

Surrogacy – Tip Toeing through a Legal Minefield

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Understanding inconsistency in the law between states in Australia presents problems for practitioners and their clients. Navigating the many legal barriers facing those desperate for a child, who battle bureaucracies and the legal systems of Australia and other nations, is a major challenge. There is also a significant amount of misinformation available to clients about the surrogacy processes both within Australia and internationally. This paper aims to demystify and shed light on the murky world of international, altruistic and commercial surrogacy and the less murky but still complex jurisdictional issues of surrogacy arrangements entered into in Australia.

Surrogacy in Australia

Surrogacy in Australia is a state regulated altruistic surrogacy regime, with varying levels and types of regulation and bureaucracy. Common to all States (with the exception of the Northern Territory, which is the only jurisdiction to have no surrogacy regime) is a prohibition against commercial surrogacy. The Northern Territory relies upon South Australian based IVF services and therefore picks up some aspects of South Australian law by default.

The system adopted in all States and Territories for the transfer of parentage is a post-birth system, requiring a court order in a State or Territory Court after the birth of the child provided certain requirements are met. The planning for this must be done pre-pregnancy. This is in contrast with surrogacy arrangements entered into overseas by couples who are resident in Australia, usually commercial in nature. These are generally dealt with by the Family Court and the outcomes are less predictable.

Relevant legislation

There is a wide range of legislation in Australia which impacts on surrogacy and parentage arrangements. A useful table summarising this legislation was prepared by Stephen Page of Harrington Family Lawyers. It is reproduced below with his permission:

| Juris-diction | Legislation/Regulation | Purpose/Effect |
|----------------------|---|---|
| Cth | <i>Australian Citizenship Act 2007, s.16</i> | Citizenship of “ <i>child</i> ” born to Australian “ <i>parent</i> ” overseas |
| | <i>Australian Passports Act 2005</i> | s.11: issuing of passports to child in absence of consent of those with “parental responsibility” |
| | <i>Child Support (Assessment) Act 1989, ss 5, 20</i> | “ <i>Parent</i> ”, “ <i>eligible child</i> ” by reference back to <i>Family Law Act</i> |
| | <i>Family Law Act 1975</i> | <i>Parent</i> ”, <i>child</i> ” especially in ss60H and 60HB, parenting presumptions. |
| | National Health and Medical Research Council, <i>Ethical Guidelines on the Use of</i> | Licensing, prohibition of IVF clinics engaging in commercial surrogacy nor advertising surrogacy services |

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|------------|--|---|
| | <i>Assisted Reproductive Technology in Clinical Practice and Research, 2007</i> | |
| | <i>Prohibition of Human Cloning for Reproduction Act 2002, s.21</i> | Ban on commercial trade in eggs, sperm, embryos, max penalty 15 year imp. |
| | s.24 | State laws operate concurrently |
| | | |
| ACT | <i>Births, Deaths and Marriages Registration Act 1997</i> | Altering birth register |
| | <i>Human Cloning and Embryo Research Act 2004, s.19</i> | Ban on commercial trade in eggs, sperm, embryos, max 15 years imp. |
| | <i>Parentage Act 2004</i> | Parenting presumptions, regulation of altruistic surrogacy, ban of commercial surrogacy |
| | | |
| Qld | <i>Births, Deaths and Marriages Registration Act 2003</i> | Altering birth register |
| | <i>Research Involving Human Embryos and Prohibition of Human Cloning for Reproduction Act 2003, s.17</i> | Ban on commercial trade in eggs, sperm, embryos, max 15 years imp. |
| | <i>Status of Children Act 1978</i> | Parenting presumptions |
| | <i>Surrogacy Act 2010</i> | Regulation of altruistic surrogacy, ban of commercial surrogacy |
| | | |
| NSW | <i>Assisted Reproductive Technology Act 2007</i> | Regulation of IVF clinics |
| | <i>Births, Deaths and Marriages Registration Act 1995</i> | Altering birth register |
| | <i>Human Cloning for Reproduction and Other Prohibited Practices Act 2003, s.26</i> | Ban on commercial trade in eggs, sperm, embryos, max 15 years imp. |
| | <i>Status of Children Act 1996</i> | Parenting presumptions |
| | <i>Surrogacy Act 2010</i> | Regulation of altruistic surrogacy, ban of commercial surrogacy |
| | | |
| Vic | <i>Assisted Reproductive Treatment Act 2008</i> | Regulation of altruistic surrogacy, ban of commercial surrogacy |
| | <i>Births, Deaths and Marriages Registration Act 1996</i> | Altering birth register. Note: there is no stated ability to recognise interstate parentage orders. |
| | <i>Prohibition of Human Cloning for Reproduction Act 2008, s.17</i> | Ban on commercial trade in eggs, sperm, embryos, max 15 years imp. |
| | <i>Status of Children Act 1974</i> | Parenting presumptions, parentage orders |
| | | |
| Tas | <i>Births, Deaths and Marriages Registration Act 1999</i> | Altering birth register |
| | <i>Human Cloning for Reproduction and Other Prohibited Practices Act 2003, s.20</i> | Ban on commercial trade in eggs, sperm, embryos, max 15 years imp. |

