FEDERAL MAGISTRATES COURT OF AUSTRALIA

Monday, 10 October, 2011

Chief Federal Magistrate Pascoe AO CVO

The rise of surrogate parenting: Family law and Human Rights implications in Australia and Internationally

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1. INTRODUCTION[1]

Family Law is, perhaps more than any other branch of law, an accurate barometer for changes that take place in society. It is impossible to work in Family Law, either as a Judge or a practitioner, and remain ignorant of wider shifts that are taking place in people's lives.

In recent years, the Federal Magistrates Court in Australia has borne witness to real changes that are underway within Australian society, as a result of increasing applications from de facto couples, same sex couples and couples from multicultural backgrounds.

My topic today, surrogacy, is another issue that the Family Law Courts are increasingly being asked to rule on. This reflects a growing interest in and use of surrogacy arrangements.

Surrogacy is unique because it presents issues that could not have been anticipated as little as 30 years ago, such as the splitting of biological, social and legal parentage, and – in some cases – the nexus of commerce and parenthood.

It is also an issue which has highlighted the inadequacies of instruments which regulate Family Law and protect the rights of children. In this paper, I will outline the

[1] I wish to acknowledge the contribution of my Legal Associate Mr Andrew Small in preparing this paper.

current legislative framework governing surrogacy arrangements in Australia, along with some key cases that have been considered by the Family Law Courts. I will also recommend some ways in which ambiguities and inconsistencies in the current system could be clarified to achieve the best outcomes for those involved in surrogacy arrangements – particularly the child.

2. DEFINITIONS

The applicable laws in Australia refer to two types of surrogacy: "altruistic" and "commercial". In an altruistic surrogacy arrangement, the surrogate mother receives no compensation for carrying and delivering the child; whereas commercial surrogacy applies a "free market" philosophy to surrogacy, allowing the surrogate mother and/or the facilitating organisation to make a net gain.

Different countries have taken very different approaches to commercial surrogacy: in Australia, it is illegal to make a commercial surrogacy agreement, while other countries, including India and the USA, are more permissive.

It is also necessary, from a legal perspective, to note the two different ways in which surrogacy can be carried out: either "traditionally" or "gestationally".

- Traditional surrogacy – where a woman carries a child for another person or a couple, then relinquishes it after giving birth – has been practiced around the world for thousands of years. In Australia, for example, the customary adoption practices of some communities in the Torres Strait have been described as similar to Western-style surrogacy.[2]

- Gestational Surrogacy is a far more recent phenomenon, which has been made possible by advances in Invitro-Fertilisation (IVF) technology. This technology enables a surrogate mother to act as a "gestational" carrier of an embryo that has been produced from the eggs of another woman, and the sperm of the intended father.

[2] *Lowe & Barry and Anor* [2011] FamCA 625, 4

3. CONTEMPORARY PREVALENCE

In recent years, the numbers of people entering surrogacy arrangements – either altruistic or commercial – has been on the rise. In Australia it is estimated that 100 couples a year use a surrogate mother either domestically or abroad[3]. And the numbers in other countries are even more dramatic. In America, more than 1,000 gestational surrogacy events take place each year, while in India, it is estimated around 1,500 pregnancy attempts are made annually at 350 surrogacy facilities.[4] To attract the business of international customers, surrogacy clinics in countries as diverse as America, India and Ukraine all have active web presences. A recent Google search for the phrase "Surrogacy Clinic India" returned over 30,000 results.

There are a number of reasons for this rise in the prevalence and visibility of surrogacy services, including: a drop in the number of children available for adoption domestically; a tightening of inter-country adoption procedures; increasing infertility in western countries coupled with a trend towards having children later in life; the existence of a new, global surrogacy marketplace; and new technologies, which have made gestational surrogacy possible, affordable and reliable[5].

4. LEGAL FRAMEWORK

The legality of surrogacy depends on the type of surrogacy, and where it occurs. In Australia, altruistic surrogacy is legal, if certain requirements are fulfilled, however commercial surrogacy is illegal. The criminal penalties attached to commercial surrogacy were justified by a report from the Standing Council of Attorneys-General in 2009, which stated that the practice "commodifies the child" and "risks the exploitation of poor families for the benefits of rich ones".[6] The framework in

[3] Jenni Millbank, 'The new surrogacy parentage laws in Australia: Cautious regulation or 25 brick walls'?" (2011) 45 *Melbourne University Law Review*, 5
[4] Margaret Cohen, *'A search for a surrogate leads to India', Wall Street Journal* (Washington), 9 October 2009.
[5] Millbank, above n 2,
[6] Standing Committee of Attorneys-General Joint Working Group, *A Proposal for a National Model to Harmonise Regulation of Surrogacy* (2009), 4-5

Australia does allow for altruistic surrogacy, but only if a number of age, health and administrative criteria have been met.[7]

From 2004 to the present, laws regulating surrogacy have been introduced in each state and territory in Australia except the Northern Territory[8]. This law reform has come in response to seven public enquiries that took place within three years, along with a discussion paper produced by a federal-state government working party.[9] The new laws, which allow for the transfer of parentage after a surrogacy arrangement, are state-based, but prescribed by the Commonwealth *Family Law Act Regulations*.[10] It is in this way that surrogacy arrangements can be specifically recognised under the *Family Law Act* 1975. There are, however, several ambiguities in the current Australian framework – particularly with regard to the definitions of 'parent' and 'child' – which I will address shortly.

