Singapore Journal of Legal Studies
[2021] 291–331

MOTHERLESS OR FATHERLESS BY DESIGN: CHILD'S WELFARE AS THE FIRST AND PARAMOUNT CONSIDERATION & THE CASE AGAINST SURROGACY & ART

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This article analyses the current state of the law and policy in Singapore on surrogacy, assisted reproduction technology ("ART"), and adoption in light of the ministerial statements after *UKM v Attorney-General*. Of particular and pressing concern is situations where overseas surrogacy and *ART* leave a child fatherless or motherless for life. Analysing this in light of various factors, including the fragmentation or elimination of the various aspects of parenthood, the principle of putting the child's welfare and best interests as the first and paramount consideration (including a child's right to both a father and mother), public policy and social science, it will be argued that this form of surrogacy and ART should be urgently prohibited. A brief survey of how other countries have approached such issues will be conducted. Various recommendations for law reform will also be proposed.

I. INTRODUCTION

Surrogacy is "where a woman is artificially impregnated, whether for monetary consideration or not, with the intention that the child is to be given and adopted by some other person or couple".[1] The Singapore High Court (Family Division) in *UKM v Attorney-General*[2] held that in Singapore, there is a public policy in favour of parenthood within marriage, as well as a public policy against the formation of same-sex family units. However, despite these public policies and the unavailability of surrogacy in Singapore to anyone, the Court in *UKM* allowed a gay man (who

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1 See Singapore, Ministry of Health, *Licensing Terms and Conditions on Assisted Reproduction Services* (Singapore: Ministry of Health, 26 April 2011) [*ART Licensing Terms 2011*], promulgated under s 6(5) of the *Private Hospitals and Medical Clinics Act* (Cap 248, 1999 Rev Ed Sing), at clause 5.48(b). The 2020 version of the ART Licensing Terms [*ART Licensing Terms 2020*) (with clause 5.48(b) now re-numbered as clause 5.54(b)) repeats the same definition.

2 [2019] 3 SLR 874 (HCF) [*UKM*]. For a discussion of and commentary on this case, see: Tan Seow Hon, "Surrogacy, Child's Welfare, and Public Policy in Adoption Applications: UKM v Attorney-General" [2019] 1 Sing JLS 263 [Tan Seow Hon, "Surrogacy: UKM"]; Tracey Evans Chan & Prem Raj Prabakaran, "Biomedical Law and Ethics" (2018) 19 Sing Ac L Ann Rev 82 at paras 6.1-6.10; Chen Siyuan & Jonathan Muk, "Family Law" (2018) 19 Sing Ac L Ann Rev 502 at paras 16.16-16.35.

was co-parenting with his gay partner) to adopt his 5-year-old son, who was conceived overseas through gestational surrogacy[3] (using his sperm and the egg from an anonymous donor, and then implanted in the womb of a surrogate mother, a US citizen). This article analyses the current state of the law and policy in Singapore on surrogacy, ART,[4] and adoption in the light of the ministerial statements after *UKM*.

Section II(A) recaps the urgency for law and policy review as expressed by the Court in *UKM*, and then reviews the post-judgment ministerial statements (Section II(B)) and highlights the key concerns which arise (Section II(C)). Of particular and pressing concern is that there is a lacuna in law and policy which allows singles as well as same-sex couples in Singapore to have and raise children commissioned through overseas surrogacy and ART.[5] The arguments *for* and *against* this form of surrogacy and ART will be set out briefly in Section II(D). Section III then examines such arguments in greater detail, considering them in light of factors such as the fragmentation or elimination of the various aspects of fatherhood and motherhood (Section III(A)), the best welfare principle and a child's right to both a mother and father (Section III(B)), public policy (Section III(C)), social science (Section III(D)), and the distinction between this form of surrogacy and ART versus the traditional understanding of adoption and other alternative forms of parenthood and other arguments (Section III(E) and (F)).

All things considered, such forms of surrogacy and ART should be urgently prohibited, regardless of where they are procured. If left unregulated, this form of surrogacy and ART will produce a group or class of children who will either be fatherless or motherless *by design* of the commissioning parent(s). This goes against the welfare and best interests of the children, relegating it from the first and paramount consideration to something which is never considered, and in respect of which the voices of these children are never sought nor heard. Section III(G) considers whether certain hypothetical events and the approach of various countries (Australia, America, England, Greece, Hong Kong, Israel and Russia) on this issue would affect this conclusion. Finally, various recommendations for law reform will be proposed in Section III(H).

II. Existing Lacuna in Law and Policy

Singapore has no comprehensive legislation regarding surrogacy. However, there are Ministry of Health guidelines prohibiting Assisted Reproduction Centres ("AR Centres") from engaging in surrogacy. In this regard, Clause 5.48(b) of the *ART Licensing Terms 2011* (renumbered as clause 5.54(b) in the *ART Licensing Terms*

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3 Where the gametes in this arrangement can originate from one or both commissioning parents or from a third party. This is distinct from *traditional* surrogacy, where the surrogate mother is artificially inseminated with the intended father's sperm.

4 Surrogacy is a form of ART.

5 Even if moving forward, having regard to the Court's comment in *UKM*, *supra* note 2 at para 246, adoption applications by same-sex male couples to legitimise the parent-child relationship may potentially become harder. It must be emphasised that those with same-sex attractions must be accepted with sensitivity, compassion and respect. Nothing in this article detracts from this, and nothing in this article is a criticism of the subjective intentions or motivations of anyone, regardless of sexual orientation, who have had or wish to have recourse to surrogacy and ART.

2020) provides that AR Centres shall "**not**" carry out surrogacy.[6] As such, surrogacy, "whether traditional or gestational, altruistic or commercial, is unavailable in Singapore".[7] As for assisted reproductive services, the ART Licensing Terms envisage that only a married woman may receive such services and only with the consent of her husband.[8]

A. *Urgency after* UKM

The Court in *UKM* found that, absent express governmental confirmation, it was not in a position to articulate a policy against obtaining surrogacy services, whether in or outside Singapore.[9] The Court went on to make the following observation:

> We have no doubt that the Government is studying the position carefully and will in time determine its policy stance and take the appropriate legislative and enforcement action. But it is perhaps not out of place for us to observe that there is a case for *some urgency* in this regard.[10]

What is the urgency? The Court explained that should a similar case come before the court in the future, the parentage of the child would likely be determined under the *Status of Children (Assisted Reproduction Technology) Act*.[11] The *SCARTA* did not apply to the child in *UKM* because he was born before the *SCARTA* came into force in May 2015.[12] As the Court noted in *UKM*, the *SCARTA* does not seem to permit the commissioning parents to displace the gestational mother and her husband or *de facto* partner as the legal parents of the child under any circumstance.[13] The commissioning parents will therefore almost certainly attempt to circumvent this restriction by applying to adopt the child, which would require at least a significant adaptation of the adoption regime.[14] The court, presented with a *fait accompli*, may feel inexorably compelled by welfare considerations to make the adoption order sought. This introduces dissonance in the law, for the commissioning parents would be allowed, by means of an adoption order, to achieve a result which the *SCARTA*—the latest legislative word on the status of children born through ART—does not

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6 See *supra* note 1 [emphasis in original].

7 *UKM*, *supra* note 2 at para 169.

8 See clause 5.2 of the *ART Licensing Terms 2011* (renumbered as clause 5.3 in the *ART Licensing Terms 2020*). See also *UKM*, *supra* note 2 at paras 190(c), 197, 199.

9 *UKM*, *supra* note 2 at para 178.

10 *Ibid* at para 186 [emphasis added].

11 (Cap 317A, 2015 Rev Ed Sing) [*SCARTA*]. See *UKM*, *supra* note 2 at para 186. The main reason for the introduction of the *SCARTA* was the growing number of children conceived as a result of ART. Possible reform in this area was studied since early 2010, before the Thomson Medical Centre's in vitro fertilisation mix-up case. See Parliamentary Debates *Singapore:* Official Report, vol 90 at 5.56 pm (12 August 2013) (Mr K Shanmugam). Under the *SCARTA*, for in vitro fertilisation mix-up cases, the default position is that the gestational mother and her husband will be the legal parents of the child (s 9(2) of the *SCARTA*). However, the biological parent will be able to make an application to the Court to contest this position pursuant to s 9(3) of the *SCARTA*.

12 *UKM*, *supra* note 2 at para 72.

13 *Ibid* at para 186 (read with para 172).

14 *Ibid* at para 186 (read with para 173).

appear to embrace.[15] Barring further clarity from the government, such may well be the state of the law.[16]

B. *Ministerial Statements after* UKM

After *UKM* was decided, the then Minister for Social and Family Development, Mr Desmond Lee ("MSF Minister Lee") stated that the Ministry for Social and Family Development ("MSF") is reviewing Singapore's adoption laws and related policies "to see if they should be amended and further strengthened"[17], affirmed that the current position is that surrogacy is not allowed in Singapore,[18] and also stated that surrogacy laws were being carefully studied and reviewed.[19] Importantly, MSF Minister Lee made the following three key clarifications.

First, it was affirmed that the government supports and encourages parenthood within marriage (specifically, a married heterosexual couple having and raising children).[20] Consistent with this policy, the government will generally not object if married couples with fertility problems apply to the Singapore Court to adopt children born through surrogacy that is carried out overseas. This is provided they are medically assessed to be unable to conceive children and the surrogacy arrangement is carried out in a jurisdiction where surrogacy is not illegal or unlawful.[21] This will be referred to as the "Limited Overseas Surrogacy Policy".

Second, it follows from the public policy in favour of parenthood within marriage that the government does not encourage planned and deliberate single parenthood as a lifestyle choice.[22] Specifically, the government does not support the use of surrogacy or ART by singles to conceive children and to adopt them for the purpose of forming single unwed parent households.[23] MSF Minister Lee emphasized that hence, in vitro fertilisation ("IVF") or other ART procedures at licensed assisted reproduction institutions are "available in Singapore only to married couples who experience difficulties in natural conception",[24] *ie*, heterosexual married couples. This will be referred to as the "Policy against PADSP".

Third, it was reiterated that the government does not support the formation of same-sex family units ("SSFU"),[25] including doing so through institutions and

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15 *Ibid.*

16 *Ibid.*

17 Rahimah Rashith, "Minister Desmond Lee addresses concerns over ruling in gay man's adoption case", *The Straits Times* (20 December 2018), online: <https://www.straitstimes.com/singapore/minister-addresses-concerns-over-ruling-in-gay-mans-adoption-case>. This position was repeated in Parliament on 14 January 2019 and 7 October 2019.

18 *Parliamentary Debates Singapore: Official Report*, vol 94 (14 January 2019) (MSF Minister Lee's statements were made in response to Questions 19-21) ["14 January 2019 *Parliamentary Debate*"]; *Parliamentary Debates Singapore: Official Report*, vol 94 (7 October 2019) (MSF Minister Lee's statements were made in response to Question 53) ["7 October 2019 *Parliamentary Debate*"].

19 *Ibid*.

20 See Section III(C) below for a definition of this policy and an elaboration on this point.

21 7 October 2019 *Parliamentary Debate*, *supra* note 18.

22 14 January 2019 *Parliamentary Debate* and 7 October 2019 *Parliamentary Debate*, *supra* note 18.

23 *Ibid.*

24 14 January 2019 *Parliamentary Debate*, *supra* note 18.

25 Rashith, *supra* note 17.

processes such as adoption.[26] He also mentioned that after the publication of *UKM*, "it may be harder for future applicants doing the same to argue that they did not intentionally set out to [go against this public policy]".[27]

C. *Concerns*

Two key concerns arise in relation to the above ministerial statements.

First, it is respectfully submitted that the government's Limited Overseas Surrogacy Policy, while well-meaning and consistent with the public policy of parenthood within marriage (and laudable in that regard) and which also fits into the overall goal of the government to improve fertility rates in Singapore, is nevertheless highly problematic. Surrogacy is an "ethically complex and morally fraught issue".[28] To some, surrogacy represents a medical solution of last resort to the problem of infertility, and it offers hope that the desire to procreate and raise a child may be fulfilled.[29] However, to entertain this solution, one must grapple with surrogacy's profound moral and social implications.[30] In this regard, legitimising surrogacy involves "a radical reconsideration of established paradigms of family, intimacy, parenthood, gender relations, sexuality and the creation of life."[31] Surrogacy fragments the concept of motherhood by separating gamete contributor, gestational carrier and caregiver, regards these roles as links in a supply chain for the on-demand production of human life, and "promote[s] a world of private ordering" in which family relations are less a matter of circumstance and more a matter of choice.[32] Other weighty concerns or objections, particularly but not limited to where commercial surrogacy is involved, include the commodification of children,[33] the dehumanising of women by commodifying the womb and industrialising the reproductive process,[34] the adequate protection of the birth mother (which includes concerns about exploitation or coercion as well as significant health risks in both the physical and emotional aspects),[35] anxieties about how to protect children born through surrogacy (including concerns about surrogacy being used as a cover for child trafficking),[36] as well as serious concerns on the consequences that may follow if access to surrogacy (and ART) is unrestricted and inadequately regulated.[37]

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26 14 January 2019 *Parliamentary Debate*, *supra* note 18. A similar position was repeated during the 7 October 2019 *Parliamentary Debate*, *supra* note 18.

27 Rashith, *supra* note 17.

28 *UKM*, *supra* note 2 at para 179. See also paras 179-185 for a broad-based survey of these ethical, moral and social issues.

29 *Ibid* at para 179. To be precise, the desire to procreate and raise one's *own biologically-related child* (unless the commissioning parent(s) contribute none of the gametes).

30 *Ibid*.

31 *Ibid* at para 180.

32 *Ibid* citing Radhika Rao, "Surrogacy Law in the United States: The Outcome of Ambivalence" in Rachel Cook, Shelley Day Sclater & Felicity Kaganas, eds, *Surrogate Motherhood: International Perspectives* (Oxford & Portland: Hart Publishing, 2003) ch 2 at 33.

33 See *UKM*, *supra* note 2 at para 181 citing commentators who have raised this objection.

34 *Ibid*.

35 See *ibid* at para 182 for a discussion on these issues.

36 See *ibid* at para 183 for a discussion on these issues.

37 See *ibid* at para 184 for a discussion on these issues. In this regard, the Court in *UKM* raised the infamous example, which was relied upon by the Guardian, of the 24-year-old Japanese businessman who was in

There are several commentators and organisations who have compellingly argued that *all forms* of surrogacy,[38] especially commercial surrogacy,[39] should be prohibited. It is beyond the scope of this article to re-canvass or consider such arguments in detail. Nevertheless, some brief observations may be made. The government's position (which is effectively a "green light") to allow infertile married couples to have access to overseas surrogacy in a regulated overseas state unfortunately and completely bypasses a detailed consideration of the aforesaid profound legal and ethical issues raised by surrogacy (and ART). Importantly, if surrogacy may be viewed as exploitative, Singapore would have a shared responsibility to protect women both in Singapore and abroad.[40] A stringent system of regulation should be created,[41] instead of leaving the issue and assessment of legality to a foreign jurisdiction (or to simply assume, without more, that their standard of "legality" or regulation suffices).[42] In addition, ex-post facto examinations of agreements completed in other jurisdictions, after the child is already living with the commissioning parents, cannot

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the news for fathering 13 children through ART, and in particular, through gestational surrogacy, and who was reported to desire to have up to 1,000 children and to continue making babes until he was dead. The Court went on to outline ethical implications flowing from this example.

