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The Baby Gammy case

JACKY CAMPBELL, JUNE 2016

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Recently, the Family Court of Western Australia delivered judgment in the "Baby Gammy" case. Although colloquially called the "Baby Gammy" case, the Court was asked to determine the parenting arrangements which were in the best interests of Pipah (Baby Gammy's twin sister).The lengthy judgment of almost 800 paragraphs and 190 pages is reported as *Farnell & Anor and Chanbua*[1], so reading it is not for the fainthearted.

Thackray CJ found that s 90H(1) *Family Law Act 1975* did not apply to surrogacy procedures, that Pipah was not a "child of a marriage", and that the state legislation applied.

The surrogate wanted Pipah to live with her, Baby Gammy and her husband in Thailand. Thackray CJ refused that application and, in doing so, he debunked a number of media myths. For example, he found that the Farnells did not abandon Gammy and did not seek access to Gammy’s trust fund for Pipah’s welfare needs or for their legal costs.

Thackray J also took the opportunity to express strong views on surrogacy, which are quoted later in this article.

Although not relevant in this case, the Family Court of Australia, now has set out in the *Family Law Rules 2004*, the evidentiary requirements and procedures for surrogacy cases.

Orders made

In making his decision Thackray CJ recognised that Gammy appeared to be thriving in the care of Mrs Chanbua and her extended family. However, in relation to Pipah, he said:

> “I have decided that Pipah should not be removed from the only family she has ever known, in order to be placed with people who would be strangers to her, even though I accept they would love her and would do everything they could to care for all her needs.”

The Family Court of Western Australia made orders giving the Farnells equal shared parental responsibility of Pipah and for Pipah to live with them. The surrogate/birth mother, Mrs Chanbua, and the Farnells are required to keep each other informed about Pipah's welfare and engage Pipah in important Buddhist events.

The Registrar of Births Deaths & Marriages was directed to register Pipah’s birth to show her surname as that of Mrs Chanbua's maiden name and her parents as Mrs Chanbua and Mrs

[1] [2016] FCWA 17

Chanbua's husband. The Registrar was permitted to record on the birth certificate, if he considered it appropriate, that the Farnells had equal shared parental responsibility.

The Farnells and Mrs Chanbua are required to keep each other informed of their contact details. The Farnells may, if they wish, provide Mrs Chanbua with copies of Pipah's school reports, photographs of themselves and Pipah and presents for Gammy.

Contact between the two families electronically or face-to-face is as agreed between the families from time to time.

A safety plan was put in place for Pipah, given Mr Farnell's history of child sexual abuse.

The Orders were made on the basis of the court having formally found that the Farnells:

1. did not abandon Gammy in Thailand;
2. did not seek to access Gammy's trust fund for Pipah's welfare needs or to meet their legal costs; and
3. never applied to the court for access to Gammy's trust fund for any purpose.

Thackray J's views on surrogacy

In his judgment, Thackray J took the opportunity to express strong views on surrogacy, including criticism of the immigration law, which were not harmonised with the laws of the rest of the country. If he had heard the earlier, he may have ordered that Pipah return to live in Thailand with her birth mother and brother. He said:

> "It should be apparent that I have approached this dispute from the perspective of what would be best for Pipah. The decision should therefore not be interpreted as indicating any form of approval of commercial surrogacy. While I accept my orders may be seen as encouragement to other couples to beg forgiveness rather than seek permission, the outcome might have been very different had the dispute come before me much earlier in Pipah's life. At that point, it may well have been decided it was in her best interests to return to live with her birth mother and twin brother.
>
> The appalling outcome of Gammy and Pipah being separated has brought commercial surrogacy into the spotlight. Quite apart from the separation of the twins, this case serves to highlight the dilemmas that arise when the reproductive capacities of women are turned into saleable commodities, with all the usual fallout when contracts go wrong. The facts also demonstrate the conflicts of interest that arise when middlemen rush to profit from the demand of a market in which the comparatively rich benefit from the preparedness of the poor to provide a service that the rich either cannot or will not perform.
>
> This case should also draw attention to the fact that surrogate mothers are not baby-growing machines, or "gestational carriers". They are flesh and blood women who can develop bonds with their unborn children. It is noteworthy that no evidence was provided about the long-term impact on mothers of giving up children they carried, and there was no evidence of the impact on the children themselves. Nor was there any expert evidence of the impact on the other children of birth mothers who would have seen their mother

