

**OUTSIDE THE NUCLEAR FAMILY:
GAY DADS
AND SURROGACY**



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PART 1

INTRODUCTION

There is no definition of “family” within the *Family Law Act*. Although the *Family Law Act* seems largely designed to deal with the “traditional family”, comprising a mother, a father and children, the reality in society is that the family comprises many different forms.

Within the gay and lesbian community, it is not uncommon for same sex couples to start their own family. Of necessity this will involve an artificial conception procedure, whether it is in vitro fertilisation or donor insemination.

Increasingly surrogacy is an option for creating a family being utilised by gay male couples¹.

Surrogacy is an arrangement whereby a commissioning couple (“the intending parents”) enter into an arrangement with a woman (“the surrogate mother”) who will carry their child, and then surrender the child to the intending parents upon birth. There are two forms of surrogacy. The first is traditional surrogacy, whereby the surrogate mother undergoes donor insemination treatment using her own eggs. This form of surrogacy does not occur via IVF clinics in Australia, as a matter of policy. The alternative form of surrogacy is gestational surrogacy whereby the donor egg is harvested from a third person and fertilised using a sperm donation from one of the intending parents. The embryo is then implanted in the surrogate mother, and the child will not have her DNA.

Leaving aside any debate about moral or ethical issues, surrogacy is a reality within our society. In my own experience as a lawyer, couples who cannot have children of their own through conventional means (whether same sex couples, or opposite sex couples for medical reasons) and who utilise surrogacy as an option to start a family are not so concerned with any issues about morality or ethics.

¹ The author is not relying upon any data from the Australian Institute of Family Studies or elsewhere. Rather this is an observation based on the authors own experiences through volunteering at the Inner City Legal Centre at Kings Cross in Sydney, and in private practice.

For the intending parents, the primary legal issue is who is a parent. This issue is significant because of the provisions of s61C of the *Family Law Act*, which makes provision for who has parental responsibility of a child as follows:

Each parent has parental responsibility (subject to court orders)

(1) *Each of the parents of a child who is not 18 has parental responsibility for the child.*

Note 1: This section states the legal position that prevails in relation to parental responsibility to the extent to which it is not displaced by a parenting order made by the court. See subsection (3) of this section and subsection 61D(2) for the effect of a parenting order.

Note 2: This section does not establish a presumption to be applied by the court when making a parenting order. See section 61DA for the presumption that the court does apply when making a parenting order.

Note 3: Under section 63C, the parents of a child may make a parenting plan that deals with the allocation of parental responsibility for the child.

(2) *Subsection (1) has effect despite any changes in the nature of the relationships of the child's parents. It is not affected, for example, by the parents becoming separated or by either or both of them marrying or re-marrying.*

(3) *Subsection (1) has effect subject to any order of a court for the time being in force (whether or not made under this Act and whether made before or after the commencement of this section).*

Parents have parental responsibility, which is defined in section 61B of the *Family Law Act* as follows: .

Meaning of parental responsibility

*In this Part, **parental responsibility** , in relation to a child, means all the duties, powers, responsibilities and authority which, by law, parents have in relation to children.*

In Australia the laws, whether at a State/Territory or Commonwealth level, are not particularly advanced insofar as how they deal with surrogacy arrangements compared to say the laws in California.

Each of the States and Territories in Australia has its own legislation dealing with assisted reproductive technology, and generally about surrogacy arrangements. For instance in New South Wales under the *Assisted Reproductive Technology Act 2007*

commercial surrogacy arrangements are prohibited² and entering into any commercial surrogacy arrangement can render the parties involved liable to prosecution. Commercial surrogacy is an arrangement whereby the intending parents provide a monetary benefit to the surrogate mother for her services. Otherwise under the *Assisted Reproductive Technology Act 2007* surrogacy agreements are void³. There are similar provisions in legislation of the other States and Territories around Australia.