| | | |
|-----------|---|---|
| | <i>Surrogacy Act 2012</i> | Regulation of altruistic surrogacy, ban of commercial surrogacy, |
| | <i>Status of Children Act 1974</i> | Parenting presumptions |
| | | |
| SA | <i>Births, Deaths and Marriages Registration Act 1996</i> | Altering birth register |
| | <i>Family Relationships Act 1975</i> | Parenting presumptions, regulation of altruistic surrogacy, ban of commercial surrogacy |
| | <i>Prohibition of Human Cloning for Reproduction Act 2003, s.16</i> | Ban on commercial trade in eggs, sperm, embryos, max 15 years imp. |
| | | |
| WA | <i>Artificial Conception Act 1985</i> | Parenting presumptions |
| | <i>Births, Deaths and Marriages Registration Act 1998</i> | Altering birth register |
| | <i>Human Reproductive Technology Act 1991, s.53Q</i> | Ban on commercial trade in eggs, sperm, embryos, max 15 years imp |
| | <i>Surrogacy Act 2008</i> | Regulation of altruistic surrogacy, ban of commercial surrogacy |
| | | |
| NT | <i>Births, Deaths and Marriages Registration Act 1997</i> | Not altering birth register |
| | <i>Status of Children Act 1996</i> | Parenting presumptions |

A table summarising the differences in the legislative regimes is at the end of this paper.

Process

The process for commissioning parents¹ to enter into a surrogacy arrangement in Australia varies between States and Territories, but can be roughly summarised as follows:

- They must first locate a person willing to act as a surrogate who meets the legislative requirements, and engage an authorised Assisted Reproductive Treatment (“ART”) provider. Given the restrictions on advertising for a surrogate and the ban on commercial surrogacy, this is one of the biggest hurdles faced by commissioning parents. Most States and Territories have a ban on publication so the people who use internet forums to find a surrogate may be committing an offence. Newspapers seem unaware that the prohibition on publication is the same as under s 121 of the *Family Law Act 1975*. In most jurisdictions the surrogate is required to be at least 25 years of age and already have children of their own.
- They must undergo counselling. In all States and Territories, both the commissioning parents and surrogate parents must undergo counselling sessions prior to commencing treatment, however this requirement can be waived in particular circumstances.
- They must obtain legal advice. In all States and Territories bar the Australian Capital Territory, both sets of parents must receive legal advice regarding their respective legal rights, entitlements and obligations and the consequences of the surrogacy arrangement. This requirement can be waived in particular circumstances.

¹ In this article, a reference to "commissioning parent/s" means the party/ies who have sought the assistance of another woman to carry a child for them. References to "surrogate" or the "surrogate mother" mean the woman who carried and delivered the child, and her partner (if any).

- In Victoria and Western Australia, approval must be obtained from the regulatory body after approval by the relevant IVF clinic. In practice, this means that waiver of the requirements for counselling and legal advice is unlikely to occur as they will be required by the IVF clinic.
- Once the child is born, the surrogate mother is considered to be the child's parent. If the surrogate has a partner and that partner consented to the procedure, that partner will also be considered at law to be the child's parent. To replace the surrogate parents with the commissioning parents as the child's legal parents, an application to the State or Territory Court must be made. In Victoria this is referred to as an Application for a Substitute Parentage Order. There are a number of matters the Court must be satisfied of prior to making the order. For example, in Victoria, before making the order the Court must be satisfied that:
 - Making the order is in the best interests of the child.
 - The surrogacy arrangement was commissioned with the assistance of an ART provider.
 - The Patient Review Panel approved the surrogacy arrangement before the surrogacy arrangement was entered into.
 - The child was living with the commissioning parents at the time the application was made.
 - The surrogate parents did not receive any material benefit or advantage from the surrogacy arrangement.
 - The surrogate mother freely consented to the making of the order.