> pregnant, and perhaps felt the baby move in her belly, only to find that the baby never came home from hospital. Did those children wonder who would be the next to be given away? And what of their feelings of grief and loss if they were misled into believing the baby had died?
>
> I accept it is for others to decide whether the manifest evils associated with overseas commercial surrogacy can be overcome by importing the problem into Australia, even though such suggestions have been made as a result of what happened to "baby Gammy". It is also for others to determine whether even a "first world" country can provide a regulatory regime sufficiently robust to protect the interests of surrogate mothers and the children they bear …
>
> The arrangement leading to the births of Pipah and Gammy would never have been put in place had it not been for the fact that a department of the Australian Government provided assurances that the children would receive citizenship and automatic entry to this country. Such assurances could not be provided if the citizenship laws were harmonised with all the other laws of this country. Effective law reform therefore does not have to involve the legalisation of commercial surrogacy to encourage would-be parents to buy locally-grown children. Equally, it could involve amendment of the citizenship laws to align them even more clearly with existing state laws. A fundamental policy decision is required."[2]

Family Law Rules 2004 – requirements of surrogacy applications

As the number of applications for parenting orders to the Family Law Courts in relation to children born under surrogacy arrangements is increasing, the *Family Law Rules* were amended, commencing 1 January 2016 – so after most of the Baby Gammy case had been heard - to ensure that the court has sufficient evidence to determine these applications. These Rules apply to applications not covered by the various State and Territory schemes, so primarily to overseas surrogacy arrangements. These will usually be commercial arrangements.

The evidence required is set out in r 4.34 - 4.36:

1. A copy of any surrogacy agreement
2. Evidence of the personal circumstances of the applicant including in relation to the surrogacy arrangement.
3. Evidence of the personal circumstances of the surrogate mother including in relation to the surrogacy arrangement.
4. Evidence of the identity of the child.
5. Evidence about the relevant law in the child's birth country.

At the first hearing date of the application the court must:

- Make procedural orders.

[2] (at paras 755-9)

- Consider an order for the appointment of an independent children's lawyer.
- Consider ordering a family consultant to prepare a family report.
- Consider whether a condition in s 65G(2) has been met. Section 65G deals with the making of a parenting order about whom a child lives with or the allocation of parental responsibility by consent in favour of a non-parent. Section 65G(2) provides:

  "The court must not make the proposed order unless:
  (a) the parties to the proceedings have attended a conference with a family consultant to discuss the matter to be determined by the proposed order; or
  (b) the court is satisfied that there are circumstances that make it appropriate to make the proposed order even though the conditions in paragraph (a) are not satisfied."

An application for a parenting order cannot be made by filing an application for consent orders. It must be commenced by an Initiating Application (Family Law)[3], so the evidence and procedures set out in the Rules are followed.

Conclusion

The Baby Gammy case demonstrated how complex overseas surrogacy arrangements are, and some of the many things that can go wrong. It is also a further example of a case where a Family Law Court was not prepared to just rubber-stamp arrangements as being in a child's best interests. The case was heard over 7 days and resulted in a lengthy judgment. The introduction of procedural and evidentiary requirements into the Family Law Rules, combined with the strong statements of judges in several cases, including the Baby Gammy case, are a reminder that parents should not embark on overseas surrogacy arrangements thinking that they are guaranteed to obtain parenting orders in Australia.

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[3] r 10.15(3)