The position with surrogacy in general in Australia is that whilst commercial surrogacy is prohibited, altruistic surrogacy is not prohibited. However, agreements to enter into altruistic surrogacy arrangements are void, and therefore altruistic surrogacy arrangements cannot be enforced. The consequence is that any surrogacy arrangements entered into within Australia run the risk that upon the birth of the child, the surrogate mother may decide not to surrender the child and cannot be compelled to do so. The only possible remedy for the intending parents in such a situation is to apply to either the Family Court or Federal Magistrates Court for parenting orders that the child live with them.

Part 2

Who is a Parent? Family Law Act Provisions

Given all surrogacy arrangements will involve an artificial conception procedure, the issue of parentage is dealt with by s60H of the *Family Law Act* which provides as follows:

Children born as a result of artificial conception procedures

(1) If:

(a) a child is born to a woman as a result of the carrying out of an artificial conception procedure while the woman was married to, or a *de facto* partner of, another person (the **other intended parent**); and

(b) either:

² Per s43 Assisted Reproductive Technology Act 2007

³ Per s45 Assisted Reproductive Technology Act 2007

(i) the woman and the other intended parent consented to the carrying out of the procedure, and any other person who provided genetic material used in the procedure consented to the use of the material in an artificial conception procedure; or

(ii) under a prescribed law of the Commonwealth or of a State or Territory, the child is a child of the woman and of the other intended parent;

then, whether or not the child is biologically a child of the woman and of the other intended parent, for the purposes of this Act:

(c) the child is the child of the woman and of the other intended parent; and

(d) if a person other than the woman and the other intended parent provided genetic material--the child is not the child of that person.

(2) If:

(a) a child is born to a woman as a result of the carrying out of an artificial conception procedure; and

(b) under a prescribed law of the Commonwealth or of a State or Territory, the child is a child of the woman;

then, whether or not the child is biologically a child of the woman, the child is her child for the purposes of this Act.

(3) If:

(a) a child is born to a woman as a result of the carrying out of an artificial conception procedure; and

(b) under a prescribed law of the Commonwealth or of a State or Territory, the child is a child of a man;

then, whether or not the child is biologically a child of the man, the child is his child for the purposes of this Act.

(5) For the purposes of subsection (1), a person is to be presumed to have consented to an artificial conception procedure being carried out unless it is proved, on the balance of probabilities, that the person did not consent.

(6) In this section:

"this Act" includes:

(a) the standard Rules of Court; and

(b) the related Federal Magistrates Rules.

Pursuant to the provisions of ss60H(1)(a)–(c) & (2) *Family Law Act*, the presumption of parentage will apply to the surrogate mother and her married or de facto partner provided the following applies:

1. Both the woman and her married or de facto partner consented to the carrying out of the procedure;
2. The woman and her married or de facto partner were in that relationship at the time of conception⁴;
3. Under a prescribed law of the Commonwealth or of a State or Territory the child is a child of the surrogate mother and her married or de facto partner.

Section 12CA of the *Family Law Regulations* provides that the following laws are prescribed laws for the purposes of s60H(2)(b) of the *Family Law Act*:

Artificial conception procedures: child of woman -- prescribed laws

For paragraph 60H (2) (b) of the Act, the laws mentioned in the following table are prescribed.

Item	Law
1	<i>Status of Children Act 1996 (NSW), section 14</i>
1A	<i>Status of Children Act 1974 (Vic), section 15 and 16</i>
2	<i>Status of Children Act 1978 (Qld), section 18AB</i>
3	<i>Artificial Conception Act 1985 (WA)</i>
4	<i>Family Relationships Act 1975 (SA), sections 10B and 10C</i>
5	<i>Status of Children Act 1974 (Tas), Part III</i>
6	<i>Parentage Act 2004 (ACT), subsections 11 (2) and (3)</i>
7	<i>Status of Children Act 1978 (NT), sections 5B, 5C and 5E</i>

Section 60H(2) provides that if a prescribed law of the Commonwealth or a State or a Territory provides that a child is a child of a woman as a result of an artificial conception procedure, then for the purposes of the *Family Law Act* it is her child whether or not the child is biologically a child of the woman.

⁴ Per *Keaton and Albridge* [2009] FamCA 92 at paragraph 39.