38 The following commentators, amongst others, have argued that *all forms* of surrogacy should be banned: Tan Seow Hon, "Surrogacy and Human Flourishing" (2020) 45:1 J Leg Philosophy 49 [Tan Seow Hon, "Surrogacy and Human Flourishing"]; Adeline A Allen, "Surrogacy and Limitations to Freedom of Contract: Toward Being More Fully Human" (2018) 41 Harv JL & Pub Pol'y 753; The National Council of Churches of Singapore, "Surrogate Motherhood: A Statement by the National Council of Churches of Singapore" (11 March 2019), online: <https://nccs.org.sg/2019/03/nccs-statement-on-surrogacy/surrogate-motherhood-nccs-statement/>; Darius Lee, "Clear stance on all forms of surrogacy needed", *The Straits Times* (20 December 2018), online: <https://www.straitstimes.com/forum/letters-in-print/clear-stance-on-all-forms-of-surrogacy-needed> [Darius Lee, "Clear stance on all forms of surrogacy needed"].

39 The following, amongst others, have argued that at least *commercial surrogacy* should be banned: Member of Parliament, Mr Christopher de Souza (see the 14 January 2019 *Parliamentary Debate*, *supra* note 18); Tan Seow Hon, "Should commercial surrogacy be legalised?", *The Straits Times* (17 January 2018), online: <https://www.straitstimes.com/opinion/should-commercial-surrogacy-be-legalised>; Darius Lee, "Children are not commodities; commercial surrogacy a form of human trafficking", *TODAYonline* (11 January 2018), online: <https://www.todayonline.com/voices/children-are-not-commodities-commercial-surrogacy-form-human-trafficking>. See also the concerns raised by John Pascoe, "Sleepwalking Through the Minefield: Legal and Ethical Issues in Surrogacy" (2018) 30 Sing Ac LJ 455 [Pascoe, "Sleepwalking Through the Minefield"]; Nathan Hodson, Lynne Townley & Brian D Earp, "Removing Harmful Options: The Law and Ethics of International Commercial Surrogacy" (2019) 27:4 Med L Rev 597.

40 Claire Fenton-Glynn, "Outsourcing Ethical Dilemmas: Regulating International Surrogacy Arrangements" (2016) 24:1 Med L Rev 59 at 59 [Fenton-Glynn, "Outsourcing Ethical Dilemmas"] (making this argument in the context of England).

41 See *eg ibid* where Fenton-Glynn's suggestion of a domestic system of regulation involves England allowing surrogacy within England itself, albeit with strict prior approval of the surrogacy arrangement, rather than the current system of ex-post facto regulation (*ibid* at 69-71). Singapore should *not* be allowing surrogacy within Singapore itself. The best and first option would be to prohibit surrogacy altogether. If this is not accepted, it is submitted that the next best option would be to put up a stringent pre-surrogacy approval system for those eligible under the Limited Overseas Surrogacy Policy.

42 For example, some of the abusive and exploitative practices (relating to both women and children) arising from international commercial surrogacy took place in purportedly well-regulated commercial surrogacy jurisdictions: see the *Report of the Special Rapporteur on the Sale and Sexual Exploitation of Children, Including Child Prostitution, Child Pornography and Other Child Sexual Abuse Material*, UNGAHRC, 37th Sess, UN Doc A/HRC/37/60 (2018) [*2018 Special Rapporteur Report*] at paras 30-32, 34, 68.

be seen as an acceptable compromise, as authorisation will inevitably be granted in the child's best interests.[43] A further flaw of this policy is that it does *not* come with any *pre-conception* assessment of the suitability of intending parents or *pre-conception* authorisation of surrogacy arrangements.[44] It is also unclear if there is any practice of pre-entry examination and authorisation to enter Singapore with the child,[45] or any comprehensive post-birth review of proceedings abroad and best-interests assessments[46] (other than the best-interests assessment conducted by the Court in determining whether to grant an adoption order).

The second and more pressing concern (which is the main focus of this article) is that notwithstanding the government's clear expression of the Policy against PADSP and clear affirmation of the public policy against the formation of SSFUs, it remains open for singles and same-sex couples to commission children through overseas surrogacy or ART, and then raise them in Singapore.[47] This lacuna in law and policy is examined in detail at Section III(C) below. We will now first briefly summarise the arguments for and against whether singles and same-sex couples should have access to surrogacy and ART to commission children, before analysing such arguments in depth in Section III below.

D. *Summary of Arguments For and Against Singles and Same-Sex Couples having Access to Surrogacy and ART to Commission Children*

There are several arguments *for* the position that singles and same-sex couples should have access to surrogacy and ART to commission children. First, it is inappropriate to eschew alternative conceptions of parenthood in the context of surrogacy arrangements whilst they are accepted elsewhere, *eg*, children adopted or on permanent care orders may maintain a relationship with their biological parents, whereas

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43 Fenton-Glynn, "Outsourcing Ethical Dilemmas", *supra* note 40 at 75. See also para 57 of the *Report of the Special Rapporteur on the Sale and Sexual Exploitation of Children, Including Child Prostitution, Child Pornography and Other Child Sexual Abuse Material*, UNGA, 74th Sess, UN Doc A/74/162 (2019) [*2019 Special Rapporteur Report*] ("it will rarely be in the child's best interests to refuse to recognise or grant parenthood that reflects the child's lived reality").

44 See *2019 Special Rapporteur* Report, *ibid* at para 34, citing examples of countries which conduct such assessments/authorisation. See also paras 73, 77 of the *2018 Special Rapporteur Report*, *supra* note 42, (recommending appropriate suitability reviews of intending parents, either prior to or after the birth or both).

45 See the *2019 Special Rapporteur Report*, *supra* note 43 at paras 54-55.

46 See the recommendations at paras 70, 73 of the *2018 Special Rapporteur Report*, *supra* note 42.

47 In theory, it also remains open for singles and same-sex couples to *adopt* children overseas and bring them back to Singapore. The public policy against the formation of SSFUs would still arguably apply, while the Policy against PADSP (which is formulated in the context of singles *using surrogacy or ART* to conceive children and to adopt them for the purpose of forming single unwed parent households as part of a planned and deliberate single parenthood as a lifestyle choice) is unlikely to apply. Singapore will need to come up with its own policy for this scenario. There are also critical differences between adoption (as originally designed) versus motherless/fatherless surrogacy and ART (see Section III(F) below). Furthermore, the sense of confusion, loss or hurt felt by children born through third party reproduction or the severance or truncation of gestational connection (see Section III(D.2) below) will not apply, or at least, the prospective adoptive parent(s) would not have played a part in causing or contributing to such potential or actual harm. Subject to the above important qualifications, all other arguments in this article would apply to this scenario.

children whose parents have divorced and remarried will have biological and new step-parents.[48] In other words, this is just another alternative form of parenthood ("Alternative Parenthood Argument"), albeit based on *intention* rather than circumstances. Second, with the advent of new reproductive technology, even previously infertile couples may now fulfil their innate human desire to have children. There is no reason why singles or same-sex couples cannot similarly leverage on such technology, and fulfil their desire (or even their "right") to have children ("Desire Argument"). The first two arguments are closely connected, in that they both rely on the concept of intention-based parenthood. Third, looking at things from the best welfare of the child, children raised by singles or same-sex couples fare just as well, *if not better*, than those raised by heterosexual couples ("Same/Better Outcome Argument"). Fourth, children commissioned through surrogacy and ART are "wanted" at the outset, *ie*, explicitly planned, which is good for the welfare of such children.[49] It has been asserted that all things being equal, a "wanted" child probably stands a better chance of having a better outcome than an "unwanted" child ("Wantedness Argument"). This flows from the third argument. Fifth, in any event, incorporating gamete donors or the surrogate mother into the child's life would help to soften the blow (if any) of motherlessness or fatherlessness ("Incorporation Argument").

On the other hand, the arguments *against* the position that singles and same-sex couples should have access to surrogacy and ART to commission children[50] may be summarised as follows. First, when surrogacy and ART are used by singles or same-sex couples, it not only fragments the role(s) of parenthood, but also eliminates either fatherhood or motherhood *completely*. Second, applying first principles, this form of surrogacy and ART is against the welfare and best interests of children, including unborn children. In particular, it deprives a child of his or her right to a mother and a father. It must be reiterated that no one has a right to a child. The rights of a child must trump the desires of adults. Third, this form of surrogacy and ART breach public policies in Singapore. There is a need to affirm and strengthen the public policy in favour of parenthood within marriage (which is, by definition, heterosexual), as well as to prevent further breaches of the public policy against the formation of SSFUs and the Policy against PADSP. Fourth, there is a real likelihood of *potential adverse outcomes* to the children born from surrogacy and ART, which designs a child to be motherless or fatherless for life. Fifth, in relation to this form of surrogacy and ART, the disadvantages to the child including the total loss of a mother or a father, have been deliberately imposed on the child by the commissioning parent(s),

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48 John Tobin, "To Prohibit or Permit: What Is the (Human) Rights Response to the Practice of International Commercial Surrogacy?" (2014) 63:2 ICLQ 317 at 328.

49 See: Elizabeth Marquardt, Norval D Glenn & Karen Clark, "My Daddy's Name is Donor: A New Study of Young Adults Conceived Through Sperm Donation", online: Institute for American Values <https://www.parliament.tas.gov.au/Ctee/Council/Submissions/GovtAdminA_Surrogacy%20-%20Greg%20Donnelly%20MLC%20-%20My%20Daddy's%20name%20is%20Donor.pdf> at 63 [Marquardt, 2010]; Elizabeth Marquardt, "One Parent or Five? A Global Look at Today's New Intentional Families", The Commission on Parenthood's Future, *Institute for American Values* (2011), online: <https://perma.cc/Y5D4-6HT2> at 53-58 [Marquardt, 2011].

50 The same arguments against or concerns arising from allowing infertile married heterosexual couples to have access to overseas surrogacy in a regulated overseas state, as set out in Section II(C) above, would apply equally here but they lie outside the main focus of this article.

rather than befallen through adverse circumstances, chance or misadventure.[51] In considering these arguments in depth in Section III below, the above five arguments in favour of this form of surrogacy and ART will also be considered and dealt with. The Desire Argument is dealt with under Section III(B) below. The Same/Better Outcome Argument, the Wantedness Argument and the Incorporation Argument are considered in Section III(E) below. Lastly, the Alternative Parenthood Argument is evaluated at Section III(F) below. In Section III(G), we will also consider whether various hypothetical situations would affect the conclusion of this article as well as the examples of other countries.

III. Motherless or Fatherless by Design

A. *Fragmentation of Fatherhood and Motherhood through Surrogacy and ART*

In the natural course of things, both the father and mother of the child contribute their gametes (sperm and egg) to conceive the child. The child is carried in the mother's womb until birth and, ideally, both father and mother share in parental responsibilities for the care, nurture and upbringing of the child. However, surrogacy and ART fragments fatherhood, motherhood or both, whether used by singles, same-sex couples or married heterosexual couples. Yet, when used by singles or same-sex couples, the fragmentation is the most severe, because it results in the *elimination* of the child's experience of either motherhood or fatherhood. Table 1 below illustrates this.

Table 1. Fragmentation of Fatherhood and Motherhood through Surrogacy and ART

Cat	Types of Parents	Fatherhood		Motherhood		
		Genetic/ Gamete Contributor[52]	Caregiver Father(s)[53]	Genetic/ Gamete Contributor[54]	Gestational Carrier/ Mother[55]	Caregiver Mother(s)[56]
1	Heterosexual, biological parents	√	√	√	√	√

Cat 4-7, 10-13 (involving surrogacy)
Cat 2-3, 8-9 (involving ART other than surrogacy)
Light-shaded boxes (where one or more aspect(s) of fatherhood or motherhood is/are eliminated)
Dark-shaded boxes (where either fatherhood or motherhood is *completely* eliminated)

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51 See *UKM*, *supra* note 2 at para 173 citing Bryson J at para 17 of *Re A and B* (2000) 26 Fam LR 317, which concerned an application to adopt a child born through surrogacy before the State of New South Wales had legislated to provide a means of transferring parental rights to commissioning parents.

52 *Ie*, the male person who contributes the sperm.

53 *Ie*, the male person (who may or may not have contributed the sperm) who plays the role as father and caregiver to the child. This is sometimes also called the "social father".

54 *Ie*, the female person who contributes the egg.

55 *Ie*, the female person who carries the child in her womb until birth.

56 *Ie*, the female person (who may or may not have contributed the egg or carried the child in her womb) who plays the role as mother and caregiver to the child. This is sometimes also called the "social mother".

Table 1. (*Continued*)

Cat	Types of Parents	Fatherhood		Motherhood		
		Genetic/ Gamete Contributor[52]	Caregiver Father(s)[53]	Genetic/ Gamete Contributor[54]	Gestational Carrier/ Mother[55]	Caregiver Mother(s)[56]
2	Heterosexual parents, sperm donated	—	√	√	√	√
3	Heterosexual parents, egg donated	√	√	—	√	√
4	Heterosexual biological parents, surrogacy	√	√	√	—	√
5	Heterosexual parents, sperm donated, surrogacy	—	√	√	—	√
6	Heterosexual parents, egg donated, surrogacy	√	√	—	—	√
7	Heterosexual parents, sperm & egg donated, surrogacy	—	√	—	—	√
Surrogacy and ART which eliminates either fatherhood or motherhood *completely*						
8	Single mother/lesbian couple, sperm donated	—	—	√	√	√
9	Single mother/lesbian couple, sperm and egg donated	—	—	—	√	√
10	Single mother/lesbian couple, sperm donated, surrogacy	—	—	√	—	√
11	Single mother/lesbian couple, sperm and egg donated, surrogacy	—	—	—	—	√

Table 1. (*Continued*)

Cat	Types of Parents	Fatherhood		Motherhood		
		Genetic/ Gamete Contributor[52]	Caregiver Father(s)[53]	Genetic/ Gamete Contributor[54]	Gestational Carrier/ Mother[55]	Caregiver Mother(s)[56]
12	Single father/gay couple, egg donated, surrogacy	√	√	—	—	—
13	Single father/gay couple, sperm & egg donated, surrogacy	—	√	—	—	—

As can be seen from Table 1 above: (1) only Category 1 (*ie*, heterosexual, biological parents) has *all* five aspects/roles of fatherhood and motherhood combined; (2) Categories 2-7 (*ie*, heterosexual couples using surrogacy and ART) eliminate *some* aspect(s)/role(s) of either fatherhood or motherhood[57]; (3) only Categories 8-13 (*ie*, singles or same-sex couples using surrogacy and ART) ("Categories 8-13") eliminate either fatherhood or motherhood *completely*,[58] which is a compelling reason why these categories should be urgently prohibited, especially when seen from the perspective of the best welfare and interests of the child. To this, we next turn.

B. *Welfare and Best Interests of Children as First and Paramount Consideration, and the Right to a Father and Mother*

The principle that the welfare of the child is the first and paramount consideration in proceedings relating to children is found in international law, in particular, the *United Nations Convention on the Rights of the Child*,[59] to which Singapore is a party (see *eg*, Article 3(1) ("In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the *best interests of the child shall be a primary consideration*"),[60] Article 21 ("State Parties that recognize and/or permit the system of adoption shall ensure that the *best interests of the child shall be the paramount consideration*…"[61]), and various other articles referring to the best interest(s) of the child).[62] The Special Rapporteur affirmed that certain human rights principles are applicable to both adoption and surrogacy, including the best interests of the child

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57 With respect to Categories 2-3 (*ie*, heterosexual couples having recourse to ART, but without surrogacy) and Categories 4-7 (*ie*, heterosexual couples having recourse to surrogacy), there are strong arguments for why they should *not* be allowed, but these lie outside the scope of this article.

58 Visually, the boxes at Categories 8-13 are shaded in dark grey where either fatherhood or motherhood is *completely* eliminated.

59 *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) [*CRC*].

60 [Emphasis added].