A practical difficulty arises with respect to this final stage, as in most States and Territories the application cannot be brought until 28 days after the child's birth and must be brought within 6 months of the child's birth. An application outside of these dates requires the leave of the Court. As a result, everyone is left in a "limbo" period, where the commissioning parents have the care of the child while the legal responsibility for the child rests with the surrogate parents. In practical terms, this means that the surrogate parents need to be readily contactable to ensure they can authorise any medical treatment. Another option is to have a Medical Treatment Power of Attorney. In rare cases, it may be necessary to apply to the Family Court for an urgent order for parental responsibility to be made in favour of the commissioning parents pending the making of a parentage order in the State or Territory court.

Once an order is made with respect to a child born as a result of a surrogacy arrangement under a prescribed law of a State or Territory, to the effect that the child is a child of one or more persons and that each of one or more persons is a parent of a child, that order applies for the purposes of the *Family Law Act*² and therefore for other purposes such as social security and immigration.

Complications

Because of the disparity between the various State and Territory legislative mechanisms for regulating surrogacy arrangements, complications can arise where, for example, the commissioning parents and surrogate live in different jurisdictions or a Parentage Order is sought to be made in a State or Territory other than the one in which the child was born. Some States have addressed this by introducing legislation that recognises interstate Parentage Orders. For example, in New South Wales,

² Section 60HB(1).

s 25B of the *Births, Deaths and Marriages Registration Act 1995 (NSW)* provides that if an interstate Parentage Order is made in relation to a person who has a birth certificate issued in New South Wales, that interstate Order may be registered in New South Wales. In most States and Territories a Parentage Order will not be granted unless both the commissioning and surrogate parents live in that State or Territory, the procedure is commissioned with an ART provider in that State or Territory, and the child is born in that State or Territory.

In light of these problems, and the challenges faced by international commercial surrogacy, it may be time to adopt a unified, national approach to surrogacy arrangements. This sentiment was echoed by the Honourable Nahum Mushin, former Justice of the Family Court, at a seminar titled "Surrogacy and Adoption: Pitfalls and Promises" hosted by Monash University on 2 October 2013. He posed the question whether all surrogacy arrangements ought to be brought under the *Family Law Act*.

The Commonwealth Attorney-General's Department has issued the Family Law Council with terms of reference in relation to parentage and surrogacy. Their findings and submissions were due to be released in December 2013. The international legal community is also looking at the problems. It is possible that in the future a Hague Convention will deal with international surrogacy.

Ban on Commercial Surrogacy

Commercial surrogacy is banned in Australia. The definition of a "commercial surrogacy agreement" differs between States and Territories, however the common theme is that the surrogate mother is not to receive a material benefit or advantage for entering into a surrogacy agreement.

There is a range of exceptions for allowable costs associated with the surrogacy arrangement, and each State and Territory has differing views as to what monies can legally be reimbursed to the surrogate. For example, in Victoria the *Assisted Reproductive Treatment Act 2008 (Vic)* provides for the surrogate parents to be reimbursed for the "prescribed costs" actually incurred by them as a direct consequence of entering into the surrogacy arrangement. "Prescribed costs" are defined as:

- Any reasonable medical expenses that are not recoverable under Medicare, health insurance or another scheme;
- Legal advice obtained as required under the Act; and
- Travel costs related to the pregnancy or birth.

There are further costs that do not fall into the category of "prescribed costs" in Victoria but which nonetheless do not appear to offend the legislation, so long as the costs have been actually incurred, are directly related to the surrogacy and the reimbursement of these costs does not put the surrogate parents in a better financial position than they were before they entered into the surrogacy arrangement. These include costs of life insurance, disability insurance and health insurance for the surrogate mother, costs of maternity clothes and loss of wages.

Tasmania has a detailed list of allowable expenses which includes travel, accommodation and actual loss of earnings for specified periods. By contrast, in South Australia, the only allowable expenses are those connected with the pregnancy, the birth or care of the child, counselling or medical services in connection with the surrogacy agreement, and legal services in connection with the agreement.

Precisely what expenses are covered and how they are calculated is uncertain. For example, are travel costs calculated on the Australian Taxation Office rate? Must medical expenses be authorised by a doctor or can they be recommended by a pharmacist, physiotherapist, naturopath or other health professional? If the commissioning parents incur expenses looking after the surrogate's children, are these offset against the costs incurred by the surrogate? If there is a dispute about expenses, are the surrogate's legal costs of the dispute covered?

It is advisable to check the legislation applying to the specific jurisdiction in question as what constitutes allowable costs varies, as does the definition of "commercial surrogacy agreement".