The upshot of s60H is that in a surrogacy arrangement whereby one of the intending parents provides the sperm donation, the surrogate mother and her married or de facto partner will be presumed the parents of the child, even though the child does not have their DNA. This leaves the intending parents without a presumption of parentage under the *Family Law Act* on the face of it.

Commonly where surrogacy arrangements involve a gay male couple, by consent the intending parent who provided the sperm donation is named on the child's birth certificate as a parent of the child. On the face of it, the intending parent named on the birth certificate as the father will have a presumption of parentage under s69R of the *Family Law Act* which provides as follows:

Presumption of parentage arising from registration of birth

If a person's name is entered as a parent of a child in a register of births or parentage information kept under a law of the Commonwealth or of a State, Territory or prescribed overseas jurisdiction, the person is presumed to be a parent of the child.

Where the intending parent who provided the sperm donation is named on the child's birth certificate, this gives rise to a conflict between presumptions of parentage. On the one hand the surrogate mother's married or de facto partner has a presumption of parentage by virtue of s60H(1)(a)-(c), whereas s60H(1)(d) provides that if a person other than the woman and her married or de facto partner provided the genetic material for the child, then a child is not a child of that person. Effectively s60H(1)(d) precludes a sperm donor as being a parent of the child if he was not in a marriage or de facto relationship with the surrogate mother. Conflicts between presumptions of parentage will be dealt with later in this paper.

Section 60HB deals with presumptions of parentage of children in surrogacy arrangements. It provides as follows:

Children born under surrogacy arrangements

(1) If a court has made an order under a prescribed law of a State or Territory to the effect that:

(a) a child is the child of one or more persons; or

(b) each of one or more persons is a parent of a child;

then, for the purposes of this Act, the child is the child of each of those persons.

(2) In this section:

"this Act" includes:

(a) the standard Rules of Court; and

(b) the related Federal Magistrates Rules

For the purposes of s60HB, the prescribed laws it refers to are set out in regulation 12CAA of the Family Law Regulations as follows:

Children born under surrogacy arrangements -- prescribed law

For subsection 60HB (1) of the Act, the following laws are prescribed:

(a) section 21 of the Surrogacy Act 2008 (WA);

(b) section 26 of the Parentage Act 2004 (ACT);

*(c) section 22 of the **Status of Children Act 1974** (Vic).*

Recently a standing committee of the Attorney Generals of the States and Territories and the commonwealth examined the laws of all the States and Territories insofar as they applied to surrogacy arrangements. It was resolved that each of the States and Territories would enact uniform laws making provision for a mechanism, through the courts, to transfer parentage from the surrogate mother and her married or de facto partner to the intending parents. Currently those laws exist in Western Australia, the ACT and Victoria. Queensland and New South Wales will be enacting their own laws making provision for such a mechanism in the near future. The specifics of these laws will be dealt with later in this paper.

Part 3

Case Law

In 2003 Justice Brown of the Family Court in Melbourne delivered a decision in the case of *Re Mark: an application relating to parental responsibilities*⁵. This is a case involving a gay male couple who entered into a commercial surrogacy arrangement with a woman from California. In California, commercial surrogacy is not only legal, commercial surrogacy agreements are enforceable. In this surrogacy arrangement, an egg donation was provided by an anonymous female third person, and the sperm donation was provided by one of the gay male couple who are from Melbourne. The embryo was implanted in the surrogate mother, who was married. Upon the birth of the child, he was surrendered to the care of the gay male couple, the parties entered into a legal mechanism via the Californian Supreme Court to confer parental responsibility upon the gay male couple, and a birth certificate issued naming the parents as the sperm donor and the surrogate mother.

The gay male couple filed an Application for Consent Orders in the Family Court at Melbourne. They were named as the applicants, and the respondents were the surrogate mother and her husband. The consent orders provided for the gay male couple to have parental responsibility of the child, and that he live with them.

Eventually Justice Brown made the parenting orders by consent, but by way of obiter she considered the issue of who is the child's parent in this case. She reviewed previous case authorities including *B & J*⁶ and *re: Patrick*⁷.