61 [Emphasis added].

62 See *eg*, *CRC*, *supra* note 59, arts 9(1), 9(3), 18(1), 20(1), 37(c), 40(2)(b)(iii).

as a paramount consideration.[63] In addition, Pascoe argues that in all the legal and ethical complexity arising out of surrogacy, the primary focus must be the best interests of the child.[64] It is submitted that this primary focus extends to *unborn* children as well. In this regard, the preamble of the *CRC* affirms that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, *before as well as after birth*".[65]

The "best interests" principle is also embedded in domestic law. The welfare of the child is the first and paramount consideration in any adoption application,[66] any proceedings before the court pertaining to *inter alia* the custody or upbringing of a child,[67] as well as applications by parents and court-appointed guardians to apply for custody of, access to and maintenance of a child.[68] In addition, the *Women's Charter*[69] regulates the *private* care of children (including decisions on the custody, care and control of children after divorce, where the "paramount consideration" shall be the welfare of the child[70]), while the *Children and Young Persons Act*[71] regulates the *public* care of children.[72] "In both spheres, the welfare of the child is the paramount consideration".[73] Where the parenthood of a child is to be determined in the discretion of the Court under the *SCARTA*, "the welfare and best interests of the child shall be the first and paramount consideration of the court".[74] Indeed, this principle is the "golden thread" which runs through all proceedings directly affecting the interests of children.[75]

Having regard to the aforesaid, there is no reason why for children *yet to be born*, the child's welfare and best interests should not likewise be the first and paramount consideration in the formulation of laws and policy on whether, and if so under what circumstances, they should be conceived (if at all) through surrogacy or ART. Applying this first principle, it is submitted that surrogacy or ART which eliminates either motherhood or fatherhood completely *cannot* be in the child's welfare and best interests.

Indeed, the "best interests" principle is closely linked to the right of a child to be raised by a father and a mother. Beginning again with international law, Article 7(1) of the *CRC* provides that a child shall have, "as far as possible, the right to know and be cared for by his or her parents". Read together with Articles 9(3),[76]

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63 *2018 Special Rapporteur Report*, *supra* note 42 at para 28, citing arts 3, 21 of the *CRC*.

64 Pascoe, "Sleepwalking Through the Minefield", *supra* note 39 at para 3.

65 [Emphasis added].

66 *UKM*, *supra* note 2 at paras 50, 53.

67 S 3 of the *Guardianship of Infants Act* (Cap 122, 1985 Rev Ed Sing) [*GIA*].

68 *VET v VEU* [2020] 4 SLR 1120 at paras 10-12 (HCF).

69 (Cap 353, 2009 Rev Ed Sing) [*Women's Charter*].

70 S 125(2) of the *Women's Charter*.

71 (Cap 38, 2001 Rev Ed Sing).

72 *UNB v Child Protector* [2018] 5 SLR 1018 at para 1 (HCF).

73 *Ibid*.

74 *SCARTA*, s 10(7)(a).

75 *BNS v BNT* [2015] 3 SLR 973 at para 19 (CA).

76 "State Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with *both parents* on a regular basis, except if it is contrary to the child's best interests." [Emphasis added].

10(2)[77] and 18(1)[78] of the *CRC*, the central or common thread is that *both* parents are to be intimately and regularly involved in a child's life, care, upbringing and development, and to have and maintain personal relations and direct contact with the child on a regular basis (even if separated from the child or living in different countries), with the child's best interests at the heart of it all. Putting it from the perspective of the child, "children have a right to be known and cared for by both their mother and father, should not be separated from their parents, and have a right to remain in contact when apart [and they] have a right to their biological identity and extended family."[79] On a closely related note, the obligation to take care of the mother's pre-natal and post-natal healthcare is also seen as an integral part of ensuring the child's right of access to healthcare services.[80] This strongly implies or assumes the mother's *continuing* role, importance and involvement in the child's life.

One may counterargue that the above reading of the *CRC* is grounded on the traditional understanding or assumption that a child is born out of a union between a man and a woman, which would have been true in 1990 when the *CRC* was drafted, but is no longer universally applicable with the advent and increasing use of surrogacy and ART. However, there is nothing under international law which contradicts the above proposed reading of the *CRC*, in particular, when one considers that there are no legally-binding human right declaration(s) or instrument(s) suggesting that singles and same-sex couples have a right to access surrogacy and ART. In a 2014 joint publication by the United Nations' Office of the High Commissioner for Human Rights, the United Nations Population Fund ("UNFPA")[81] and the Danish Institute for Human Rights,[82] Box 11 of the *Reproductive Rights Handbook* discusses "New Technology and Reproductive Rights".[83] Reiterating the ICPD's reference to the "basic rights of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so",[84] the *Reproductive Rights Handbook* noted that despite this wording (and

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77 "A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with *both parents*." [Emphasis added].

78 "States Parties shall use their best efforts to ensure recognition of the principle that *both parents* have common responsibilities for the upbringing and development of the child." [Emphasis added].

79 Katy Faust & Stacy Manning, *Them Before Us: Why We Need a Global Children's Rights Movement* (New York: Post Hill Press, 2021) at 37-38 [Faust & Manning, *Them Before Us*], summarising the effects of arts 7-10, 18 of the *CRC*. Art 8(1) provides that "States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognised by law without unlawful interference".

80 See arts 24(1), 24(2)(d) of the *CRC*.

81 The UN's sexual and reproductive health agency.

82 *Reproductive Rights are Human Rights: A Handbook for National Human Rights Institutions*, United Nations' Office of the High Commissioner for Human Rights, United Nations Population Fund, Danish Institute for Human Rights, UN Doc HR/PUB/14/6 (2014) [*Reproductive Rights Handbook*].

83 As the UNFPA explains on its website, "[t]he purpose of this Handbook is to provide National Human Rights Institutions with tools and guidance on how to integrate reproductive rights into their work", online: <https://www.unfpa.org/publications/reproductive-rights-are-human-rights>. See also the *Reproductive Rights Handbook*, *supra* note 82 at 13 where this is reiterated. This document is non-binding under international law, or at best, arguably falls under art 38(d) of the *Statute of the International Court of Justice* being "…the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law".

84 *Reproductive Rights Handbook*, *supra* note 82 at Box 11 at 115. The ICPD refers to the International Conference on Population and Development, Cairo 1994.

what it could imply), many would say that reproductive assistance "falls beyond reproductive rights", including for those who are "single or live in same sex relationships".[85] It goes on to discuss questions concerning the practice of surrogacy, and concludes that the "need to balance the rights of potential parents with the rights of other persons and the rights of the unborn child remain in focus".[86] Pascoe interprets the *CRC* as providing the child the right to know his or her parents, "which includes nationality and genetic heritage, as well as all the people who actually raised the child", and that it is a "positive duty incumbent on the custodial parent to ensure that such knowledge is acquired, retained and imparted to the child".[87] In other words, the child has a right to know *all* his parents (insofar as it is no longer just *two*)—not only the caregiving parent(s), but also all the gamete contributor(s) and the surrogate mother.

Importantly, it is recognized that there is no "right to a child" under international law.[88] A child is not a good or service that the State can guarantee or provide, but rather "a rights-bearing human being". Providing for any "right to a child" would be a "fundamental denial of the equal human rights of the child", and the "right to a child" approach must be "resisted vigorously, for it undermines the fundamental premise of children as persons with human rights".[89]

There are Singapore authorities which allude to a child's strong desire and right to know his parents. First, the Singapore Court of Appeal ("SGCA") declared in *CX v CY* that "[t]here can be no doubt that the welfare of a child is best secured by letting him enjoy the love, care and support of both parents".[90] Second, in *Re UKM*, District Judge Nair noted that the "adoption court has seen time and again the deep, almost abstruse desire of adoption children to seek the face of their biological parents in an effort to find themselves".[91] Third, in *Melati bte Haji Salleh v Registrar-General of Births and Deaths*, Chan Sek Keong J (as he then was) granted an adopted child's application to inspect the (now defunct) Adoption of Children Register and make copies of it. He held that "[i]n the absence of a demonstrable public interest against disclosure, I would have thought that it is only morally right that an adopted child in such a position should be granted the right to know who his or her natural parents are".[92] Fourth, the SGCA in *ACB v Thomson Medical Pte Ltd* observed

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85 *Ibid* [emphasis added].

86 *Ibid*. See also Report of the Special Rapporteur on the Sale and Sexual Exploitation of Children, Including Child Prostitution, Child Pornography and Other Child Sexual Abuse Material, UNGAHRC, 43rd Sess, UN Doc A/HRC/43/40 (2020) at para 57 where the Special Rapporteur highlighted that nothing in her reports on surrogacy (including the previous ones in 2018 and 2019) should be interpreted as a restriction of women's autonomy in decision-making or of their rights to sexual and reproductive health. But she emphasised that further research on surrogacy by other human rights mechanisms is needed, in particular as it relates to women's rights.

87 John Pascoe, "A View from the Bench in Australia" in Jens M Scherpe, Claire Fenton-Glynn & Terry Kaan, eds, *Eastern and Western Perspectives on Surrogacy* (Cambridge: Intersentia, 2019) 105 at 113 [Scherpe, Fenton-Glynn & Kaan, *Eastern and Western Perspectives on Surrogacy*].

88 *2018 Special Rapporteur Report*, *supra* note 42 at para 64.

89 *Ibid*.

90 *CX v CY (minor: custody and access)* [2005] 3 SLR (R) 690 at para 26 (CA) [*CX v CY*]. This case was decided in the context of a custody dispute, whereupon the Court endorsed the concept of joint parenting even after divorce and held that generally joint or no custody orders should be made, with sole custody orders being an exception to the rule.

91 [2018] SGFC 20 at para 36. This was the District Court decision which led to the appeal in *UKM*.

92 [1989] 1 SLR (R) 534 at para 8 (HC).

that the ordinary human experience was that parents and children were bound by ties of blood and this fact of biological experience—heredity—carried deep socio-cultural significance.[93] The IVF mix-up resulted in the appellant losing the right to "genetic affinity" with the child. The Court recognised that this was a cognisable injury that should sound in damages.[94] It is submitted that the above observations would apply with equal force to children conceived through surrogacy arrangements. They would likewise have a deep, almost abstruse desire to seek the face of their biological parent(s) and gestational mother in an effort to find themselves. It is only morally right that they be granted the right to know their biological parent(s) and gestational mother. In addition, their "genetic affinity" with their biological parent(s) and gestational mother should give rise to a right to know them. Fifth, and wrapping up this point, District Judge Nair's incandescent observations in *Re UKM*[95] on the rights of the child in the context of surrogacy is apposite:

> When we speak of the rights of a child in the larger context of his welfare, we must appreciate *what those rights are from the very beginning of life* and not only as they appear today. It is poignant that this child's *right to know his mother has been denied*. Even with prosperous advances in technology, a child is born of the union between a man and a woman. That remains today, the starting point of any reasonable discourse on human identity and the rights of individuals. If this be the starting point, *denying him the right to his mother* brings about far more challenging consequences than the perceived stigma associated with his birth process.[96]

In light of the above, surrogacy and ART which intentionally designs a child without a mother or father is a denial and breach of a child's right to *both* a mother and father.[97] Indeed, "[e]very child has a right to a mother and a father; no one has a right to a child".[98] This may be connected back to the Desire Argument. One may empathise with those who have the "basic human impulse to create and raise a child".[99] But impulse and desire alone cannot be the determining factor. Putting the best welfare and interests of the child *first*, the adults' impulse and desire must necessarily take a backseat.

C. *Public Policy*

The Court in *UKM* held that there was "strong evidence" of a public policy in favour of parenthood within marriage,[100] meaning that "the position to be encouraged is that

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93 [2017] 1 SLR 918 at para 128 (CA).

94 *Ibid* at para 135.

95 *Supra* note 91.

96 *Ibid* at para 36 [emphasis added]. While *Re UKM* was reversed on appeal in *UKM*, this point (*ie*, denying the child of the right to know his mother) was not argued or considered on appeal in *UKM*.

97 See, in contrast, Tobin, *supra* note 48 at 318, 323-328.

98 Allen, *supra* note 38 at 800, citing CanaVox, an organisation dedicated to promoting marriage.

99 Professor Leong Wai Kum, as cited in *UKM*, *supra* note 2 at para 208.

100 *UKM*, *supra* note 2 at para 187.

the family unit should be understood as comprising a *married heterosexual couple* having and raising children, and in addition, this should be regarded as the *optimal parenting conditions* under which a child here may be raised".[101] The strong evidence include the speech of Prime Minister Lee Hsien Loong ("PM Lee") during the 2007 parliamentary debates on whether to repeal section 377A of the *Penal Code* ("PM Lee's 2007 Speech"),[102] 2016 and 2017 parliamentary debates where this policy was affirmed,[103] and various legislation, statutes and regulations.[104]

After *UKM*, this policy was affirmed by MSF Minister Lee that "the prevailing social norm in our society is still that of a *man and woman marrying*, and *having and bringing up children within a stable family unit*. This is also the family structure that the government encourages."[105]

As such, singles or same-sex couples having (through surrogacy and ART) and raising children is inconsistent with the public policy in favour of parenthood within marriage (as defined above), clearly breaches the public policy against the formation of SSFUs and the Policy against PADSP, and also departs from other norms envisaged or intended to be protected by different legal frameworks.[106] However, as mentioned above in Section II(C), despite such public policies, it currently remains open for singles and same-sex couples to commission children through overseas surrogacy or ART, and then raise them in Singapore.

The lacuna in law and policy may be illustrated by the following five points. First, there are examples of children commissioned by same-sex couples through overseas surrogacy whereby these children have remained in Singapore for significant or substantial periods of time.[107] These couples often rely on frequent visa-runs to allow the children to remain in Singapore in the meantime. As long as they do not mind the long-term inconvenience of this arrangement, there is nothing stopping them from commissioning children overseas and raising them in Singapore even *without* an adoption order (which would appear to be harder to obtain after *UKM*[108]

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[101] *Ibid* at para 191 [emphasis added].

[102] Where PM Lee "endorsed specifically the traditional understanding of a family as a *married heterosexual couple* having and raising children within their household", and that it was "family units, so understood, which together contributed to the preservation of a stable society". See *UKM*, *supra* note 2 at para 187 [emphasis added].

[103] *UKM*, *supra* note 2 at para 188.

[104] *Ibid* at paras 189-190. These include various provisions of the *Adoption Act* (Cap 4, 2012 Rev Ed Sing) [*Adoption Act*], the *SCARTA* and the *GIA*.

[105] 14 January 2019 *Parliamentary Debate*, *supra* note 18 [emphasis added]. The same affirmation was made on two other occasions: see Rashith, *supra* note 17; 7 October 2019 *Parliamentary Debate*, *supra* note 18.

[106] See Tan Seow Hon, "Surrogacy: UKM", *supra* note 2 at 272-273, where she points out that while the Court in *UKM* defined its role conservatively as that of interpreter of the law, "ironically, its holding turned out to approve of departures from the norms envisaged or intended to be protected by different legal frameworks— relating to ART, s 377A, adoption, and citizenship."

[107] See *eg*, *VET v VEU*, *supra* note 68 at paras 4, 8, 48 (younger sister of the child in *UKM*, commissioned through overseas surrogacy and born in early 2019, but raised in Singapore); *VCX v VCY* [2019] SGFC 130 (male child commissioned by same-sex male couple and born in India through gestational surrogacy, and at the time of this reported decision, had already remained in Singapore for seven years despite the ICA consistently rejecting various applications over the years by the same-sex couple for permanent residency, long-term visit pass or student pass for the child).