International Commercial Surrogacy

It is difficult to access statistics about the number of Australians choosing to enter into international surrogacy arrangements, however it is clear that the number is rising. The number of Australian citizenship applications lodged on behalf of minors has increased significantly in India and Thailand, two of the most popular countries for Australians entering commercial surrogacy arrangements. Applications for Australian citizenship by descent for children born in India increased from 126 in 2008 to 519 in 2012. Applications for children born in Thailand increased from 297 in 2008 to 459 in 2012.³ Anecdotal evidence indicates that the primary cause of this increase was a combination of the availability and relative affordability of international surrogacy coupled with the paucity of reproductive options available in Australia due to difficulties accessing donor eggs and/or surrogates.

Immigration law

Family lawyers need to be aware that they cannot give family law advice in relation to international surrogacy in isolation from a referral to an immigration lawyer for immigration advice. Immigration advice can only be given by migration agents. People who practice as unregistered migration agents in Australia are breaching the law and may be fined up to \$6600 or imprisoned for up to 10 years.

The immigration issues vary depending on:

- The jurisdiction in which the surrogacy arrangement was performed, and the laws regarding the issuing of a birth certificate in that jurisdiction.
- The genetic material used to create the child.
- The information given by the commissioning parents on the application for a birth certificate.

Immigration laws in the country in which the birth took place are also relevant. For example, India has introduced visa regulations which require medical visas to be applied for by people going to India for the purpose of surrogacy arrangements. A letter from the Australian Government is also required. The letter must state that Australia recognises surrogacy and that the child will be permitted entry into Australia as a biological child of the commissioning couple.

Parents of children born overseas must apply for either Australian citizenship by descent or a permanent visa for the child. It must be disclosed at the time of making the application whether the child was born via a surrogacy arrangement.

³ Statistics compiled by Jenni Millbank, University of Technology Sydney, using data gathered from the Department of Immigration and Citizenship

A child is eligible for citizenship by descent if at the time of birth they had a parent who was an Australian citizen. In surrogacy arrangements where the genetic material of one or both commissioning parents was used, this requirement is readily satisfied by a DNA test. Where there is no biological relationship with the child and one or both of the commissioning parents, further evidence must be provided to demonstrate that a parent-child relationship existed at the time of birth between the child and the commissioning parents.

The Immigration Department has listed the following non-exhaustive list of factors indicating a parent-child relationship:

- A formal surrogacy agreement was entered into before the child was conceived.
- The lawful transfer of parental rights occurred in the country in which the surrogacy took place, before or at the time of the child's birth.
- Evidence that the commissioning parent/s inclusion as a parent on the birth certificate was done with that parent's prior consent.
- Evidence that the commissioning parent/s was involved in providing care for the unborn child and/or the mother during the pregnancy, for example, emotional, domestic or financial support and making arrangements for the birth and prenatal and postnatal care.
- Evidence that the child was acknowledged socially from or before birth as the Australian citizen's child.

Criminal law

In the majority of States and Territories, the ban on commercial surrogacy applies only to surrogacy arrangements occurring in that State or Territory, and does not have extra-territorial effect. The three exceptions to this are New South Wales, the Australian Capital Territory and Queensland. A person ordinarily resident in these States or Territories (or domiciled in New South Wales) will have committed an offence if they enter into a commercial surrogacy arrangement, regardless of where the arrangement was entered into. Further, whilst most States and Territories make it an offence for any person to enter into or facilitate a commercial surrogacy arrangement, in Victoria and South Australia the offence is only committed by the person who receives a material benefit or advantage, rather than the person supplying the benefit.

Although there are no statistics to support this, from personal experience as Victorian legal practitioners, it is not uncommon to receive enquiries from prospective commissioning parents living in New South Wales or Queensland as to the definition of "ordinarily resident" and "domiciled". Their plan appears to be to relocate temporarily to Victoria and from there enter into an international commercial surrogacy agreement. Fortunately for those people, they sought legal advice first.

Moral concerns

Lawyers are not arbiters of morals, but it is impossible to ignore the ethical conundrums posed by commercial surrogacy, particularly where it takes place in jurisdictions that are poorly regulated, do not have adequate protections for surrogates and children and the risk of exploitation is high.

Beyond the general distaste associated with children being dealt with as a commodity, it appears that the majority of women agreeing to be surrogates in third world countries are extremely poor and have

limited education. However, is it more "morally right" to use a United States surrogate and pay, say, \$200,000 in total for the surrogate's fee, legal fees, IVF and medical expenses, but know that the surrogate has had proper legal advice and medical care? Why is that better than paying for a surrogate in a third world country who may have greater need of the money? These are value judgments considered by the public, judges and those looking to enter into commercial surrogacy arrangements.