Justice Brown concluded that by applying presumptions of parentage applicable in Australia, the surrogate mother and her husband would be presumed the parents of the child. This was by way of operation of s60H of the *Family Law Act*, as it then was. However, the sperm donor was noted on the birth certificate as the father of the child. Justice Brown then examined whether he would be presumed a parent for the purposes of s69R of the *Family Law Act*. She noted that s69R can deem a

⁵ [2003] Fam CA 822

⁶ [1996] Fam CA 124

⁷ [2002] Fam CA 193

person a parent if they are named as a parent on a birth certificate issued from a prescribed overseas jurisdiction. At the time the case was determined, there were no prescribed overseas jurisdictions in the *Family Law Regulations* for the purposes of recognising birth certificates from overseas. Accordingly, she found that the sperm donor was not a parent for the purposes of s69R.

When examining other case authority Justice Brown found that in the absence of a definition of the word *parent* or a deeming provision as to the status of the sperm donor, she could apply the common law definition of parent, which is to be found in the Oxford Dictionary. She found that a parent is a person who has begotten or born a child.

Upon examining the facts of the case in *re Mark*, Justice Brown found that the sperm donor provided the sperm donation expressly for the purpose of conceiving a child which he would parent. She did not make any finding that the sperm donor in this case was a parent for a number of reasons. There is no contradicting party to the application and there may have been arguments contrary to the sperm donor being deemed a parent. Otherwise Justice Brown was mindful of the impact of finding a sperm donor to be a parent, including that men who have donated sperm to the IVF industry may find they are deemed parents and have parental responsibility, and potential child maintenance liabilities.

The issue concerning the status of the sperm donor, who is not in a marriage or de facto relationship with the birth mother, has now been overcome with the amendments to s60H of the *Family Law Act* which came in to effect in November 2008. Specifically, s60H(1)(d) deems a sperm donor in the *re: Mark* scenario not to be a parent of the child.

The decision of Justice Watts of the Family Court of Australia *re Michael: surrogacy arrangements*⁸ dealt with the application of presumptions of parentage for a child who is born into a surrogacy arrangement. Although the case involved an opposite sex couple who entered into a surrogacy arrangement with the mother of the

⁸ [2009] Fam CA 691

intended mother, and an application to the Family Court for leave to adopt under s60G of the *Family Law Act*, the reasoning of this decision has application in cases involving gay male couples where the sperm donor in the surrogacy arrangement is named on the birth certificate as the father.

The decision in *re Michael: surrogacy arrangements* provided that the second limb of s60H(1)(b) of the *Family Law Act* incorporates presumptions of parentage under the *Status of Children Act (NSW)*, since the *Status of Children Act (NSW)* is a prescribed law for the purposes of s60H *Family Law Act*. Therefore, if a presumption of parentage arising out of an artificial conception procedure applies under s14⁹ of the *Status of Children Act (NSW)*, and therefore under s60H of the *Family Law Act*, then by virtue of the provisions of s17¹⁰ of the *Status of Children Act (NSW)* it will prevail over any presumption of parentage which may apply out of birth registration under s11¹¹ of the *Status of Children Act (NSW)*, or s69R of the *Family Law Act*.

The facts of *re Michael: surrogacy arrangements* involved the intending parents entering into an arrangement with the intending mother's own mother to act as the surrogate mother. The surrogate mother underwent an IVF procedure whereby the intending father provided the sperm donation and an egg donation came from a third person. The surrogate mother was in a de facto relationship.

After the birth of the child the surrogate mother surrendered the child to her daughter and her husband. The surrogate mother and the intended father (the sperm donor) were named as parents on the birth certificate.

By virtue of the operation of s60H of the *Family Law Act* the surrogate mother and her de facto partner were presumed parents of the child. However, the intending father/sperm donor being named on the birth certificate had a presumption of parentage under s69R of the *Family Law Act*. The presumption of parentage of the

⁹ S.14 *Status of Children Act (NSW)* makes provision for presumptions of parentage where the child was conceived by way of an artificial conception procedure. The presumptions operate in similar terms to that under s.60H *Family Law Act*.