[108] *UKM*, *supra* note 2 at para 246; Rashith, *supra* note 17.

and which is in any event generally unavailable for a male adult applying to adopt a female child).[109]

Second, a lesbian couple who travels overseas for ART services would not face the same barriers to setting up a SSFU so long as *one of them bears the child*. An adoption order would not be required to have the child, albeit illegitimate, to be registered as a Singapore citizen,[110] so as to remain in Singapore long-term. Single women (regardless of sexual orientation) may achieve the same result if she bears the child. An adoption order is not required at all. Both scenarios also bypass the ART Licensing Terms, which envisage that only a married woman may receive such services and only with the consent of her husband.[111]

Third, regardless of whether an adoption order is required for the purposes of rectifying a child's non-citizenship, there remains the possibility of obtaining an adoption order to legitimise the parent-child relationship. In this regard, it was held in *UKM* that an adoption order would be for the welfare of the child. The key reason for this finding is that an adoption order would increase the child's prospect of securing Singapore citizenship and long-term residence here, where his family is located. This in turn would enhance his sense of security, his emotional well-being, and the long-term stability of his care arrangements.[112] It was also held that an adoption order to legitimise the parent-child relationship would have some positive social, psychological and emotional impact on the child due to the social acceptance attached to being a legitimate child, and this would be for the child's welfare (albeit to a limited or lesser extent as compared to the citizenship element).[113] All children commissioned through overseas surrogacy or ART by singles or same-sex couples would be illegitimate, having been born out of wedlock. In this way, the deliberate breach of the Policy against PADSP or the policy against the formation of SSFUs creates the child's status of illegitimacy, which in turn ironically increases the chances of obtaining an adoption order.

Fourth, notwithstanding the Policy against PADSP, it is possible that an adoption order may nevertheless be granted to singles who commission children through overseas surrogacy in order to resolve a child's non-citizenship or illegitimacy. This is because a future Court may give little or no weight to the Policy against PADSP (which does not emanate from the *Adoption Act*) when juxtaposed against the statutory imperative in the *Adoption Act* itself to promote the welfare of the child and to regard his welfare as first and paramount.[114]

Fifth, to the extent that even after the above Ministerial statements (see Section II(B) above), adoption orders continue to be granted to singles or same-sex couples,

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109 S 4(3) of the *Adoption Act*.

110 See Chan & Prabakaran, *supra* note 2 at para 6.8.

111 See Section II above read with *supra* note 6.

112 *UKM*, *supra* note 2 at paras 65-67, 84. The Court also observed at para 67 that in arriving at this view, it was aware that the child's precarious immigration status in Singapore was in large part the result of the appellant's own actions (in commissioning the child through overseas surrogacy, and thereby creating a situation where the child was treated as illegitimate and a non-citizen). However, this did not conceptually affect the point that the child's well-being would be improved if the appellant was allowed to adopt him.

113 *Ibid* at paras 75, 84.

114 By way of analogy, see *UKM*, *ibid* at paras 244, 248 (the public policy against the formation of SSFUs did not emanate from the *Adoption Act* itself, and thus, little or no weight was given to it when juxtaposed against the statutory imperative to promote the welfare of the child as first and paramount).

with the effect of displacing or excluding the gestational mother and her husband or *de facto* partner whom she later marries as the legal parents, the lacuna or dissonance in the law identified by the Court in *UKM*[115] (namely, the significant adaptation of the adoption regime and the bypassing of the *SCARTA*) remains wholly unresolved.

In summary, guarding the back door of adoption does not prevent the unregulated and continuing use of the front door of overseas surrogacy and ART by singles and same-sex couples. If this continues to be left unregulated, there will be a growing number of children born into and raised in single-parent and same-sex families.[116] The principle of the best interests of children may eventually be turned on its head, in that it may be used to demand that same-sex parenting arrangements be afforded legal recognition and protection,[117] and even become a stepping stone to demand for the recognition of same-sex marriage.[118] This would side-step section 377A and the policy against the formation of SSFUs. In due course, similar demands will likely also be made for the recognition and protection of PADSP on account of the best interests of the children born through surrogacy or ART and raised by singles. The traditional notion of family (as affirmed by the policy in favour of parenthood within marriage, which is by definition heterosexual) will inevitably be chipped away.[119]

There is, therefore, an urgent need to legislate against motherless/fatherless surrogacy and ART, so as to affirm and strengthen the public policy in favour of parenthood within marriage, as well as to prevent further breaches of the public policy against the formation of SSFUs and the Policy against PADSP.

D. *Social Science*

In the face of Singapore's public policy that married heterosexual parenthood is the optimal condition for having and raising children, as well as Singapore's public

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115 See Section II(A) above.

116 In relation to same-sex families, see *supra* note 107 above for examples of *reported* cases derived from case law. If one were to have access to the *unreported* cases as well (including those who never applied for court orders), the total number would probably be significantly higher. See also Indulekshmi Rajeswari, ed, *Same But Different: A Legal Guidebook for LGBT Couples & Families in Singapore*, online: <https://www.singaporelgbtlaw.com/> at ch 2, where a team of lawyers in Singapore provide answers to legal issues concerning how LGBT couples in Singapore may have children via assisted reproduction, surrogacy and adoption (either locally or overseas), and covers issues relating to immigration/entry into Singapore, citizenship, parenthood and parental rights, guardianship, adoption, *etc*. The availability of such legal guidance reflects or assists in the growing number of same-sex couples having and raising children in Singapore.

117 See *eg*, Lydia Bracken in *Same-Sex Parenting and the Best Interests Principle* (Cambridge: Cambridge University Press, 2020), where she argues that the best interests of children can be used to demand that same-sex parenting arrangements are afforded legal recognition and protection.

118 See *eg*, the landmark United States Supreme Court decision in *Obergefell v Hodges* 576 US 644 (2015) [*Obergefell*] which, in a 5-4 ruling, recognised a constitutional right to same-sex marriage in America. One of the four major grounds for the majority decision (see the headnotes at 3) was that traditional marriage laws (note: marriage, by definition, is limited to a man and a woman) harm and humiliate the children of same-sex couples.

119 See also Tan Seow Hon, "Surrogacy: UKM", *supra* note 2 at 273 where she argues that if current adoption laws were not changed to reflect the policy of not encouraging overseas surrogacy, the government might end up "indirectly approving of attempts to seek overseas surrogacy", and amongst other things, "the edifice of the traditional notion of the family that section 377A was meant to protect might also be chipped away".

policy against the formation of SSFUs and the Policy against PADSP, "[m]inimum prudence dictates that we do not make [any] radical changes without strong evidence that it will do no harm. In other words, the burden of proof should be on advocates of [PADSP and same-sex parenting]".[120] This burden of proof extends to providing strong evidence that single and same-sex parenting are *equally optimal* conditions for having and raising children and that it will *do no harm*.[121] As will be evident below, based on a brief review of social science literature,[122] this burden is not discharged.

1. *Optimal Condition for Having and Raising Children*

(a) *Heterosexual married parents*: Overall, and after controlling for other variables, "the weight of scholarly evidence suggests that *having a married mother and father* is linked to children's increased physical and mental health, general life happiness, academic and intellectual performance, [behavioural] success at school, and increased likelihood of graduating from college and successfully entering adulthood."[123] The evidence "strongly suggests that seeking to integrate the mother-child bond, the father-child bond, and the sexual bond between men and women through this institution called 'marriage' is, on average, good".[124] In addition, "[e]very viable society nurtures its children", and that "[i]n virtually all cases, the *preferred form* of bringing a child into the world and raising it is to provide a child with an acknowledged mother and father".[125]

In short, "[d]ecades of social science research documents that children develop *optimally* when reared by their two biological parents in a low conflict

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[120] See George W Dent Jr, "No Difference?: An Analysis of Same-Sex Parenting" (2011) 10 Ave Maria L Rev 53 at 78. While Dent makes this argument in relation to advocates of same-sex marriage bearing the burden of showing strong evidence that it will do no harm, there is no reason why this principle should not be extended to advocates of PADSP and same-sex parenting. In making this argument, Dent cites Richard E Redding, "It's Really About Sex: Same-Sex Marriage, Lesbigay Parenting, and the Psychology of Disgust" (2008) 15 *Duke J Gender L & Pol'y* 127 at 143, where Redding admits that "when considering fundamental changes in family law policies that may affect the welfare of children for generations to come, the importance of 'getting it right' *argues for setting a fairly demanding standard* when relying on lesbigay parenting research in guiding public policy" [emphasis added].

[121] The government does not have the burden of justifying, using empirical evidence, the various public policies described above (all of which are value judgments/policy decisions). Instead, it is the advocates for *changes* to or *departures* from these policies who bear the burden of showing strong evidence why any change or departure is justified.

[122] For the avoidance of doubt, this section is *not* intended as an exhaustive review of the social science literature. This author's expertise is in the law, and this foray into empirical research on social science is merely a starting point. As noted in *UKM*, *supra* note 2 at para 184, there has yet to be systematic research on the long-term psychological and social impact on children born through surrogacy. The call is for legislators and policy-makers to study this area very carefully.

[123] Elizabeth Marquardt, "Of Human Bonding: Integrating the Needs and Desires of Women, Men, and the Children Their Unions Produce" in Linda C McClain & Daniel Cere, eds, *What is Parenthood?: Contemporary Debates about the Family* (New York: New York University Press, 2013), ch 15 at 322-323 (see 323, n 8, for the extensive social science literature cited by Marquardt in support of her assertion) [McClain & Cere, *What is Parenthood?*].

[124] *Ibid* at 323.

[125] Peter Wood, "The Anthropological Case for the Integrative Model" in *ibid*, ch 4 at 85-86 [Wood, "Anthropological Case for Integrative Model"] [emphasis added]; see also generally Faust & Manning, *Them Before Us*, *supra* note 79.

marriage".[126] Mothers and fathers parent differently and make unique contributions to the overall development of the child.[127] The aforesaid supports the notion and is consistent with Singapore's public policy in support of parenthood within marriage (which is, by definition, heterosexual), which is the *optimal condition* for having and raising a child.

In contrast, there are many others, relying on various studies or literature on non-traditional families, who argue or claim that the child's well-being is not adversely affected when raised in non-traditional family forms (or at least the child do not fare worse) as compared to being raised by a mother and father within marriage, and that there is no evidence that the latter model is superior.[128] Such new family forms include planned and deliberate single-parenting, as well as same-sex parenting.

(b) *Single and same-sex parenting, and the "No Difference" hypothesis*: The argument that there are purportedly no differences between same-sex and opposite-sex families, parents or children[129] has been termed the "no difference" hypothesis.[130] Speaking in the context of Western countries,[131] Professor Schumm explains that it is "safe to say that most progressive scholars and scholarly professional organizations have adopted this idea as a basic fact".[132] In fact, many scholars in this field purport to claim that there is a scientific "consensus" that there is no difference.[133] The "no difference" hypothesis is mostly related to same-sex parenting, although some researchers have tried to extend this to single-parenting by choice as well.[134]

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126 See the statement of the American College of Pediatricians ("ACP"), *Homosexual Parenting: A Scientific Analysis*, online: <https://acpeds.org/position-statements/homosexual-parenting-a-scientific-analysis> (with updated references as at May 2019) [*ACP's Statement*] and the numerous studies/research cited therein in support of this assertion [emphasis added]. See, however, the position of the American Academy of Pediatrics, which by 2013 had endorsed both "marriage equality" and adoption by same-sex couples.

127 *ACP's Statement*, *ibid* (see the numerous studies/research cited therein for this assertion). See also Kyle D Pruett, *Fatherneed: Why Father Care is as Essential as Mother Care for Your Child* (New York: Broadway Books, 2001) (explaining how fathers have always parented differently than mothers and why that difference is important to a child's physical, cognitive, and emotional development).

128 See *eg*, McClain & Cere, *What is Parenthood?*, *supra* note 123 at chs 3, 8, 10.

129 In fact, some scholars have recently argued that outcomes are *better* for children of same-sex parents than heterosexual parents or that biological links are not necessary for (nor do they ensure) normal child development. See Walter R Schumm, *Same-Sex Parenting Research: A Critical Assessment* (London: Wilberforce Publications, 2018) at locations 330-336, 2264 [Schumm, 2018]; Walter R Schumm, "Changes Over the Decades in Selected LGBTQ Research Findings" (2020) 4:2 J Sexual Medicine 1029 at 4 [Schumm, 2020], citing the scholars who have made these recent arguments.

130 Walter R Schumm, "A Review and Critique of Research on Same-Sex Parenting and Adoption" (2016) 119:3 Psychological Reports 641 [Schumm, 2016].

131 Namely, America, Canada and Europe, as well as Australia and New Zealand, amongst other countries.

132 Schumm, 2020, *supra* note 129 at 2. For references to the many scholars who support or assert the "no difference" hypothesis, see *ibid*; Schumm, 2016, *supra* note 130 at 642, 665-667; Schumm, 2018, *supra* note 129.

133 See the various scholars, as cited in Schumm, 2016, *supra* note 130 at 642, 667; Schumm, 2018, *supra* note 129 at ch 11; Schumm, 2020, *supra* note 129 at 2, who have asserted this "consensus", *eg*, Susan Golombok, Wendy D Manning, Marshal Neal Fettro & Esther Lamidi; Stephanie Newton Webb & Jill Chonody; Alicia L Fedewa, Whitney W Black & Soyeon Ahn; Timothy J Biblarz & Judith Stacey; Jimi Adams & Ryan Light; Leslie Cooper & Paul Cates; Katherine Mason, amongst others.

134 See *eg*, the series of studies led by Susan Golombok between 1997-2010 (on children raised by lesbians and single heterosexual mothers in fatherless families, at infancy, adolescence and as young adults),

However, for almost two decades, the "no difference" hypothesis has been challenged by Professor Schumm and many others.[135] They point out the numerous methodological limitations or weaknesses in the studies cited in apparent support of this hypothesis,[136] including non-citation bias.[137] They also urge strong caution in prematurely reaching any scientific "consensus" for this hypothesis,[138] let alone uncritically relying on such contested studies for making any policy or judicial decisions.[139]

Precisely because the lives and welfare of children are at stake, the *highest* standards of science in this field should be upheld.[140] In light of the numerous and serious issues raised about the methodological limitations and weaknesses of such studies,[141] as well as the heavy politicisation of this area of science,[142] these studies provide no reliable basis to modify, let alone change, the long-held and prevailing position that parenthood within marriage (by definition, heterosexual) is and remains the optimal condition for having and raising children. Indeed, it is "remarkable [that] after more than 50 years of research on homosexuality and LGBT relationships; it can still be

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culminating in Susan Golombok & Shirlene Badger, "Children Raised in Mother-Headed Families from Infancy: A Follow-up of Children of Lesbian and Single Heterosexual Mothers, at Early Adulthood" (2010) 25:1 Human Reproduction 150.

135 See *eg*, as cited by Professor Schumm, these include Stephen Lowell Nock, Professor Douglas Allen & Dr Loren Marks. See Schumm, 2016, *supra* note 130 at 642, 715, 736, 749-750; Schumm, 2018, *supra* note 129 at Appendix D; the *ACP's Statement*, *supra* note 126 at 2; Dent, *supra* note 120 at 53, where he argues that the claim of "no difference" is "unsubstantiated and almost certainly false".

136 See Schumm, 2016, *supra* note 130 and the numerous research articles written by Professor Schumm from 2000 to 2016 listed at 754-756; Schumm, 2018, *supra* note 129; Schumm, 2020, *supra* note 129.

137 See Walter R Schumm, "Navigating Treacherous Waters—One Researcher's 40 Years of Experience with Controversial Scientific Research" (2015) 4 Comprehensive Psychology at 6 [Schumm, 2015]; Schumm, 2018, *supra* note 129 at location 640 (with further examples of non-citation bias provided). Non-citation bias refers to the refusal to cite contrary studies or opinions, let alone deal with them.