Whatever viewpoint is taken, it is clear that the current regulatory environment appears to be largely defective in that it is characterised by uncertainty and leaves children born as a result of international surrogacy arrangements in a legal void regarding their parentage and nationality unless and until Family Court orders are made. The criminalisation of overseas commercial surrogacy by New South Wales, Queensland and the ACT appears to have been a largely ineffective deterrent, perhaps due in part to the 'mixed messages' sent by the Australian Government in relation to international commercial surrogacy. In particular, the Australian Government has condemned commercial surrogacy on an international level⁴, yet it appears to be indirectly encouraging it by granting citizenship by descent to children born as a result of commercial surrogacy arrangements.

An additional deficiency in the current system is that it places judges exercising jurisdiction under the *Family Law Act* in an extremely difficult position. In particular, it places the Court in the uneasy position of making parenting orders affecting a surrogate mother's parenting rights, in circumstances where the Court has little or no capacity to examine whether the surrogate mother's consent to relinquish the child was freely given, and whether the surrogacy arrangement was free of exploitation. It further requires the Court to essentially act contrary to public policy and the larger policy considerations surrounding surrogacy, as the Court's primary obligation pursuant to the *Family Law Act* is to ensure that the child's best interests are met. As a result, once a child is born and is in Australia and an application for parenting orders is before the court, it is arguably too late to penalise the commissioning parents as it is unlikely to be in a child's best interests for their parents to be prosecuted.

Another moral dilemma arises where the genetic material of a person with a different cultural background is used. There may be future cultural and socialisation issues for children born as a result of overseas commercial procedures if the country of origin is different from that of the commissioning parents, as there is no requirement for the intending parents (unlike with overseas adoptions) to assist the child with knowledge and acceptance of the country from which the genetic material was obtained. By contrast, some parents are attracted to overseas surrogacy so they can access genetic material of the same racial background to one or both parents, which may be unavailable in Australia.

As there may be no counselling requirements for surrogacy arrangements in the overseas jurisdiction (and the *Family Law Act* requirements for counselling in the case of parenting orders involving third parties are usually accepted as being impractical in the circumstances) these children do not have the same protections as children adopted from overseas or born from domestic surrogacy arrangements. In Queensland, the intended parents seeking a domestic parentage order need to demonstrate their understanding of the social, psychological and legal implications of the surrogacy arrangement and the making of a parentage order. Other States and Territories do not have this requirement, but have

⁴ Australia is a party to the United Nations Convention on the Rights of the Child, and the Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption.

differing requirements for counselling and legal advice before the commencement of the surrogacy procedure and a best interests test for the domestic parentage order.

Given the ethical issues and the impossibility of regulating international surrogacy, an alternative is to loosen the restrictions against commercial surrogacy in Australia, thereby reducing the attractiveness of travelling overseas. Legalisation of commercial surrogacy in Australia would enable safeguards to be implemented to protect against exploitation of surrogate mothers and better protect the child's rights. Alternatively, Australian immigration laws could be toughened to better reflect the domestic bans on commercial surrogacy. This could, however, have unintended consequences with children being left "parentless" overseas.

Surrogacy and the Family Law Act

Where a surrogacy arrangement has not been made in accordance with the relevant State legislation, for example a commercial surrogacy arrangement, the commissioning parents do not have open to them the State-based parentage transfer mechanisms. The only option is to seek a parentage declaration and/or an order for parental responsibility pursuant to the *Family Law Act*.

Whether or not commissioning parents feel it necessary to seek orders from the Family Court will largely depend on where the surrogacy arrangement was entered into. For example, surrogacy arrangements entered into in some States of the United States of America allow the child's birth certificate to be issued naming both commissioning parents as the child's parents. For these parents, the birth certificate is often sufficient for them. However, in Thailand for example, it is common for the woman who gave birth to the child to be listed on the birth certificate along with the commissioning father. An application for parenting orders is likely to be made, so that the other commissioning parent has a legal parenting relationship with the child. As the non-biological parent is not on the birth certificate, advice should be sought by the commissioning parents with respect to the child's inheritance rights.

Do the commissioning parents have standing to bring the Application?

Section 65C of the *Family Law Act* sets out who may apply for a parenting order. A parenting order in relation to a child may be applied for by:

- (a) *either or both of the child's parents; or*
- (b) *the child; or*
- (ba) *a grandparent of the child; or*
- (c) *any other person concerned with the care, welfare or development of the child.*

In a large number of cases, one or both of the applicants will be the child's biological parents. However, this may not be enough to overcome the hurdle in s 65C(a). Justice Ryan in *Mason*⁵ made it clear that a biological parenting relationship does not equate to parentage.