¹⁰ S.17 *Status of Children Act (NSW)* deals with conflicts between presumptions of parentage, and provides irrebuttable presumptions will prevail over rebuttable presumptions.

¹¹ S.11 *Status of Children Act (NSW)* is in similar terms to s.69R *Family Law Act* making provision for a presumption of parentage arising out of birth registration.

intending father/sperm donor was in conflict with the presumption of parentage applying to the surrogate mother's de facto partner. The presumption of parentage under s.60H(1) *Family Law Act* is irrebuttable, whereas the presumption of parentage under s.69R *Family Law Act* is rebuttable. Given that s17 of the *Status of Children Act (NSW)* is incorporated into the presumptions of parentage under s60H and provides that irrebuttable presumptions of parentage will prevail over rebuttable presumptions of parentage, the presumption of parentage of the surrogate mother's de facto partner prevailed over that of the intended/sperm donor.

The consequence of the operation of the presumptions of parentage under s.60H *Family Law Act* and s.69R *Family Law Act*, and of the decision in *re: Michael, surrogacy arrangements* for gay male couples entering into surrogacy arrangements is that being named on the birth certificate as a parent will be insufficient to give that person a presumption of parentage, and therefore will not enable that person to exercise parental responsibility over the child. This is the correct strictly legal/technical position. However, what may be occurring in practice within the community may be different.

Part 4

State/Territory Laws – parentage transfer mechanism

ACT law

The *Parentage Act 2004 (ACT)*, in division 2.5 of that Act, makes provision for parentage orders. It has a mechanism whereby in surrogacy arrangements the status of parent of the surrogate mother and her married or de facto partner are transferred to and conferred upon the intending parents. The relevant sections, s23-26, provide as follows:

24 Application of div 2.5

This division applies to a child if—

- (a) the child was conceived as a result of a procedure carried out in the ACT; and*
- (b) neither birth parent of the child is a genetic parent of the child; and*
- (c) there is a substitute parent agreement, other than a commercial substitute parent agreement, under which 2 people (the **substitute parents**) have indicated their intention to apply for a parentage order about the child; and*
- (d) at least 1 of the substitute parents is a genetic parent of the child; and*

(e) *the substitute parents live in the ACT.*

25 Application for parentage order

- (1) *An application may be made to the Supreme Court for a parentage order about the child.*
- (2) *The application may be made by either or both of the substitute parents.*
- (3) *The application may only be made when the child is between the ages of 6 weeks and 6 months.*

26 Parentage order

- (1) *The Supreme Court must make a parentage order about the child if satisfied that—*
 - (a) *the making of the order is in the best interests of the child; and*
 - (b) *both birth parents freely, and with a full understanding of what is involved, agree to the making of the order.*
- (2) *However, the Supreme Court may dispense with the requirement under subsection (1) (b) in relation to a birth parent if satisfied that—*
 - (a) *the birth parent is dead or incapacitated; or*
 - (b) *the applicants cannot contact the birth parent after making reasonable inquiries.*
- (3) *In deciding whether to make a parentage order, the Supreme Court must take the following into consideration, if relevant:*
 - (a) *whether the child's home is, and was at the time of the application, with both substitute parents;*
 - (b) *whether both substitute parents are at least 18 years old;*
 - (c) *if only 1 of the child's substitute parents has applied for the order, and the other substitute parent is alive at the time of the application, whether—*
 - (i) *the other substitute parent freely, and with a full understanding of what is involved, agrees to the making of the order in favour of the applicant substitute parent;*
or
 - (ii) *the applicant substitute parent cannot contact the other substitute parent to obtain his or her agreement under subparagraph (i);*
 - (d) *whether payment or reward (other than for expenses reasonably incurred) has been given or received by either of the child's substitute parents, or either of the child's birth parents, for or in consideration of—*
 - (i) *the making of the order; or*
 - (ii) *the agreement mentioned in subsection (1) (b); or*
 - (iii) *the handing over of the child to the substitute parents; or*
 - (iv) *the making of any arrangements with a view to the making of the order;*
 - (e) *whether both birth parents and both substitute parents have received appropriate counselling and assessment from an independent counselling service;*
 - (f) *if a birth parent is dead or incapacitated or cannot be contacted—any evidence before the court that the birth parent no longer intended or intends the substitute parents to obtain a parentage order about the child.*
- (4) *The Supreme Court may take into consideration anything else it considers relevant.*
- (5) *For subsection (3) (e), a counselling service is not **independent** if it is connected with—*
 - (a) *the doctor who carried out the procedure that resulted in the birth of the relevant child; or*
 - (b) *the institution where the procedure was carried out; or*
 - (c) *another entity involved in carrying out the procedure.*
- (6) *The Supreme Court must make a parentage order under subsection (1)—*
 - (a) *if both substitute parents apply for the order—in favour of both substitute parents; or*
 - (b) *if only 1 substitute parent applies for the order, and the other substitute parent is dead or incapacitated at the time of the application (unless the court is satisfied that, at the time of death or incapacitation, the deceased or incapacitated substitute parent no*