138 Schumm, 2016, *supra* note 130 at 729: "All of these concerns with the limitations of research concerning LGBT issues should raise *red flags* about any attempt to achieve scientific consensus prematurely, even if for a good or noble cause." [Emphasis added]. See also Schumm, 2018, *supra* note 129 at location 342 (concluding that the significant and substantial differences in the studies overturns the so-called research consensus and contradicts the views of numerous social scientists and professional organisations); Schumm, 2020, *supra* note 129 at 2.

139 Schumm, 2015, *supra* note 137 at 24-25, 31-32; Schumm, 2016, *supra* note 130 at 715, 729; Schumm, 2018, *supra* note 129 at location 265 ("science can be corrupted by the repetition of limited or even false information which can lead to poor public policy decisions or even judicial decisions".)

140 Schumm, 2018, *supra* note 129 at location 310: "we are dealing with science where the highest standards should be upheld rather than being excused away for the sake of expediency or politics"; see also Redding, *supra* note 120 at 143.

141 See *eg*, Schumm, 2016, *supra* note 130 at 644-648, 708-713, 715-735; Schumm, 2018, *supra* note 129 at Appendix D; Schumm, 2020, *supra* note 129 at 2; *ACP's Statement*, *supra* note 126; Donald Sullins, "Bias in Recruited Sample Research on Children with Same-Sex Parents Using the Strengths and Difficulties Questionnaire (SDQ)" (2015) 5:5 Journal of Scientific Research & Reports 375; Thomas Schofield, "Knowing What We Don't Know: A Meta-Analysis of Children Raised by Gay or Lesbian Parents", *The Winnower* (2016), online: <http://dx.doi.org/10.15200/winn.147568.84110>. The manifold and weighty concerns raised by these scholars and commentators should be carefully studied and seriously considered.

142 See Schumm, 2018, *supra* note 129 at ch 1 (explaining that the scholarship on LGBT parenting has been heavily politicised and that research has been interpreted in a way which is biased in favour of progressive values) and at location 304 ("science as an enterprise has been thrown 'under the bus' in the interests of politics in this area of study").

said in a major review of the literature that '[r]esearch on LGBT parents is in its infancy"'.[143]

2. *Adverse Findings*

We will now consider some empirical evidence of adverse outcomes[144] when a child is not parented by *both* biological and opposite-sex parents. We will first consider single and same-sex parenting, before considering the absence of gestational connection or genetic link.

(a) *Single and same-sex parenting*: Research consistently show that when either fathers[145] or mothers[146] are absent, children suffer and such absence is associated with (or increases the risks of) adverse outcomes among children.[147] Where children from single parent families turn out well in life (and a significant number do), it is a testimony to and a triumph of the human spirit (of the child, the single parent and other caregivers), but this does not therefore mean that such children did not suffer from or were not disadvantaged by the absence of a parent in their lives. This coincides with Singapore's recently clarified public policy *against* PADSP.

With respect to same-sex parenting, "[i]f the *absolute* claims of 'no-difference' were true, then there should be *no research whatsoever* that has ever yielded positive or adverse findings with respect to same-sex parenting".[148] Yet, there *are* studies which yielded adverse findings with respect to same-sex parenting.

For example, Professor Schumm published review articles in 2016, 2018 and 2020 which summarised several studies which allude to adverse findings,[149] drew attention

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[143] Schumm, 2020, *supra* note 129 at 6 and 8, citing Sara Chiara Haden & Kimberly Applewhite, "Parents who are lesbian, gay, bisexual, or transgender" in Stephen Hupp & Jeremy Jewell, eds, *The Encyclopedia of Child and Adolescent Development* (New York: Wiley, 2019), online: <https://doi.org/10.1002/9781119171492.wecad242>.

[144] Sadly, researchers/scholars who have highlighted adverse outcomes have been subject to *ad hominem* attacks, and attempts have been made to silence or discredit them. See *eg*, Schumm, 2015, *supra* note 137 at 26-27; Schumm, 2016, *supra* note 130 at 714, 729; Schumm, 2018, *supra* note 129 at Appendix C and location 2270-2276; Schumm, 2020, *supra* note 129 at 2. That should not happen in Singapore. Science should be assessed on its merits, without personal attacks on whoever may take or support whichever position or argument.

[145] See *eg*, David Popenoe, *Life without Father: Compelling New Evidence That Fatherhood and Marriage Are Indispensable for the Good of Children and Society* (New York: Martin Kessler Books, 1996); David Blankenhorn, *Fatherless America* (New York: Basic Books, 1995); Ronald P Rohner & Robert A Veneziano, "The Importance of Father Love: History and Contemporary Evidence" (2001) 5:4 Review of General Psychology 382; Sarah McLanahan & Dona Schwartz, "Life without Father: What Happens to the Children?" (2002) 1:1 Spring 2002 Contexts 35; Richard P Fitzgibbons, "Growing Up with Gay Parents: What is the Big Deal?" (2015) 82:4 The Linacre Quarterly 332 at 332; see also generally Faust & Manning, *Them Before Us*, *supra* note 79.

[146] See *eg*, Fitzgibbons, *supra* note 145 at 332; *ACP's Statement*, *supra* note 126: "[p]sychological theory of child development has always recognised the critical role that mothers play in the healthy development of children". See also generally Faust & Manning, *Them Before Us*, *supra* note 79.

[147] See notes 145-146 above. See also Sara McLanahan & Gary Sandefur, *Growing Up with a Single Parent: What Hurts, What Helps* (Cambridge: Harvard University Press, 1994).

[148] Schumm, 2016, *supra* note 130 at 668 [emphasis added].

[149] *Ibid* at 668-713. Schumm acknowledges that while it is possible that factors other than parental sexual orientation per se might account for some of these differences/disparities, it is "one thing to argue

to and raised important concerns with respect to the sexual orientation,[150] gender identity (including the issue of harm arising from premature gender transition),[151] gender roles,[152] and mental health[153] of children raised by same-sex parents, and juxtaposed them against the absolute claims to the contrary that there are no differences. He finds it "remarkable that one could find 90% of over 70 literature reviews having drawn incorrect conclusions about some aspects of same-sex parenting".[154] He also points out that "[t]here do appear to be *significant* and *substantial differences* between same-sex and heterosexual parents and in the long-term outcomes for their children, contrary to many, many allegations by numerous social scientists over the past decades".[155] Schumm also questions whether same-sex couples are more likely to break up than different-sex couples.[156] This is an important issue since reduced parental stability is not beneficial for children.[157] Many others have expressed the adverse findings or outcomes in much stronger terms.[158]

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for 'no differences' dogmatically and another to explain some observed differences as part of a more complex model" (at 696); Schumm, 2018, *supra* note 129; Schumm, 2020, *supra* note 129.

150 Schumm points out that there are now dozens of studies that appear to refute the hypothesis that the sexual orientation of same-sex parents has no role or effect on their children's sexual orientation (Schumm, 2018, *supra* note 129 at locations 1607-1710, 1863). In particular, it "appeared that children of same-sex parents were more likely, on average, to grow up LGBT than were children of heterosexual parents" (*ibid* at locations 1595-1601) and that further studies found "elevated rates" of non-heterosexual interest and behaviour in children of same-sex parents (*ibid* at location 1601).

151 *Ibid* at locations 1971-1977 (there is some evidence, though far from conclusive, that the children of same-sex parents may be at a greater risk for gender identity differences compared to the children of heterosexual parents).

152 *Ibid* at locations 2153-2166: "at least some studies do indicate trends for the children of same-sex parents to adopt less rigid gender roles, with sons being more feminine and daughters being more masculine". Schumm also comments that "[s]ome of these gender role differences have been observed in relatively young children and do seem to be related to the parental and home environment."

153 *Ibid* at ch 11.

154 *Ibid* at locations 3072-3079.

155 *Ibid* at location 3051 [emphasis added]. Schumm also cautions in Schumm, 2016, *supra* note 130 at 714 that much of the literature can be summarised in favour of the "no differences" hypothesis if one only considers one-time studies of either young children or children who have spent very few years in a same-sex parental household, but "if one focuses on either longitudinal studies or studies of adolescent or adult children from same-sex families, then there is much more evidence not in favo[u]r of the 'no differences' hypothesis".

156 Schumm, 2020, *supra* note 129 at 5.

157 *Ibid*.

158 See *eg*, the works of Mark Regnerus, Donald Sullins & Sotirios Sarantakos. See also *ACP's Statement*, *supra* note 126; Fitzgibbons, *supra* note 145 at 333-335; Joseph Ratzinger, "Congregation for the Doctrine of the Faith: Considerations Regarding Proposals to Give Legal Recognition to Unions between Homosexual Persons", *Vatican* (28 March 2003), online: <https://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20030731_homosexual-unions_en.html> at para 7, arguing from the biological and anthropological order that "the absence of sexual complementarity in these [homosexual] unions *creates obstacles in the normal development of children* who would be placed in the care of such persons. They would be *deprived of the experience of either fatherhood or motherhood*. Allowing children to be adopted by persons living in such unions would actually mean *doing violence to these children*, in the sense that their condition of dependency would be used to place them in an environment that is *not conducive to their full human development*." [Emphasis added]. This compelling point would apply with equal force with PADSP and same-sex parenting achieved through surrogacy/ART.

While some of the studies showing adverse findings have been criticised, much of the same criticisms or limitations would likewise apply to studies claiming the "no-difference" hypothesis.[159] Carlo is of the view that at present, "it seems impossible to open a scientific and neutral debate between the two camps",[160] and that the ethnical dimension of allowing children to grow in a same-sex family context "appears to be founded in matters of principle, rather than constituting an issue to be resolved through scientific investigation".[161]

In the Singapore context, the issue of principle has already been resolved—and this is embedded in the public policy *against* the formation of SSFUs. The studies strongly suggest a real likelihood of potential adverse outcomes, which further affirms the need for, and the stricter enforcement of, the aforesaid policy. At the very least, the studies undoubtedly prevent advocates of same-sex parenting from discharging their burden of showing that there will be no harm. The same points apply with equal force in relation to PADSP.

(b) *Absence of gestational connection or genetic link*: At present, very little research exists on whether surrogacy is harmful to children.[162] A series of studies (as part of a longitudinal study) claim that children born through gestational surrogacy do not fare worse (psychologically) than other children born through natural conception or egg donation (the children are assessed at the ages of one, two, three, seven, ten and 14).[163] However, such studies, which are confined to a self-selected sample and studied only domestic non-commercial surrogacy arrangements, suffer from many methodological limitations and are therefore of "limited utility".[164] Importantly, such studies are confined to younger children who arguably lack the maturity to appreciate the contentious nature of their creation, which may affect their psychological development later in life.[165] Tobin urges caution in relying on these studies:

> [It] would be premature to use these studies as evidence that international commercial surrogacy causes no harm to children. On the contrary, the uncertainty with respect to the developmental impact on children born under such arrangements is such that it would be within a state's margin of appreciation to prohibit such arrangements.[166]

In short, *uncertainty* demands *prudence* and leans heavily in favour of *prohibition*.

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159 Schumm, 2015, *supra* note 137 at 27-28.

160 Namely, on the one hand, supporters of the right of every individual, regardless of sexual orientation, to form a family, and on the other hand, those insisting that every child has a fundamental right to have a mother and a father. See Carlo Bastianelli *et al*, "The Welfare of the Children in Same Sex Families: An Update" (2017) 4:1 J Gynecology & Women's Health.

161 *Ibid* at 1.

162 Tobin, *supra* note 48 at 332. As in, surrogacy in and of itself.

163 See the series of studies led by Susan Golombok from 2004-2017, culminating in Susan Golombok *et al*, "A Longitudinal Study of Families Formed Through Reproductive Donation: Parent-Adolescent Relationships and Adolescent Adjustment at Age 14" *(2017) 53*:10 *Developmental Psychology* 1966.

164 Tobin, *supra* note 48 at 332.

165 *Ibid*.

166 *Ibid*.

Importantly, the child develops strong bonds to the gestational mother while developing in the womb, and the separation (and anticipated separation) of the child after birth[167] causes harm to the gestational mother and child.[168] In short, the severance or truncation of *gestational connection* causes harm to the child.

In addition, speaking for themselves, children born through third party reproduction (including sperm donation, egg donation and/or surrogacy) have felt a deep and profound sense of confusion, loss or hurt as a result of not knowing or having their genetic and/or caregiver father, or their genetic, gestational and/or caregiver mother.[169] This gives a strong indication of the potential or actual psychological or emotional harm done to such children.[170] The voice of the child matters[171] and must carry much weight,[172] even though this voice is expressed long after the child is born. Even if nothing about the *current* situation may be changed, the above considerations must guide policy and law with respect to *future* generations.

If the absence of either a gestational connection alone or genetic link alone is problematic for a child,[173] it may be strongly argued that the *complete absence* of either a mother or father in that child's life (*ie*, the *total exclusion* of all three aspects/roles of a mother as gestational carrier, gamete contributor and caregiver, or the *total exclusion* of both aspects/roles of a father as gamete contributor and caregiver), which would necessarily be the case for children born through surrogacy and ART to singles or same-sex couples, would cause even *greater* difficulties for (and harm to) the child. In any event, a "strong case for caution" can be made to go

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167 Surrogacy involves great incentives to keep the maternal-fetal attachment low, which tends to increase the risk of harm to the child. See Marcus Agnafors, "The Harm Argument against Surrogacy Revisited: Two Versions Not to Forget" (2014) 17 Medicine, Health Care & Philosophy 357.

168 See *eg*, Allen, *supra* note 38 at 794-799, 804 (and the studies cited therein); Tan Seow Hon, "Surrogacy and Human Flourishing", *supra* note 38 at 67-68 (and the studies cited therein); Susan Golombok *et al*, "Children Born through Reproductive Donation: A Longitudinal Study of Psychological Adjustment" (2013) 54:6 J Child Psychology & Psychiatry 653 (surrogacy children showed higher levels of adjustment difficulties at age 7 than children conceived by gamete donation; the absence of a gestational connection to the mother may be more problematic for children than the absence of a genetic link).

169 See *eg*, Marquardt, 2010, *supra* note 49; Marquardt, 2011, *supra* note 49. See also the many stories at The Anonymous Us Project, online: <https://anonymousus.org/stories/>; Them Before Us, "Stories of Donor-Conceived Kids with Gay Parents—Why 'Family Break-Up' Doesn't Explain their Struggles" (23 May 2017), online: <https://thembeforeus.com/stories-donor-conceived-kids-w-gay-parents/>. See also generally the many stories/testimonies of children born through third party reproduction (including sperm donation, egg donation and/or surrogacy) set out in Faust & Manning, *Them Before Us, supra* note 79. These children's sense of confusion, loss or hurt have been described as a "primal wound" or "genealogical bewilderment" (see *ibid* at chs 8-9).

170 See, however, Susan Imrie & Susan Golombok, "Long-Term Outcomes of Children Conceived through Egg Donation and their Parents: A Review of the Literature" (2018) 110:7 Fertility & Sterility 1187.

171 See *eg*, art 12(1) of the *CRC*, s 5(b) of the *Adoption Act*, and s 10(7)(b)(i) of the *SCARTA*, all of which require the views or wishes of the child to be taken into consideration.

172 This is because the manner in which a child is created affects his or her entire life. While many of the reports/stories from donor-conceived and surrogacy children may appear anecdotal at face-value (*ie*, self-reporting), they are in the same or similar genre as many of the studies which assert "no-difference" or "no-harm"—the latter also rely largely on *self-reporting* administered through standardised surveys.