Internationally, laws vary markedly. In some countries, such as India and Ukraine, and in some states of America, legally binding commercial surrogacy contracts may be entered into. The costs of these commercial international agreements can range from an average of $50,000 in India to $150,000 in the US.[11] Meanwhile other countries, including France and Iceland, prohibit all forms of surrogacy arrangements, whether altruistic or commercial.

5. CASE LAW

Due to the divergent approaches to surrogacy regulation around the world, many Australian couples are now travelling overseas to pursue surrogacy.

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7 For example, under the *Surrogacy Act* 2010 (NSW), the birth mother must be at least 25 and have received appropriate counselling, while the intended parent or parents must be classified as infertile or having a 'need' for surrogacy. A written surrogacy arrangement entered into prior to the pregnancy must also have been executed.

8 *Parentage Act 2004* (ACT); *Surrogacy Act 2010* (NSW); *Surrogacy Act 2010* (Qld); *Statutes Amendment (Surrogacy) Act 2009* (SA); *Assisted Reproductive Treatment Act 2008* (Vic) *Surrogacy Act 2008* (WA),

9 Millbank, above n 2, 2

10 *Family Law Act Regulations* 1984 (Cth), reg.12CAA

11 Millbank, above n 2, 29

This trend is reflected in a number of cases that have come before the Family Court of Australia in the past eight years.

The first of these, *Re Mark*[12], from 2004, involved a child born from a surrogacy arrangement in California. The intended parents, a same-sex couple from Victoria, applied for parenting Orders under Part 7 of the *Family Law Act* 1975. Justice Brown granted these Orders, stating it was in the best interests of the child that "Mr X and Mr Y be responsible for [the child's] long-term and day to day care, welfare and development".

Other recent cases in the Family Court of Australia – *Cadet and Scribe*[13], *Wilkie and Mirkja*[14], *Collins and Tangtoi*[15], *Dennis and Pradchapthe*[16] and *O'Connor and Kasemsarn*[17] – concern children who were born in Ohio, India and Thailand respectively.

In the cases of *Cadet*, *Collins*, *O'Connor* and *Dennis*, the birth mother was served with notice of the Family Court proceedings and consented to parenting Orders being made in favour of the intended parents (the Court was satisfied that the consent of the birth mothers was informed). While in *Re Mark*, the mother elected not to participate, and in *Wilkie*, the birth mother was unable to be located because she had given a false address in Mumbai.

In all of these cases, the Court was asked to make parenting orders in favour of the intended parents and – in the absence of any objection from the surrogate mother – agreed to do so. It should be noted, however, that parental responsibility orders in Australia differ in many key respects from legal parentage. For example, parental responsibility orders do not endure after the child turns 18, and they do not "impact on any of the web of laws that automatically grant vital rights to children, such as

[12] *Re Mark* (2004) 31 Fam LR 162
[13] *Cadet and Scribe* [2007] FamCA 1498
[14] *Wilkie & Anor and Mirkja* [2010] FamCA 667
[15] *Collins and Tangtoi* [2010] FamCA 878
[16] *Dennis and Pradchaphet* [2011] FamCA 123
[17] *O'Connor and Kasemsarn* [2010] FamCA 987

inheritance and other compensation laws, as well as rights that flow from extended family relationships."[18]

There has not yet been a case in Australia in which the surrogate mother contested the parenting order – as happened in the *Baby M* case in New Jersey, America, where the surrogate mother, Mary Beth Whitehead, refused to give up the baby girl after she was born. In that case, the court ordered the birth mother to relinquish the child, because she was bound by contract.[19] If this were to happen in Australia, the contract would not be enforceable, and the presiding Judge would instead need to apply the "best interests" test, as outlined by Justice Brown in the matter of *Re Mark.*

6. SUGGESTIONS AND SOLUTIONS

As Justice Benjamin of the Family Court of Australia noted in the judgment of *Lowe & Barry and Anor* (2011), "Modern science and medical skill surrounding the creation of life are now well ahead of legal, social and legislative policy." In the last three years, there has been a raft of law reform at the state level in Australia to address this lag. These state-based reforms have taken place in two areas: the amendment of laws which had previously restricted the use of IVF for surrogacy, and the introduction of state-based regimes for the transfer of legal parentage to the 'commissioning' or 'intended' parents.[20]