- longer intended or intends to apply for a parentage order about the child)—in favour of both substitute parents; or*
- (c) *if, in any other case, only 1 substitute parent applies for the order—in favour of the applicant substitute parent.*

The jurisdictional requirements as set out in s24 of the *Parentage Act*, and they include:

1. The artificial conception procedure resulting in the conception of the child must have been carried out in the ACT;
2. Neither birth parent of the child provided any genetic material for the conception of the child;
3. There is an agreement between the parties, other than a commercial agreement, under which the intending parents have indicated their intention to apply for a parentage order about the child;
4. At least one of the intending parents is a genetic parent of the child (ie has provided the sperm donation or the egg donation); and
5. The intending parents live in the ACT.

Western Australia law

Similar provisions for a transfer of parentage mechanism apply in Western Australia under the *Surrogacy Act*¹² as follows:

19. Circumstances for seeking parentage order

(1) *An application can be made under this Part for a parentage order only if —*

(a) *the arranged parents reside in Western Australia and at least one arranged parent has reached 25 years of age; and*

(b) *when the surrogacy arrangement was entered into or after that time but before the application is made —*

¹² Sections 19 – 21 *Surrogacy Act*.

- (i) *the arranged parents are an eligible couple; or*
- (ii) *one of the arranged parents, or the arranged parent if there is only one, is an eligible person.*

(2) *In subsection (1)(b) —*

eligible couple means 2 people of opposite sexes who are married to, or in a de facto relationship with, each other and who, as a couple —

(a) *are unable to conceive a child due to medical reasons not excluded by subsection (3); or*

(b) *although able to conceive a child, would be likely to conceive a child affected by a genetic abnormality or a disease;*

eligible person means a woman who —

(a) *is unable to conceive a child due to medical reasons not excluded by subsection (3); or*

(b) *although able to conceive a child, would be likely to conceive a child affected by a genetic abnormality or a disease; or*

(c) *although able to conceive a child, is unable for medical reasons to give birth to a child.*

(3) *The medical reasons for being unable to conceive a child that are referred to in the definitions of **eligible couple** and **eligible person** do not include —*

(a) *a reason arising from a person's age; or*

(b) *a reason prescribed for the purpose of the Human Reproductive Technology Act 1991 section 23(1)(d).*

20 . Applying for a parentage order

(1) *In the circumstances described in section 19, the arranged parents may, if the making of the order would not be prevented by section 16(1), apply in accordance with this section for a parentage order.*

(2) *The application can be lodged with the court only after a period of 28 days has elapsed since the day on which the child is born.*

(3) *The application cannot be lodged with the court more than 6 months after the day on which the child is born except with the leave of the court, which may be given in exceptional circumstances.*

(4) *If the child was born before the day fixed under section 2(b) as the day on which this section comes into operation, the application may, despite subsection (3), be lodged within one year after that day.*

(5) *Before the court considers the application, a certified copy of the child's birth certificate must, if it is available, have been lodged with the court.*