173 This is one further reason to also consider prohibiting married heterosexual couples from having access to surrogacy and ART which involve a child suffering the absence of gestational connection and/or genetic link.

slow in allowing any new forms of parenthood without first critically examining the effects of such changes on children.[174]

3. *Conclusion on Social Science*

The burden of proof is on advocates to show, with strong evidence, that motherless/fatherless surrogacy and ART is *equally optimal* (as parenthood within marriage, which is by definition heterosexual) and that there will be *no harm*. They have clearly failed to meet this burden. Worryingly, the above studies strongly suggest a real likelihood of *potential adverse outcomes* to the children born from surrogacy or ART, which designs a child to be motherless or fatherless for life. In the circumstances, having regard to the welfare and best interests of children as the first and paramount consideration, there is an even greater urgency to legislate against such forms of surrogacy and ART.

E. *Dealing with the Same/Better Outcome Argument, the Wantedness Argument, and the Incorporation Argument*

The above best welfare principle (Section III(B)), public policies (Section III(C)) and social science grounds (Section III(D)) disposes of the Same/Better Outcome Argument, the Wantedness Argument, and the Incorporation Argument.

First, in relation to the Same/Better Outcome Argument, the issue of principle has already been resolved in the Singapore context—and this is embedded in the public policies in favour of parenthood within marriage, and against the formation of SSFUs and against PADSP. These policies are entirely consistent with the first and paramount consideration of the welfare and best interests of children, including unborn children, who have a right to a mother and a father. In any event, as a matter of social science, the Same/Better Outcome Argument fails because the burden of showing strong evidence to prove no harm (or equal optimality) is not met.

Second, the Wantedness Argument fails upon proper consideration. It wrongly assumes that "wantedness" alone makes up for deliberately depriving the child of a mother or father. There is no social science evidence that "wantedness" alone (even with the greatest amount of financial, material, parental, and emotional care and support given such that a child turns out well in life and is or appears to be happy) makes up specifically for a child's deprivation and disadvantage in not having a mother or father for life. In addition, as a matter of principle, if "wantedness" is the determining factor, there is no reason why access to surrogacy and ART should be limited to singles or couples; they should also be available to trios and larger permutations of intending parents, and there would be no principled reason why there should be a limit on the number of children commissioned, as long as they are all "wanted" and well provided for. Clearly, this cannot be the case, because "wantedness" is not the determining factor. More fundamentally, "wantedness" is adult-centric and not child-centred. It completely fails to place the welfare of the

[174] Terence E Hébert *et al*, "Biological and Psychological Dimensions of Integrative Attachments" in McClain & Cere, *What is Parenthood?*, *supra* note 123 at ch 9.

intended child (and his or her need and right for a mother and father) as the first and paramount consideration. Instead, it places the *desires* of the *adult* before the *needs* of the *child*.[175]

Third, dealing with the Incorporation Argument (which suggests that incorporating gamete donors or the surrogate mother into the child's life would help to soften the blow (if any) of motherlessness or fatherlessness), as a starting point, the notion of mitigation implies harm. If there is no harm, there is nothing to mitigate. In any event, this argument does not hold water either. The child's personhood and sense of identity remains fragmented, having multiple persons playing the various aspects/roles of fatherhood and motherhood. Furthermore, not every gamete donor or surrogate would want to be involved in a child's life. In any event, such occasional involvement is wholly insufficient to compensate for the loss of a consistent and dependable father or mother figure in the child's life.

F. *The Alternative Parenthood Argument, and the Critical Distinction between Adoption and Motherless/Fatherless Surrogacy and ART*

We will now consider the Alternative Parenthood Argument, which tries to draw an analogy with alternative conceptions of parenthood which are currently widely accepted, *eg* children adopted or on permanent care orders may maintain a relationship with their biological parents, whereas children whose parents have divorced and remarried will have biological and new step-parents.

However, these situations may be termed as the "back door of family life", *ie*, the "point of family dissolution and reconfiguration".[176] The law supports these variety of families and parenting arrangements "in special need",[177] and in fact tries its best to ensure that the child will have (or continues to have) *both* maternal and paternal presence in his life moving forward. For example, the general and starting position of Singapore's adoption laws contemplate adopters to be married heterosexual couples.[178] Although the *Adoption Act* allows a single person to adopt a child, "this does not set the social norm or contravene public policy in so far as adoption was devised to make provision for children who have *lost* their parents or who have *been given up* by their parents".[179] In addition, Singapore divorce laws contemplate that *both* parents, even after divorce, are to continue to play an integral role in the life of the child, as an application of the best welfare of the child principle.[180] These varieties of families and parenting arrangements, which are borne

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[175] This is how Katy Faust, founder of Them Before Us, would put it. Them Before Us exists to advance social policies that encourage adults to actively respect the rights of children rather than expecting children to sacrifice their fundamental rights for the sake of adult desires, online: <https://thembeforeus.com/whoweare/>. See also generally Faust & Manning, *Them Before Us*, *supra* note 79.

[176] Don Browning, "Legal Parenthood, Natural and Legal Rights, and the Best Interests of the Child" in McClain & Cere, *What is Parenthood?*, *supra* note 123 at chs 5, 115.

[177] *Ibid* at 120.

[178] See *UKM*, *supra* note 2 at para 190(a). This is consistent with the MSF's webpage on the question of who can adopt, online: <https://www.msf.gov.sg/Adoption/Pages/Who-can-Adopt.aspx>.

[179] *UKM*, supra note 2 at para 190(a) [emphasis added].

[180] See *eg*, *CX v CY*, *supra* note 90 at para 26.

out of special need and the vagaries of life, do not and cannot justify new family forms *designed from inception* to completely eliminate for life a child's experience of motherhood or fatherhood. They in fact reinforce how law and policy consistently tries to ensure a child's right to experience *both* motherhood and fatherhood in his or her life. In a similar vein, with respect to the legal status of children conceived and born through ART, the *SCARTA* envisages that ART will be carried out for the benefit of only heterosexual couples, with the child having a father and a mother.[181] The gestational mother is treated as the mother,[182] while paternity is determined by reference to the gestational mother's husband or *de facto* partner whom she later marries, neither of whom may have provided sperm.[183]

Importantly, when singles or same couples use surrogacy or ART, it is not merely an alternative and equally acceptable form of parenthood, because the loss to the child of either a mother or a father is imposed *by design*, rather than to redeem an already broken situation. The critical distinction between adoption and surrogacy has been expressed as follows:

> In adoption, the biological parents are replaced by the adopted parents to redeem what is *an already broken situation*; the loss of the biological parents is not sought out. In surrogacy, by contrast, the loss of the birth mother (and depending on the procedure and whether it utilizes a donor egg, sperm, or both, the loss of one or both of the genetic parents as well) is *the very design and nature of the arrangement*. Whereas adoption serves the child, surrogacy serves only the commissioning parents.[184]

Put another way, the disadvantages to the child including the total loss of a mother or a father, have been *deliberately imposed* on the child by the commissioning parent(s), rather than befallen through adverse circumstances, chance or misadventure, as the Court observed in *UKM* citing *Re A and B*:

> An adoption order as a confirming step in a surrogacy arrangement is also a significant adaptation and a large step away from what were, initially, the usual circumstances of an adoption. The adoption of the child and the conferral on the child of legal relationships with other persons contributes to the child's welfare interests in a respect which has been wholly preconcerted and has not befallen the child through adverse circumstances, chance or misadventure. There have been significant changes in what appears, on the surface, to be the same institution; the advantages which the adoption order is proposed to confer on the child reciprocate *disadvantages which have been imposed by the deliberate and preconcerted action of those who ask the court to act in the infant's welfare and interests*.

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181 *UKM*, supra note 2 at para 190(b).

182 *Ibid* at para 171; *SCARTA*, s 6.

183 *UKM*, supra note 2 at paras 171, 190(b); *SCARTA*, s 7.

184 Allen, *supra* note 38 at 804 [emphasis added]. See also: Tan Seow Hon, "Surrogacy and Human Flourishing", *supra* note 38 at 77-78, on the substantive difference between adoption and surrogacy; Faust & Manning, *Them Before Us*, *supra* note 79 at chs 8-9.

> *Whatever disadvantages for the child are proposed to be cured by the process have been imposed on the child by the process.*[185]

The surrogacy contract in fact guarantees the separation, and the use of money (as is often the case, especially when international commercial surrogacy is resorted to) aggravates the situation:

> The surrogacy contract…*guarantees the separation of a child from its mother*; it looks to adoption regardless of suitability; *it totally ignores the child*; it takes the child from the mother regardless of her wishes and her maternal fitness; and it does all of this, it accomplishes all of its goals, *through the use of money*.[186]

Indeed, "[s]urrogacy contradicts the raison d'etre of adoption, which is to help *children* find the family they *need*, not help *adults* get the children they *want*."[187] The same criticism is applicable to the use of ART which designs the loss of a mother or father, namely, it is predominantly directed towards fulfilling the desire of adult(s) to have the children they want, without regard to the welfare and best interests of those children. Seen against the above arguments, upon proper consideration, the Alternative Parenthood Argument (or any variant of intention-based parenthood) fails.

G. *What If? Section 377A, Same-Sex Marriage and Other Countries*

Having considered all arguments for and against allowing singles or same-sex couples to use surrogacy and ART to commission children, on balance, this form of surrogacy and ART should be urgently prohibited. But one may ask a few hypothetical questions: *what if* section 377A is repealed, same-sex marriage is ever allowed, or other countries already allow what this article proposes should be prohibited—would this (and should this) conclusion remain the same?

In relation to section 377A, as recognised in *UKM*, the various pieces of evidence which support the existence of a public policy against the formation of SSFUs are PM Lee's 2007 Speech, section 377A (which criminalises sexual conduct between males) as well as section 12(1) of the *Women's Charter* (which provides that a marriage solemnised between persons who, at the date of marriage, are not respectively male and female, is void).[188] With or without section 377A, this public policy remains sufficiently supported by PM Lee's 2007 Speech and section 12(1) of the *Women's Charter*, as well as the ministerial statements after *UKM* reiterating the

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[185] See *UKM*, supra note 2 at para 173 citing Bryson J at para 17 of *Re A and B* (2000) 26 Fam LR 317 [emphasis added].

[186] *In re Baby M*, 109 NJ 396 (1988) at para 123 [emphasis added]. See also Faust & Manning, *Them Before Us*, *supra* note 79 at 184, citing testimonies of children conceived through surrogacy and how the knowledge that money was involved in their conception negatively impacts them.

[187] Darius Lee, "Clear stance on all forms of surrogacy needed", *supra* note 38 [emphasis added].

[188] *UKM*, *supra* note 2 at paras 202-207.

same (as highlighted in Section II(B) above).[189] In other words, the public policy arguments in this article would remain in full force even without section 377A and, considered together with all the other arguments in this article, the conclusion at the start of this section remains the same.

Insofar as same-sex marriage is concerned,[190] for the reasons explained in this article (including how same-sex parenting differs significantly from opposite sex parenting), same-sex parenting should not be endorsed, regardless of whether same-sex marriage is ever allowed. In any event, even in countries where same-sex marriage is allowed, it does *not* necessarily follow that it comes with parental rights. For example, although same-sex couples have been legally recognised in Greece (by way of registered partnerships), they cannot be granted parental rights as a couple, meaning that Greek law does not accept the possibility of same-sex parents.[191] Taiwan has allowed same-sex marriage, but married same-sex couples do not have the legal right to adopt non-biologically related children, unlike heterosexual couples.[192] To the extent that it is asserted that same-sex marriage *inevitably* or *necessarily* comes with parental rights (whether as a function of the concept of "marriage equality" or otherwise),[193] and assuming that Singapore accepts the child-centric conclusion that motherless/fatherless surrogacy and ART should not be allowed in any event, this in fact becomes a compelling ground not to allow same-sex marriage.

How have other countries approached the issue of motherless/fatherless surrogacy and ART? A brief survey of major jurisdictions such as England, America, Australia and Hong Kong, as well as Greece, Russia and Israel give rise to the following five observations.

First, some countries initially limit surrogacy or ART to married heterosexual couples, but subsequently make the *legislative* decision to extend this to other categories of applicant couples, including unmarried heterosexual couples and same-sex couples. For example, in England, the *Human Fertilisation and Embryology Act*

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189 It is outside the scope of this article to consider whether s 377A should or should not be repealed. In the hypothetical situation that s 377A is repealed, it would significantly weaken the public policy against the formation of SSFUs. Nevertheless, this public policy would remain sufficiently supported by other evidence (as suggested above), and it could be further strengthened by clear and unequivocal ministerial and/or statutory reaffirmation(s) of this public policy at the moment of or accompanying any repeal.

190 It is outside the scope of this article to consider whether same-sex marriage should be allowed.

191 Eleni Zervogianni, "Surrogacy in Greece" in Scherpe, Fenton-Glynn & Kaan, *Eastern and Western Perspectives on Surrogacy*, *supra* note 87 at 156. Although same-sex couples in Greece can act as foster parents (see Zervogianni at note 79). The author then suggests that discussion on whether same-sex couples should have children through ART or adoption "constitutes logically the next step" (Zervogianni at 164).

192 Currently, the same-sex marriage law in Taiwan only allows a homosexual person to adopt the biological child of their partner. A court challenge has been launched by three gay couples and rights groups in Taiwan to change this restriction. See Wu Hsin-yun & Teng Pei-ju, "Same-sex couples go to court to push for equal adoption rights", *Focus Taiwan* (4 January 2021), online: <https://focustaiwan.tw/society/202104010015>.

193 See *eg*, the United States Supreme Court decision in *Pavan v Smith* 582 US (2017) [*Pavan*]. The Arkansas Supreme Court held that the State need not issue birth certificates including the female spouses of women who gave birth. The United States Supreme Court reversed this on appeal, holding that this differential treatment infringes *Obergefell*'s commitment to provide same-sex couples "the constellation of benefits that the States have linked to marriage" and that such legal recognition of parenthood in birth certificates cannot be denied to married same-sex couples. See *Pavan* at 1, 3, 5; *Obergefell* at 17.

2008[194] encompassed the new concept of parenthood with the removal of "need for a father" and movement towards the paramount "welfare of the child" and responsible parenting being on the forefront.[195] As a result, there was recognition and an equivalent provision for same-sex couples and unmarried heterosexual couples.[196] Since 1 September 2009, it is possible for both female partners (one of whom undergoes ART and bears the child) to be included on the birth certificate of the child.[197] Same-sex couples who commission a child through surrogacy are also able to apply for a Parental Order to transfer parenthood from the surrogate mother (and her husband or partner who is deemed to be a parent by virtue of the *HFEA 2008*) to them.[198] England took a deliberate legislative choice to move to a new model of parenthood which is *not* grounded in a child being born to and raised by married heterosexual couples. Singapore's legislature need not, and should not, follow likewise.

Second, excluding singles from accessing surrogacy and ART have led to constitutional or court challenges in some countries, which were subsequently followed up by legislative amendment, for example, in England and Israel. In England, the previous criteria under section 54(1) of the *HFEA 2008* required that an application for a Parental Order be made by "two people" (whether married or unmarried, and both heterosexual and same-sex couples, as per section 54(2)[199]), and as such, single persons who commissioned surrogacy arrangements were not able to gain legal recognition of their parenthood through this mechanism.[200] In 2016, a single man who had commissioned a child through surrogacy in America challenged this exclusion.[201] The Secretary of State conceded, in the light of the evidence filed and the jurisprudential developments both domestic and in the European Court of Human Rights, that sections 54(1) and (2) of the *HFEA 2008* were incompatible with Article 14 of the *European Convention on Human Rights* taken in conjunction with Article 8.[202] In the light of this concession, the Court granted a declaration of incompatibility, namely, that these sections are incompatible with the above Articles "insofar

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194 *Human Fertilisation and Embryology Act 2008* (UK), c 22 [*HFEA 2008*].