For most commissioning parents, s 65C(c) will be the easier section under which to bring the application. In most cases, the child will have been living with the applicants since birth. It is difficult

⁵ *Mason & Mason and Anor* [2013] FamCA 424

to envisage a circumstance where the commissioning parents could not be considered to be persons concerned with the child's care, welfare and development.

Orders sought

The standard order sought is for parental responsibility to be conferred upon the commissioning parents and for the child to live with them. In one unreported matter the applicants also sought an order that the surrogate mother be restrained from communicating with the child. The surrogate mother consented to the order. Justice Cronin declined to make this order on the basis that he felt uncomfortable making an injunctive order of this kind, and made notations to this effect instead.

In deciding whether to make the parenting orders sought, the *Family Law Act* provides that the court must regard the best interests of the child as the paramount concern. A determination of whether it is in the child's best interests for an order for parental responsibility to be made involves a consideration of the factors in s 60CC. It will almost certainly be in the child's best interests for an order for parental responsibility to be made, in circumstances where:

- The surrogate mother does not intend to have any meaningful involvement in the child's life;
- The commissioning parents are committed to raising the child, and loving and caring for the child as parents ought;
- There is no evidence to the contrary with respect to either of the above matters.

Further, if the commissioning parents are found to be the child's parents, it is presumed pursuant to s 61DA that it is in the child's best interests for them to have equal shared parental responsibility.

If the commissioning parents are not found to be the child's parents for the purposes of the *Family Law Act*, s 65G will apply. This section provides that if an order for parental responsibility is proposed to be made by consent in favour of a non-parent, the court must not make the proposed order unless the parties have attended a conference with a family consultant, or the court is satisfied that there are circumstances that make it appropriate to make the proposed order without a conference. In *Gough & Kaur*,⁶ Justice Macmillan found that as the respondent lived in Thailand and wished to play no role in the proceedings, it was appropriate for parenting orders to be made without a conference.

An additional order sometimes sought is for a declaration of parentage. This is a complicated issue, and feeds into the question of "who is a parent"? There is also uncertainty as to whether s 60H (which deals with children from artificial conception procedures) and s 60HB (which deals with children born of surrogacy arrangements where a State or Territory order has been made) prevent a parentage declaration being made in international surrogacy matters. Justice Ryan in *Mason*⁷ declined to make a declaration, however in her earlier case of *Ellison*⁸ she took the opposite approach.

⁶ *Gough & Kaur* [2012] FamCA 79

⁷ *Mason & Mason and Anor* [2013] FamCA 424

⁸ *Ellison & Anor & Karnchanit* [2012] FamCA 602

Practical tips

When filing an application on behalf of commissioning parents for parenting orders, the following is a non-exhaustive list of matters to address:

- Has the surrogate mother been served with the court documents?
- Has the surrogate mother received legal advice in her native country as to the nature of the surrogacy agreement and the orders sought by the applicants?
- Does the surrogate mother agree with the orders sought?
- Is the surrogate mother's consent free of duress?
- Was the surrogate mother single at the time of entering into the surrogacy agreement and at the time of birth?
- It is helpful to have the surrogate mother on affidavit, however ensure that the requirements relating to interpreters and swearing of documents are met.
- What are the applicable State or Territory laws with respect to commercial surrogacy? Is a certificate pursuant to s 128 of the *Evidence Act 1995* (Cth) required before filing any affidavit?
- Who are the child's biological parents?
- Who are the parents listed on the child's birth certificate?
- What is the child's immigration status?
- Do the commissioning parents intend to expose the child to the heritage of the donor(s) of genetical material? If so, how?
- What arrangements have the commissioning parents put in place for the child's care and the child's integration into their family?
- Have the s 60CC factors been addressed?

Where there is an overseas surrogacy arrangement, even if the commissioning parents instruct that they have entered into an altruistic arrangement and they have an agreement with the IVF clinic to support this, there may be a second agreement between the IVF clinic and the surrogate which shows that the arrangement is commercial in nature. Any attempt to tell the Court that a surrogacy arrangement entered into in countries such as India and Thailand is an altruistic one, is likely to be greeted with suspicion by the Court.

Recent cases

Gough & Kaur [2012] FamCA 79

A child was born in Thailand as a result of a commercial surrogacy arrangement. The applicants were the commissioning parents. The child was conceived using an anonymous egg and the sperm of the applicant father. The surrogate mother had a partner at the time of entering into the surrogacy arrangement. The commissioning parents sought orders that they have equal shared parental responsibility for the child and that she live with them.

