special Rapporteur's approach was criticized by the International Women's Health Coalition and Human Rights Watch[34]:

> *"We are concerned by any over-broad view of the applicability of the prohibition on the sale of children to surrogacy that would unnecessarily, disproportionately or in a discriminatory fashion limit the options of surrogacy as a means of founding a family*

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34 https://www.hrw.org/news/2019/06/03/submission-special-rapporteur-sale-and-sexual-exploitation-children?fbclid=IwAR1ij8PIVZ_3qbU1GlScsQIryEKdbIrUta5kkE5QHGMyWAGqGIUERGpiloc .

and exercising reproductive rights. The optional protocol prohibits "any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration." People acting as surrogates may do so for no remuneration (money paid for work or a service) or no consideration (money in exchange for benefits, goods, or services), and in other cases may receive compensation that constitutes fair recompense for lost wages and other opportunity costs, health care and nutrition expenses, and restitution for the significant burdens and risks associated with pregnancy. We submit that such arrangements do not and should not in and of themselves constitute sale of children under the optional protocol."

They went on to identify that there was international law identifying human rights implicated by surrogacy arrangements, including reproductive autonomy, that rights holders should be part of discussions around surrogacy and:

"the development of guidance and policy on surrogacy should not move forward without full participation by representatives of the following groups, without discrimination

including on the basis of race, ethnicity, age, disability, sexual orientation or identity, etc., and expert groups who represent the interests of these groups:

a. *Children born of surrogacy;*

b. *Individuals who have acted or wish to act as surrogates, including through both commercial and non-commercial surrogacy;*

c. *Individuals struggling with infertility;*

d. *Individuals who have utilized (or seek to utilize) assisted reproduction, including surrogacy, to become parents; and*

e. *Individuals who have participated or may wish to participate in assisted reproduction, including surrogacy, through contribution of genetic material including eggs and sperm."*

They went on to say that key considerations and principles derived from human rights law and research that should frame the formulation of guidance, law and/or policy on issues of surrogacy.

They concluded with:

"There are risks of abuse in surrogacy. The solution to this problem is not to ban surrogacy, but for surrogacy to be practiced under a framework based in international human rights law, incorporating the rights of the child, surrogates and potential surrogates, and people seeking to become parents through use of surrogacy and other forms of assisted reproduction."

Just before the Forum, the Law Commissions of England, Wales and Scotland released a report recommending that there be auto-recognition of intended parents through surrogacy[35]. The report focused on the reality of family formation. Research by Cambridge University found that UK surrogates, whether traditional (genetic mothers) or gestational (not the genetic mothers) did not recognise themselves as the parents- but at all times considered that the intended parents were the parents[36].

About 250 invited guests attended the Forum, experts in surrogacy, including the Special Rapporteur. Sadly, I did not get to join Anne-Marie and my friends and colleagues at the

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[35] https://s3-eu-west-2.amazonaws.com/cloud-platform-e218f50a4812967ba1215eaecede923f/uploads/sites/30/2019/06/Surrogacy-consultation-paper.pdf .

[36] For example, https://pubmed.ncbi.nlm.nih.gov/25527614/ , https://academic.oup.com/humrep/article/27/10/3008/750058?login=false .

Forum, as my daughter Elizabeth (conceived through altruistic surrogacy here in Brisbane) was then almost due.

The Special Rapporteur had the opportunity to meet surrogates, parents through surrogacy, researchers and lawyers from different parts of the world.

The Special Rapporteur acknowledged that there was a gulf of practice between surrogacy as practiced in the US, where human rights issues come to the fore, there is transparency, and ultimately judicial oversight, and that of surrogacy as practiced in some developing countries, where to use John Pascoe's phrase, it could be very much a "Wild West".

Following the Forum, the Special Rapporteur's view changed. While still focused on the need to protect human rights, no longer was there a push for there to be a UN convention to ban surrogacy. Among the other recommendations, the Special Rapporteur called for the international community to support the work of HCCH and for there to be safeguards in any convention, to be complied with prior to conception, during pregnancy and post-birth, to enable the recognition of legal parenthood[37].

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[37] https://www.ohchr.org/en/special-procedures/sr-sale-of-children/surrogacy

Following the stellar success of that Forum, there has been a second International Surrogacy Forum, this time held in Copenhagen last year. Again, Jens Scherpe did the heavy lifting. I was fortunate to be on the organising committee again, and this time able to attend and speak, but Anne-Marie was lost to us before it was held.

Anne-Marie was a shining example of the best qualities of humanity and being a lawyer. She showed determination, drive, intuition, cunning when required, and always thought global as well as acting local. I am sure that if she had wished, she would have been a Grand Master of chess or an expert at bridge. She was aware of new areas of the law and society, and was not afraid to put her toe in the water- or even to go swimming there. She had mastered the art of spinning plates.

Above all, in my view Anne-Marie had that elusive quality that inspires others. She had courage. She clearly believed that fortune favoured the bold. While she took what she did seriously, she did not take life seriously. Anne-Marie was blessed with a wonderful sense of humour. Her recognition of her physical frailties in my view in part drove her success- because time is short, in whatever time she had available, she was going to make the most of it – and help change the lives of others, and if necessary the world, for the better.