195 Rina Agrawal, Elizabeth Burt & Roy Homburg, "Time-Line in HFEA Developments and Regulatory Challenges: 20 Years of Overseeing Fertility Practices and Research in the UK" (2013) 63:6 J Obstetrics & Gynecology of India 363 at 367.

196 *Ibid*.

197 *Ibid*. See the *HFEA 2008, supra* note 194, ss 42-45

198 See the *HFEA 2008, ibid*, whereby s 54(1) allows an application for a parental order by two applicants, while s 54(2) provides that they must be husband and wife, civil partners of each other, or two persons who are living as partners in an enduring family relationship and are not within prohibited degrees of relationship in relation to each other.

199 See *ibid* for s 54(2) of the *HFEA 2008*.

200 Claire Fenton-Glynn, "Surrogacy in England and Wales" in Scherpe, Fenton-Glynn & Kaan, *Eastern and Western Perspectives on Surrogacy*, *supra* note 87 at 123 [Fenton-Glynn, "Surrogacy in England and Wales"].

201 *In re Z (A Child) (Surrogate Father: Parental Order)* [2015] EWFC 73, [2015] 1 WLR 4993; *In the matter of Z (A Child) (No 2)* [2016] EWFC 1191 (Fam) [*In the matter of Z*].

202 *In the matter of Z*, *ibid* at paras 11-13. Art 14 of the *ECHR* prohibits discrimination on "on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or *other status*" [emphasis added]. Art 8 provides for the right to respect for private and family life—but the Secretary of State clarified that there was no concession that ss 54(1)-(2) of the *HFEA 2008* are incompatible with art 8 alone, and emphasised that there is "no Convention right, whether in Article 8 or elsewhere, to undertake a surrogacy arrangement" (*ibid* at para 13).

as they prevent the Applicant from obtaining a parental order on the sole ground of his *status* as a single person as opposed to being part of a couple".[203] This change has now been incorporated into legislation in 2019.[204] The above English example is inapplicable to our context. Singapore is not bound or constrained by European Union jurisprudence. The *Singapore Constitution* does not prohibit discrimination on grounds of "status", specifically, status as a single person,[205] and there is no constitutional right to respect for private and family life.[206] Importantly, the United Kingdom ("UK) Secretary of State conceded the case and did not even attempt to justify the then existing law on the child-centric grounds set out in this article (and indeed, they would not be able to, since surrogacy and ART was *already* allowed for same-sex couples and unmarried heterosexual couples).

Israel initially only allowed surrogacy to married heterosexual couples under the *Surrogacy Law*.[207] This was challenged by a single woman in 2002.[208] The Israeli High Court of Justice ("HCJ"), whilst accepting that the statutory requirements discriminated against single women, rejected her petition on the basis that a decision to extend the use of surrogacy had to be made by the legislature, in light of the novel, delicate and complex nature of surrogacy.[209] This was followed up by a legislative amendment 16 years later in 2018 which now allows single women who are unable to bear children to enter into a surrogacy arrangement, provided that they use their own egg.[210] This legislative development should be understood in light of Israel's unique social, religious and cultural background.[211] Israel is exceptional in that surrogacy is socially accepted and has been regulated under law since 1996.[212] Treatment assisting procreation is commonly used in Israel, and IVF is available for women of all sexual orientation, irrespective of marital status, and is offered

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203 *In the matter of Z*, *ibid* at paras 17-20 [emphasis added].

204 By way of the *Human Fertilisation and Embryology Act 2008 (Remedial) Order 2018* (UK) (Fenton-Glynn, "Surrogacy in England and Wales", *supra* note 200 at 124) which inserted s 54A of the *HFEA 2008* on 3 January 2019 and now allows "one person" to apply for a Parental Order.

205 Art 12(2) of the *Constitution of the Republic of Singapore* (1999 Rev Ed) [*Singapore Constitution*] provides that, except as expressly authorised by the Constitution, there shall be no discrimination against citizens of Singapore "on the ground only of religion, race, descent or place of birth in any law…".

206 The SGCA in *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at paras 44-49 (CA) [*Lim Meng Suang*] held, in the context of the 2015 constitutional challenge against s 377A, that the words "life or personal liberty" in art 9(1) of the *Singapore Constitution* does not include the right to privacy and personal autonomy. Art 9(1) provides that "[n]o person shall be deprived of his life or personal liberty save in accordance with law". The Court also cautioned at para 48 that Singapore should approach foreign cases that have conferred an expansive constitutional right to life and liberty (*eg*, India and US) with circumspection because they were decided in the context of their unique social, political and legal circumstances.

207 *The Surrogate Motherhood Agreements (Approval of Agreement and Status of Newborn Law) 1996* [*Surrogacy Law*].

208 HCJ 2458/01 *New Family v Committee for approval Surrogate agreements*, 2002, PD 57(1) 419.

209 Rhona Schuz, "Surrogacy in Israel" in Scherpe, Fenton-Glynn & Kaan, *Eastern and Western Perspectives on Surrogacy*, *supra* note 87 at 174 citing HCJ 2458/01 *New Family v Approvals Committee for Surrogate Motherhood Agreements, Ministry of Health*, 57(1) PD 419.

210 Schuz, *ibid* at 175.

211 See Yael Ilany & Netta Ilany, "The LGBT Community in Israel: Access to the Surrogacy Procedure and Legal Right for Equality, Family Life and Parenthood" (2021) 83:1 Ruch Prawniczy, Ekonomiczny I Socjologiczny 85 at 90-91 for a detailed discussion on the events leading up to the 2018 amendment.

212 *Ibid* at 88.

free of charge.[213] In addition, the prevailing view is that principles of autonomy and privacy require minimum State interference in human reproduction and there has been express judicial recognition of the right to become a parent.[214] There is also the centrality of procreation in Israeli society and the corresponding policy of encouraging childbirth.[215] Various explanations have been advanced for these pro-natalist attitudes, including religious (the biblical injunction to be fruitful and multiply), political (Zionist ideology), historical (the need to replace the Jewish people after the Holocaust) and security (the need for soldiers for national defence) reasons.[216] Singapore does not share a similar background,[217] and in any event, the public policy against PADSP is inconsistent with extending surrogacy to single women.

Third, once surrogacy or ART is extended to unmarried couples and single women, it substantially weakens any principled position, based on a child being born to and raised by a married heterosexual couple, that it should not likewise be extended to single men and same-sex couples. We will consider the examples of Greece, Russia, Australia and Israel. Greece allows gratuitous (no promised remuneration) surrogacy for heterosexual couples (even unmarried ones) and single women who cannot have a child in a natural way, but not to same-sex couples.[218] There are conflicting decisions on whether single men, who face a health condition due to which they cannot have a child in a natural way, may commission a surrogate.[219] In Russia, surrogacy is available to heterosexual couples (whether married or otherwise) and single women with fertility issues,[220] while it is unclear whether it is available to single men.[221] None of the Australian States limit surrogacy (only altruistic surrogacy is allowed) to married heterosexual couples.[222] Recent legislative amendments in South Australia extended surrogacy to single persons,[223] while legislative amendments are pending in Western Australia to extend surrogacy to single men and same-sex couples, from the current limitation of surrogacy being allowed to only married and unmarried heterosexual couples and single women with fertility or medical issues.[224]

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213 *Ibid*.

214 Schuz, *supra* note 209 at 168.

215 *Ibid*.

216 *Ibid* at 169; Ilany & Ilany, *supra* note 211 at 88.

217 Save perhaps that Singapore arguably has *one* similar interest, namely, expanding its total fertility rate given its relatively low total fertility rate and Singapore's status as a small vulnerable island nation.

218 Zervogianni, *supra* note 191 at 150, 156.

219 *Ibid* at 156. In two such cases, the Greek courts approved the surrogacy arrangement on the grounds of non-discrimination on the basis of sex, although one of these decisions was reversed on appeal (see *ibid*).

220 See Olga A Khazova, "Surrogacy in Russia" in Scherpe, Fenton-Glynn & Kaan, *Eastern and Western Perspectives on Surrogacy*, *supra* note 87 at 296-297. However, unmarried couples and single women may face difficulty registering the birth. See 293, 297.

221 *Ibid* at 297-299.

222 See generally Mary Keyes, "Surrogacy in Australia" in Scherpe, Fenton-Glynn & Kaan, *Eastern and Western Perspectives on Surrogacy*, *supra* note 87 at 85-104.

223 *Surrogacy Act 2019* (SA), s 10(2)(b), allows a single parent to become an intended parent, whereas prior to 1 September 2020 two intending parents of a qualifying relationship, which would include same-sex couples, were required (under the now repealed Part 2B of the Family Relationships Act 1975 (SA), specifically, s 10HA(2a)(d)).

224 *Surrogacy Act 2008* (WA), s 19(2); DS Family Law, "Surrogacy in Western Australia: A Legal Guide", online: <https://www.dsfamilylaw.com.au/surrogacy-wa-legal-guide/#surrogacy-eligibility>.

On 11 July 2021, the Israeli HCJ held that all legislation denying surrogacy rights to same-sex couples and single men (as mentioned above, surrogacy was previously only available to married heterosexual couples and single women) will be null and void within six months of the decision.[225] The substantive grounds for the decision are set out in an earlier 27 February 2020 partial decision,[226] which gave the Israeli Knesset (Parliament) 12 months to amend the laws, failing which a supplementary judgment will be given with an operative relief. The HCJ 781/15 2020 Partial Decision is grounded on Israel's concepts of the right to parenthood and the right to equality.[227] The *right to become a parent* is derived from the right to family life and the right to dignity. The right extends to all different medical techniques that assist procreation including the surrogacy procedure. This right is vested in everyone and does not depend on gender identity or sexual orientation, or on being single or being part of a couple.[228] As for Israel's *right to equality*, this is derived from the value of human dignity which is subscribed in the Basic Laws of the State of Israel.[229] The principle of equality has a supreme value in Israeli society, and Israeli case law long ago anchored the principle of equality as a fundamental value in the legal system.[230] Referring back to an earlier 2017 partial judgment,[231] the HCJ noted that the law that prevents individuals and same-sex couples from realising their right to become parents using surrogacy (like heterosexuals), seems discriminatory, and that there is difficulty in finding a relevant reason for distinguishing between single men and single women.[232] The HCJ held that blocking access to the surrogacy arrangement for single men in Israel violates their right to equality and their right to parenthood, while across-the-board exclusion of LGBT men from surrogacy is condemned as "suspicious" discrimination, conferring inferior status on this group and seriously harming and diminishing a person's dignity based on gender and sexual orientation.[233]

The HCJ also held that the petition seeking to allow single men to access the surrogacy process has a grip on the reality of Israeli law and is another logical step in the course of events. Under Israeli law, any person who performed a surrogacy procedure abroad (in a country that allows such a procedure legally) will have his parenting registered in Israel subject to proof of genetic affinity.[234] This is traceable to a 2014 decision where the Court granted the registration of a child of two parents of the same sex, conceived abroad by surrogacy, having genetic affiliation to one

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225 HCJ 781/15 *Etai Arad Pinkas v Committee for Approval of Agreements of Embryo Carrying According to Embryo Carrying Agreement Law (Approval of Agreement and Status of the New-born) 1996, and others*, partial decision 11 July 2021 [HCJ 781/15 2021 Decision].

226 HCJ 781/15 *Etai Arad Pinkas v Committee for Approval of Agreements of Embryo Carrying According to Embryo Carrying Agreement Law (Approval of Agreement and Status of the New-born) 1996, and others*, partial decision 27 February 2020 [HCJ 781/15 2020 Partial Decision].

227 Ilany & Ilany, *supra* note 211 at 92-94 for a detailed discussion on the HCJ 781/15 2020 Partial Decision.

228 Ilany & Ilany, *supra* note 211 at 92.

229 *Ibid*. See Israel's *Basic Law: Human Dignity and Liberty* (1992). Neither the right to parenthood nor the right to equality are expressly stated in this *Basic Law*.

230 Ilany & Ilany, *supra* note 211 at 87.

231 HCJ 781/15 (2017).

232 Ilany & Ilany, *supra* note 211 at 92.

233 *Ibid* at 93.

234 *Ibid* at 93.

parent.[235] In other words, fact scenarios like *UKM* were regularly being blessed by the Israeli system (albeit by registration rather than by way of adoption).

Israel's example is inapplicable to the Singapore context. Singapore does not have a right to parenthood. In any event, insofar as this is coached as an argument that any and all singles and same-sex couples have a right to access surrogacy or ART to have children, this would be inconsistent with the rejection, under international law, of a "right to a child",[236] as well as inconsistent with Singapore's public policies against PADSPs and the formation of SSFUs. There is also nothing under international law which suggests that singles and same-sex couples have a right to access surrogacy and ART.[237] In addition, Singapore does not share Israel's expansive right to equality. In this regard, the SGCA in *Lim Meng Suang* held that Article 12(2) of the *Singapore Constitution* (which does not have the word "sex" in it) should *not* be read or expanded to include "gender", "sex" or "sexual orientation" as new prohibited grounds of discrimination.[238] Nevertheless, it is important to note from Israel's example that extending surrogacy or ART to single women, or allowing an increasing number of same-sex couples to be recognised as legal parents of children commissioned through overseas surrogacy, opens the door to single men and same-sex couples inevitably and eventually demanding similar rights.

Fourth, in America, in relation to the remaining states with laws which exclude same-sex couples from surrogacy, Cahn and Carbone opine that to the extent that their primary purpose was to prevent recognition of married same-sex couples in circumstances where other married couples would receive parental status, "they should be unconstitutional under *Obergefell v Hodges*".[239] They go on to observe that "the principle of equal recognition for same-sex couples has increased support for surrogacy in a number of states".[240] In this regard, *Obergefell*'s commitment to provide same-sex couples "the constellation of benefits that the States have linked to marriage" was affirmed by the US Supreme Court in *Pavan*.[241] Singapore does not have same-sex marriage, and its constitutional jurisprudence is very different from America's. As such, America's example is wholly inapplicable.

Summing up, the examples of the above countries are distinguishable from and inapplicable to the Singapore context due to the vastly different and unique social, political and legal circumstances of each country, as pointed out above. Importantly, from the above survey, it can be seen that once there is departure from the notion that

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235 *Ibid* at 89, citing HCJ 566/11 *Doron Mamet Meged v Ministry of Interior* (2014). According to the data provided, numerous applications were submitted for status in Israel for minors born in surrogacy procedures abroad, and there has been a clear upward trend over the years. It appears there is discrimination between those who are entitled to access the surrogacy procedure in Israel compared to those who have to apply for this procedure abroad (*ibid* at 93).

236 *2018 Special Rapporteur Report*, *supra* note 42 at para 64 for a discussion on the rejection, under international law, of a "right to a child".

237 See Section III(B) above.

238 *Lim Meng Suang*, *supra* note 206 at paras 182-188. Art 12(2) of the *Singapore Constitution* provides that, except as expressly authorised by the Constitution, there shall be no discrimination against citizens of Singapore "on the ground only of religion, race, descent or place of birth in any law…".

239 Naomi Cahn & June Carbone, "Surrogacy in the United States of America" in Scherpe, Fenton-Glynn & Kaan, *Eastern and Western Perspectives on Surrogacy*, *supra* note 87 at 317.

240 *Ibid* at 322. See also 328.