Justice Macmillan considered who had standing to seek parenting orders, and in doing so considered whether the applicant father was also the child's parent. Her Honour ultimately found that although the applicant father provided genetic material, he was not a parent of the child for the purposes of the *Family Law Act*. In making this finding, Her Honour appears to have adopted the view that s 60H and 60HB are intended to "cover the field" in relation to who can be a parent in surrogacy arrangements.

Ellison & Anor & Karnchanit [2012] FamCA 602

The commissioning parents entered into a commercial surrogacy arrangement with a clinic in Thailand. The genetic material used was from the commissioning father and an anonymous egg donor. Two children were born.

The couple sought parenting orders from the Family Court, and a declaration of parentage. As the commissioning parents resided in Queensland, a certificate pursuant to s 128 of the *Evidence Act* was granted to protect them against their evidence being used against them in any criminal proceedings.

When determining whether to make a declaration of parentage, Justice Ryan explored whether paternity equated to parentage for the purposes of the *Family Law Act*. She found that, contrary to the decision of Justice Macmillan in *Gough & Kaur*, discussed above, s 60H and 60HB do not operate to exclude the general presumptions of parentage. Thus, Her Honour was able to make a declaration of parentage and found that it was in the children's best interests and welfare for her to do so. She also found that public policy considerations did not stand in the way of what was in the children's best interests.

Dennis & Anor & Pradchaphet [2011] FamCA 123

This was an early decision, and involved three children born as a result of commercial surrogacy arrangements with two women in Thailand. All three children were born on the same day. The applicant father was the genetic father of all three children. This particular decision related to only one of the children, as the application relating to the twins was heard separately.

Justice Stevenson found that, for the purposes of this case only, the applicant father was a parent of the child, for the following reasons:

- His genetic material was used;
- DNA testing had established that he is the biological father;
- He was registered on the birth certificate as the father;
- He assumed the role of father almost immediately upon birth; and
- He, and the applicant mother, intended to provide ongoing care and support for the child; and
- The surrogate mother and anonymous egg donor intended to play no role in the child's life.

Dudley & Chedi [2011] FamCA 502

A couple from Queensland entered into a commercial surrogacy arrangement with a woman in Thailand. The commissioning father's genetic material was used, along with anonymously donated eggs. The commissioning parents sought parenting orders with respect to the two children born as a result of the surrogacy arrangement.

Orders were made conferring parental responsibility on the commissioning parents, however Justice Watts referred his reasons for judgment to the Office of the Director of Public Prosecutions for consideration as to whether or not to prosecute the commissioning parents. It appears that no prosecution was made.

Mason & Mason and Anor [2013] FamCA 424

The surrogacy arrangement was undertaken in India, where twins were born. The commissioning parents sought parenting orders and a declaration of parentage.

This case highlights some of the moral considerations arising in surrogacy arrangements. The surrogate mother was illiterate in both English and Hindi, and her attestation to various documents (including the surrogacy contract and various affidavits filed in the proceedings, all of which were in English) was her thumb print. There was no evidence to suggest that these documents were read and translated to her prior to her applying her thumb print.

At Justice Ryan's insistence, an affidavit was eventually sworn by a notary public in India, confirming that he read the documents to the birth mother in her native dialect and she acknowledged their contents.

Contrary to her decision in *Ellison*, Her Honour declined to make a declaration of parentage. She found that s 60H and 60HB of the *Family Law Act* operated to prevent the Court making a declaration of parentage in relation to surrogacy arrangements, unless an order has been made pursuant to the prescribed State legislation.

Carlton & Bissett and Anor [2013] FamCA 143

An international altruistic surrogacy arrangement was entered into in South Africa between the surrogate mother (the second respondent) and the current partner of the applicant (the first respondent). At the time of the hearing, the children born as a result of the surrogacy arrangement lived with the applicant and the first respondent, a male couple. The applicant sought a number of parenting orders with respect to the children, so as to have legal recognition of the parenting relationship.

Justice Ryan found that the first respondent was a parent of the children for the purposes of s 60CC and 69E of the *Family Law Act*, by reason of his status as the children's parent in South Africa, the place where he was ordinarily resident and the children's domicile at the time of their birth. In any event, out of an abundance of caution, Her Honour made a declaration of parentage in respect of the first respondent. She also made parenting orders in favour of both the Applicant and the first respondent.

Conclusion

The surrogacy laws in Australia are complex and require parties and their lawyers to navigate differing State and Territory legislation, domestic and international surrogacy schemes, migration law, family law, assisted reproduction law, birth registration and State and Federal Court systems. The law has struggled to keep up with advances in technology and society's acceptance of surrogacy as a method of achieving parenthood.