While the new state laws have gone some way to harmonising surrogacy laws in Australia, as was the aim[21], there is still more that could be done. For example:

- With regard to commercial surrogacy, the penalties range from $4,000 to $110,000 and from 1 to 3 years jail, depending on which state the offence is committed in;
- And while all states prescribe criminal penalties for commercial surrogacy arrangements entered into within Australia, New South Wales is the only state to attach criminal penalties to commercial surrogacy completed overseas;

[18] Millbank, above n 2, 11
[19] *re Baby M*, 537 A.2d 1227, 109 N.J. 396 (N.J. 02/03/1988)
[20] Millbank, above n 2, 3
[21] SCAG report, above n. 5, 2

- Surrogacy-related payments that would be classified as "reasonable medical expenses" in Queensland may, in South Australia, attract a fine or imprisonment as the giving of valuable consideration[22];
- It is legal to advertise for a donor egg in some states, but illegal in others.

The current legal framework also leaves significant ambiguities with regard to the definition of 'parent' and 'child'. The division of responsibilities between state and Commonwealth Courts in this regard is dealt with by section 60HB of the *Family Law Act 1975*, which recognises transfer of parentage under state and territory surrogacy regimes. This status is in turn reflected in various other federal Acts – such as the *Child Support (Assessment) Act* 1989 and the *Australian Citizenship Act* 2007 – which both adopt the definition of 'parent' from s.60HB of the *Family Law Act*. However, as the academic Jenni Millbank has noted, "there remains no central definition of 'parent' and 'child' in federal law and each Act is open to a purposive interpretation based upon its own terms."[23]

Furthermore, the state-based regimes for transfer of parentage cannot be accessed if the child is born overseas through a commercial surrogacy arrangement. The result of this is that many Australian couples have been left "stranded" overseas after having a child through a surrogate mother, as they are unable to apply for citizenship for the child under the Australian *Citizenship Act*, due to the ambiguities about the definition of 'parent and child'. The intended parents in such a situation would therefore be in breach of the *Hague Convention on Inter-Country Adoption* if they attempted to bring the child back into Australia.

In the recent Family Court matter of *Wilkie and Anor & Mirkja*[24], Cronin J considered a case involving international commercial surrogacy and noted:

"The Law is, to say the least, complex in parenting cases but made more so by a case such as this where there is no clear boundary as to the definition of a parent."

[22] Anita Stumcke, 'The criminal act of commercial surrogacy in Australia: A call for review' (2011) 18 JLM 601 *Journal of Law and Medicine*, 611
[23] Millbank, above n 2, 22.
[24] *Wilkie and Anor & Mirkja* [2010] FamCA667, 8

A potential way to correct these ambiguities would be to deal with the issue of surrogacy on a national, consistent basis. However the Commonwealth Government lacks the constitutional power to enact effective national legislation in this regard, so it would be necessary for the States to refer the necessary legislative powers to the Commonwealth .[25] Absent this occurring, the best result would be if States and Territories continue to move towards a uniform position in relation to the legality of surrogacy arrangements, and the definition of 'parent' and 'child'.

On an international level, it would be an improvement if the rights of children born through surrogacy arrangements could be specifically protected. The *Convention on the Rights of the Child*, which has been signed by 140 nations,[26] refers at Article 8 to the right of the child to "preserve his or her identity, including nationality, name and family relations" but does not contain specific reference to children born through surrogate arrangements. This is perhaps reflective of the fact that international commercial surrogacy was an emerging phenomenon when the convention was drafted in 1989.

7. CONCLUSION

In recent decades, the practice of surrogacy has undergone rapid change, underpinned by advances in technology and the globalisation of its practice.

It is important to remember, when looking at surrogacy from a legal point of view, that each surrogacy arrangement involves real people with real emotions. Most important of all is the child, who must be assured of their safety, citizenship and identity. It is also crucial, in the case of commercial surrogacy, that the surrogate mother not be commodified, and that the significant bond formed between the child and the surrogate mother be recognised.

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[25] *Lowe & Barry and Anor* [2011] FamCA 625, 20

[26] *Convention on the Rights of the Child*, opened for signature 20 November 1989, (entered into force 2 September 1990)

Given this speech is limited in time, I have only briefly touched on the human rights issues, which are considerable. There are gaps in international treaties: for example, as I have mentioned, there is no mention of surrogacy in the *International Convention on the Rights of the Child.*

Clearly, surrogacy raises both national and international issues. In this multi-national group, it is therefore appropriate that I close by quoting Professor Diane Geraghty from the School of Law at Loyola University, Chicago:

> *"Each jurisdiction must decide for itself whether surrogacy is consistent with the country's legal, ethical, cultural and social traditions… it is important for all nations to address squarely this important issue, which carries with it so much potential for joy and heartache."*[27]

[27] Prof. Diane Geraghty, '*Memorandum of Law: Surrogacy*', January 19, 2011.