241 *Pavan*, *supra* note 193 at 1, 3; *Obergefell*, *supra* note 118 at 17.

a child has a right to both a father and a mother and/or if one affirms the notion of a "right to a child", there is no or little principled reason to restrict surrogacy to married heterosexual couples. With this in mind, there is nothing stopping Singapore from legislatively implementing a *child-centric* and principled ban against motherless/fatherless surrogacy and ART based on the arguments set out in this article. Perhaps Hong Kong has come the closest to doing so, in terms of setting out who does *not* have access to surrogacy in Hong Kong. The Hong Kong government introduced the *Human Reproductive Technology Bill* into the Legislative Council in September 1998. The topic of surrogacy generated debate both at the Bills Committee meetings and the Provisional Council meeting on the second reading of the Bill.[242] One of the proposed limitations was to provide reproductive technology procedure to married couples only. It was argued that this was both for the welfare of the child and for better social order generally. It was also brought up that the mainstream opinion in society, as demonstrated by the consultation exercise, was that children born as a result of reproductive technology procedures should have *both parents* and be brought up in a proper family. Cohabiting couples were considered unsuitable. The Senior Assistant Law Draftsman present confirmed that such a limitation would not be problematic under related laws, although he could not advise on compliance with the Hong Kong *Bill of Rights*.[243] Under the legal framework as passed, to be eligible as commissioning parents, the couple must be married (and thus in Hong Kong, of the opposite sex).[244] Cheung queries whether this limitation, which excludes cohabiting couples and same-sex couples, is unconstitutional under Hong Kong law, but this has yet to be tested in the Hong Kong courts.[245]

H. *Law Reform Proposals*

Moving on to law reform proposals, the preferable starting point would be to treat domestic and overseas surrogacy consistently.[246] This is all the more so given the many compelling arguments against all forms of surrogacy, especially commercial

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[242] Daisy Cheung, "Surrogacy in Hong Kong" in Scherpe, Fenton-Glynn & Kaan, *Eastern and Western Perspectives on Surrogacy*, *supra* note 87 at 421. The Bills Committee was formed for members of the Legislative Council to study the important issues involved, while the Provisional Council was made up of a body of multidisciplinary professionals and government representatives in 1995. The latter advised on the drafting of the legislative provisions and a code of practice, conducted further consultation as well as identified other areas requiring further consideration.

[243] *Ibid* at 423.

[244] *Ibid* at 434. It is interesting to note that under the Hong Kong regulatory model, the use of donated gametes in a surrogacy arrangement is prohibited (under s 14 of the *Human Reproductive Technology Ordinance* (Cap 561)), which means that *only the genetic material of the commissioning parents* can be used (see Cheung, *supra* note 242 at 426). This approach would appear to help in reducing the fragmentation of parenthood for the child, since there are no biological parent(s) (*ie*, sperm and/or egg donor(s)) who would otherwise be missing from the child's life.

[245] *Ibid* at 426-427, 438.

[246] See Tan Seow Hon, "Surrogacy UKM", *supra* note 2 at 271 where she "proposed that the government treats domestic and overseas surrogacy consistently". She went on at 272-273 to recommend that if the government can find a public policy consideration against recognising children conceived through surrogacy, based on ethical concerns with surrogacy and not wanting to encourage it, it has grounds to amend the *Adoption Act* to exclude the adoption of children conceived through surrogacy.

surrogacy.[247] Treating domestic and overseas surrogacy consistently would mean prohibiting *all Singaporeans*, including married heterosexual couples with certified infertility, from accessing surrogacy anywhere in the world.

Insofar as the above option is not feasible or accepted,[248] then at the very least, it is proposed that there be legislation prohibiting Singapore citizens procuring motherless/fatherless surrogacy and ART anywhere in the world. Such a prohibition would be based on Singapore citizenship and would be similar to the prohibition against corruption committed by Singapore citizens anywhere in the world as prescribed by section 37(1) of the *Prevention of Corruption Act*.[249] Alternatively, it has been said to be settled law that any State may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the State reprehends, which is known as the "effects doctrine".[250] Motherless/fatherless surrogacy and ART are unavailable in Singapore and must necessarily be procured overseas before bringing the child back to Singapore, where the harmful consequences are felt here. Given the cosmopolitan nature of such acts, "it may well be more compelling and effective for Parliament to adopt the effects doctrine as the foundation of our extraterritorial laws in addressing potential mischief".[251]

Assuming Singapore imposes such a global ban, how should Singapore's law and policy handle situations where children are commissioned or procured overseas *anyway*? Parliament has to debate whether to impose criminal sanctions, and if so, whether a fine suffices or whether a custodial sentence is necessary. One significant consideration is that those who have recourse to this form of overseas surrogacy or ART are likely to be better off financially to begin with. Imposing only a fine may end up being merely a slap on the wrist with no real deterrent effect.

Perhaps the hardest question is what to do with the children who are commissioned or procured overseas and then brought back to Singapore. It is suggested that the child should be received at customs (or after birth, insofar as a single woman conceives via ART procured overseas) and placed in foster care, and a suitability assessment should be conducted of the commissioning parent(s) in order to decide whether to place the child back into the care and control of the commissioning parent(s), as well as whether to grant an adoption order subsequently. The welfare and best interests of the child must be the first and paramount consideration. Time is of the essence (*ie*, to receive the child into foster case as soon as possible until after the

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247 See Section II(C) above, especially the authorities/articles cited at *supra* notes 38-39 above. As explained above, it is beyond the scope of this article to re-canvass or consider such arguments in detail.

248 Especially in the light of the Limited Overseas Surrogacy Policy. See Section II(B) above.

249 (Cap 241, Rev Ed 1993 Sing). S 37(1) provides that "[t]he provisions of this Act have effect, in relation to citizens of Singapore, outside as well as within Singapore; and where an offence under this Act is committed by a citizen of Singapore in any place outside Singapore, he may be dealt with in respect of that offence as if it had been committed within Singapore". See also the criminal provisions in New South Wales, Queensland and the Australian Capital Territory which prohibit various aspects of entering into, advertising or brokering commercial surrogacy arrangements. Such offences are explicitly given an extra-territorial effect, applying to ordinary residents or domiciliaries, in relation to their activities outside the jurisdiction (Keyes, *supra* note 222 at 99-100). Hong Kong also has prohibitions against various aspects of commercial surrogacy which are expressly extra-territorial in nature (see Cheung, *supra* note 242 at 427).

250 *Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR (R) 489 at paras 85-88 (CA).

251 See *ibid* at para 88 for the quoted line, which followed from this premise: "As Singapore becomes increasingly cosmopolitan in the modern age of technology, electronics and communications…".

suitability assessment is completed), because *after the child is already living with the commissioning parent(s)*, authorisation will inevitably be granted in the child's best interests.[252]

Taking reference from the UK *Adoption and Children Act 2002*[253] and the various principles set out in this paper (including the Ministerial clarifications on the various public policies, as well as principles or findings set out in *UKM*), a proposed clause in the *Adoption Act* setting out a non-exhaustive set of considerations concerning the child's welfare is as follows (see in particular the proposed clauses (3), (6)(b) and (7) below):[254]

"Proposed Clause on Child's Welfare

Considerations applying to the exercise of powers

(1) This section shall apply whenever a court, adoption agency, or the Guardian-in-Adoption[255] is considering or coming to a decision relating to the adoption of a child.

(2) The first and paramount consideration of the court, adoption agency, or the Guardian-in-Adoption shall be the child's welfare and best interests, throughout the child's life.

(3) The child's welfare shall include the child's physical, intellectual, psychological, emotional, moral and religious well-being, both in the short term and in the long term.[256]

(4) The court, adoption agency, or the Guardian-in-Adoption must at all times bear in mind that, in general, any delay in coming to the decision is likely to prejudice the child's welfare.

(5) The court, adoption agency, or the Guardian-in-Adoption must have regard to the following matters (among others)—

  (a) the child's ascertainable wishes and feelings regarding the decision (considered in light of the child's age and understanding);

  (b) the child's particular needs;

  (c) the likely effect on the child (throughout his life) of having ceased to be a member of the original family and becoming an adopted person;

  (d) the child's age, sex, background and any of the child's characteristics which may be relevant;

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252 See *supra* note 40.

253 S 1 of the *Adoption and Children Act 2002* (UK), c 38, sets out a non-exhaustive set of considerations that the court or adoption agency must have regard to when coming to a decision regarding the adoption of a child.

254 This proposed clause is based on and developed from the draft clause on child's welfare proposed by Darius Lee at para 23 of his written representations on adoption of children in Singapore, which may be found on his blog: Darius Lee, "Written Representations on Adoption of Children in Singapore" (5 March 2021), online: at <https://ionsg.blogspot.com/2021/03/written-representations-on-adoption-of.html>.

255 The Director-General of Social Welfare, MSF, acts as the Guardian-In-Adoption (temporary guardian for the child) in adoption proceedings. See Singapore, Ministry of Social and Family Development, "Adoption Policy and Process" (Singapore: Ministry of Social and Family Development), online: <https://www.msf.gov.sg/policies/Strong-and-Stable-Families/Supporting-Families/Pages/Adoption-Policy-and-Process.aspx>.

256 See *UKM*, *supra* note 2 at para 45.

(e) any harm which the child has suffered or is at risk of suffering;
(f) the relationship which the child has with relatives, with any person who is a prospective adopter with whom the child is placed, and with any other person in relation to whom the court, adoption agency, or the Guardian-in-Adoption considers the relationship to be relevant, including—
(i) the likelihood of any such relationship continuing and the value to the child of its doing so;
(ii) the ability and willingness of any of the child's relatives, or of any such person, to provide the child with a secure environment in which the child can develop, and otherwise to meet the child's needs;
(iii) the wishes and feelings of any of the child's relatives, or of any such person, regarding the child.
(g) a prospective adopter's age, sex, background, marital status and any of the prospective adopter's characteristics which may be relevant.

(6) In placing a child for adoption, the court, adoption agency, or the Guardian-in-Adoption must:
(a) give due consideration to the child's and the prospective adopter's religious persuasion, racial origin, and cultural and linguistic background;
(b) endeavour, as far as possible, to place the child for adoption by a man and a woman in a stable marital relationship.[257]

(7) An adoption order shall not be made in any case where the applicant(s) had recourse to surrogacy or artificial reproductive technology to conceive the child with the effect of leaving the child without a father or a mother, unless there are special circumstances which justify as an exceptional measure the making of an adoption order.[258]

(8) For the purposes of this section—
(a) references to relationships are not confined to legal relationships;
(b) references to a relative, in relation to a child, include the child's natural mother and natural father."

Applying this proposed framework, the potential results may be observed in three hypothetical situations. First, if a Singaporean businessman who has fathered 13 children through surrogacy, and desires to have up to 1,000 children and to continue making babies until he was dead,[259] shows up at the Singapore customs with yet another child commissioned overseas through surrogacy, quite clearly, he will fail to meet the suitability assessment having regard to the welfare and best interests of the child as the paramount consideration. This is especially so if the child lacks any maternal care, and being one of numerous children, would receive little or no paternal

[257] This is consistent with Singapore's public policy in favour of parenthood within marriage (which is by definition, heterosexual) and the position that marriage is the optimal condition for having and raising children.

[258] This is modelled after s 4(3) of the *Adoption Act* (which prohibits adoption where the sole applicant is a male and the infant is a female unless the court is satisfied that there are special circumstances which justify as an exceptional measure the making of an adoption order).

[259] See *UKM*, *supra* note 2 at para 184 for the example of the then 24-year-old Japanese businessman who reportedly did this.

care and attention. In this regard, the child has suffered or is likely to suffer harm. Importantly, the starting point is that no adoption order shall be made because this applicant resorted to surrogacy with the effect of leaving the child without a mother, and there are no special circumstances which justify as an exceptional measure, the making of an adoption order.

Second, and on the other end of the spectrum, if a married heterosexual but *fertile* couple commissions a child through overseas surrogacy, they would arguably stand a much higher chance of satisfying the suitability assessment given that the child will have both maternal and paternal care (assuming that all other factors point towards the welfare and best interests of the child). The couple would meet the criterion that it should be endeavoured, as far as possible, to place the child for adoption by a man and a woman in a stable marital relationship. This is so even though the couple would have breached the government's Limited Overseas Surrogacy Policy, of which a key criterion is the medically-assessed inability to conceive.

The third hypothetical scenario is if a single person or a same-sex couple commissions or procures a child through overseas surrogacy or ART and brings the child back to Singapore. (This third scenario will cover the facts of *UKM*.) The child would be placed in foster care as soon as possible pending a suitability assessment which is to be conducted quickly. The burden is on the commissioning parent(s) to show that it is nevertheless in the welfare and best interests of the child for the child to remain in their care and custody (and that an adoption order should subsequently be made) notwithstanding that the child will be deprived of a father or mother for life. If this burden is not met,[260] then the child would be put up for adoption by a married heterosexual couple. This would be consistent with a child's right to have a mother and a father. It should also be considered whether to give the commissioning parent who had contributed either the sperm or the egg access to the child at the appropriate time, in a manner which would be consistent with the child's right to know his or her identity (which includes knowing the identity of his or her biological parents and the gestational mother).[261] All of the above is ultimately an extremely delicate balance (and an admittedly difficult one) between all competing factors.

IV. Conclusion

All things considered, there are compelling reasons why singles and same-sex couples should not have access to surrogacy and ART to commission children. First, this involves the *complete* elimination of either fatherhood or motherhood. Second, applying first principles, motherless/fatherless surrogacy and ART is against the welfare and best interests of children, including *unborn* children, who have a right to

[260] Perhaps one hypothetical set of special circumstances may potentially justify as an exceptional measure the making of an adoption order *despite* fatherless/motherless surrogacy or ART being involved—*eg*, where the child has special needs or serious medical condition(s), the child requires high amounts of time, money, resources and temperament to take care of and to raise both in the short and long run, all attempts to put up the child for adoption by a married heterosexual couple have been unsuccessful, and it is in the welfare and best interests of the child to be adopted by the commissioning parent(s) rather than to remain in foster care.

[261] See generally Tobin, *supra* note 48 at 328-330; see also the argument in Faust & Manning, *Them Before Us*, *supra* note 79 (summarising the effects of various articles of the *CRC*), as well as the various authorities cited in Section III(B) above.

have a mother and a father. Third, motherless/fatherless surrogacy and ART breaches public policies in Singapore. There is an urgent need to legislate against this, so as to affirm and strengthen the public policy in favour of parenthood within marriage (as defined above), as well as to prevent further breaches of the public policy against the formation of SSFUs and the Policy against PADSP. Fourth, the burden of proof is on surrogacy/ART advocates to show, with strong evidence, that not having a father or mother by design are *equally optimal* conditions for having and raising children or that it will *do no harm*. Even based on a brief review of social science literature, they have clearly not discharged this burden. In fact, there is a real likelihood of *potential adverse outcomes* to the children born under such circumstances.

Even if one were to consider creating an exception to the integrative model of child rearing (*ie*, parenthood within heterosexual marriage), even the exceptions are "bound by the search for ways to ensure that children receive *paternal as well as maternal care*".[262] The use of surrogacy and ART by singles and same-sex couples unfortunately ignores this. The parties to the surrogacy contract may have consented to the arrangement that produced the child, but "the child has consented to none of these things, fragmentation in personhood and all"[263] and the voice of the child is lost amidst competing voices.[264] It is hoped that this article provides a voice for such children, and that Parliament acts expeditiously to reform the law accordingly.

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[262] Wood, "Anthropological Case for Integrative Model", *supra* note 125 at 100 [emphasis added].

[263] Allen, *supra* note 38 at 798.

[264] Pascoe, "Sleepwalking Through the Minefield", *supra* note 39 at para 75. "Amidst the clamouring arguments of parents groups, profit-driven intermediaries and women's rights advocates, *the voice of the child is lost*. *The child is the only party who has no say in the arrangement at all*" [emphasis added].