31 January 2014

The requirement of each State and Territory is different. A table setting out these distinctions is below:

| | Age of Child when application can be made | Residence of Intended Parents | Genetic Links | Location of assisted conception | Written Surrogacy Agreement required | Counselling for all parties required | Legal Advice required | Commercial Surrogacy banned | Age of birth mother | Age of intended parents | Intended parents must be a couple | Intended parents can be a male or a male couple | Need for surrogacy |
|-------------------------------------|--|--------------------------------|---|---------------------------------|--------------------------------------|---|--|-----------------------------|---|---|--|---|------------------------|
| Australian Capital Territory | 6 weeks - 6 months | Within the ACT | Neither birth parent can be a genetic parent. At least one of the intended parents must be a genetic parent of the child. | ACT | No | The court takes this into consideration. It is advisable but not mandatory. The court has a discretion whether or not to grant parentage order. | No | Yes, extra-territorially. | N/A | Both at least 18 | Yes, but application can be made by only one and the court will take a number of matters into consideration in deciding whether to make the parentage order. | Yes | N/A |
| New South Wales | 30 days - 6 months unless exceptional circumstances. | Within NSW at time of hearing. | Birth mother can be a genetic parent however, fertility clinics will usually refuse to perform the procedure. | N/A | Yes | Yes, however this is not a mandatory precondition. It can be dispensed with by the court in exceptional circumstances. | Yes, however this is not a mandatory precondition. It can be dispensed with by the court in exceptional circumstances. | Yes, extra-territorially. | At least 25 when entering surrogacy arrangement. However, this requirement can be dispensed with by the court in exceptional circumstances. It is mandatory that the birth mother is at least 18 when entering a surrogacy arrangement. | At least 18 when entered surrogacy arrangement. However, if under 25, the court needs to be provided with evidence of maturity. | No | Yes | Medical or social need |

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|------------------------|---|--|---|---|--|---|---|-----------------------------|--|---|--|---|--|
| Queensland | 28 days - 6 months or later with the Court's leave if there are exceptional circumstances to justify the delay and it is for the wellbeing and in the best interests of the child to grant leave. | Within Queensland at time of the order. This requirement can be dispensed with by the court in exceptional circumstances and it is for the wellbeing and in the best interests of the child. | Birth mother can be a genetic parent - however, some fertility clinics will refuse to perform the procedure. | N/A | Yes | Yes, however this requirement can be dispensed with for any party by the court in exceptional circumstances and it is for the wellbeing and in the best interests of the child. | Yes, however this requirement can be dispensed with for any party by the court in exceptional circumstances and it is for the wellbeing and in the best interests of the child. | Yes, extra-territorially | At least 25 when surrogacy arrangement made (also birth mother's spouse (if any)). | At least 25 | Yes at the time the surrogacy arrangement was made. However, if the intended parents are no longer a couple, only 1 of the intended parents may apply for a parentage order. | Yes | Medical or social need. |
| South Australia | 4 weeks to 6 months. Court has power to waive requirement. | Domiciled within South Australia. Court has power to waive requirement. | At least one of the commissioning parents must provide human reproductive material unless specified medical reasons. Birth mother can be a genetic parent - however, some fertility clinics will refuse to perform the procedure. Court has power to waive requirement. | SA. Court has power to waive requirement. | Yes. Court has power to waive requirement. | Yes, prior. Court has power to waive requirement. | Yes. Court has power to waive requirement. | Yes | At least 18 years old when agreement made. Court has power to waive requirement. | Both at least 18 when agreement made. Court has power to waive requirement. | Yes. Must be legally married or had continuous 3 year heterosexual de facto relationship or 3 of 4 years. Court has power to excuse failure to comply with requirement. Court has power to waive requirement. | No. | Female intended parent is infertile or unable to give birth on medical grounds, a risk of serious genetic defect, diseases, or illness transmitted to child born, or at risk of serious physical harm if gives birth. Court has power to excuse failure to comply with requirement. |
| Tasmania | 30 days to 6 months or later with leave (similar to Qld) | In Tasmania at the time the arrangement was entered. | Birth mother can be a genetic parent - however, some fertility clinics will refuse to perform the procedure. | N/A | No | Yes, prior and after. Can be waived by the court if in best interests of child | Yes. Can be waived by the Court if in best interests of child. | Yes | At least 25 years when surrogacy arrangement made | At least 21 when the surrogacy arrangement made | No | Yes | Medical or social need |