21 . Court may make parentage order

- (1) *The court may, on an application made under section 20(1), make a parentage order.*
- (2) *Before it makes a parentage order the court has to be satisfied that —*
- (a) *the circumstances that section 19 requires for applying for a parentage order exist; and*
- (b) *except to the extent that subsection (3) authorises the court to dispense with the requirement for a birth parent to have received the counselling, the child's birth parents and the arranged parents have received appropriate counselling about the effect of the proposed order; and*
- (c) *except to the extent that subsection (3) authorises the court to dispense with the requirement for a birth parent to have received the advice, the child's birth parents and the arranged parents have received independent legal advice about the effect of the proposed order; and*
- (d) *except to the extent that subsection (3) authorises the court to dispense with the requirement for a birth parent's consent, the child's birth parents freely consent to the making of the order; and*
- (e) *except in circumstances identified in subsection (4), the child was, when the application for the order was lodged with the court, and is, when the court makes the proposed order, in the day to day care of the arranged parents; and*
- (f) *except to the extent that subsection (3) authorises the court to dispense with the requirement for a birth parent to have agreed, the child's birth parents and the arranged parents have agreed in writing to an appropriate plan (the **approved plan**) in accordance with section 22; and*
- (g) *it is in the best interests of the child for the court to make the proposed order.*
- (3) *In circumstances identified in subsection (4) or if the court is satisfied that a birth parent is deceased or incapacitated or that the arranged parents have been unable to contact a birth parent despite having made reasonable efforts to do so, the court may dispense with —*
- (a) *the requirement for the birth parent to have received counselling as described in subsection (2)(b); or*
- (b) *the requirement for the birth parent to have received independent legal advice as described in subsection (2)(c); or*
- (c) *the requirement for the birth parent to consent under subsection (2)(d) to the making of a parentage order; or*
- (d) *the requirement for the birth parent to have agreed to an appropriate plan as described in subsection (2)(f).*
- (4) *The circumstances this subsection identifies are that —*
- (a) *the birth mother is not the child's genetic parent; and*
- (b) *at least one arranged parent is the child's genetic parent.*

(5) *In subsection (4) —*

genetic parent of a child means a person from whose egg or sperm the child is conceived.

The jurisdictional requirements to access the transfer of parentage mechanism in WA includes: -

1. The intending parents reside in WA and at least one is at least 25 years of age;
2. The intending parents are an opposite sex married or de facto couple who either cannot conceive a child for medical reasons, or can conceive a child but it is likely to be born with genetic defects.

Clearly the transfer of parentage mechanism excludes same sex couples.

Unlike the jurisdictional requirements in the ACT legislation, there is no requirement that the artificial conception procedure be carried out in WA, and presumably could extend to arrangements where the intending couple residing in WA enter into a surrogacy arrangement with a surrogate mother interstate or overseas.

Victoria law

Victoria has provisions in the *Status of Children Act 1974*¹³ for a transfer of parentage mechanism by way of parentage orders, similar to the provisions in WA and ACT legislation. The jurisdictional requirements are set out in s.20 as follows:

20 Application for a substitute parentage order

- (1) *The commissioning parents of a child born under a surrogacy arrangement may apply to the court for a substitute parentage order if—*
 - (a) *the child was conceived as a result of a procedure carried out in Victoria; and*
 - (b) *the commissioning parents live in Victoria at the time of making the application.*
- (2) *An application for a substitute parentage order must be made—*
 - (a) *not less than 28 days, and not more than 6 months after the birth of the child; or*
 - (b) *at another time with leave of the court.*
- (3) *Before the court hears the application, the commissioning parents must file a certified copy of the child's birth certificate (if available) with the court.*

¹³ Sections 20 – 26 *Status of Children Act 1974*

Section 20 Status of Children Act sets out the jurisdictional requirements that must exist before the transfer of parentage mechanism can be accessed, including: -

1. The child was conceived by way of an artificial conception procedure carried out in Victoria;
2. The intending parents live in Victoria at the time the Application is made for a parentage order.

The transfer of parentage mechanism in Victoria does not exclude same sex couples, however by operation of s.23 *Status of Children Act*, the jurisdictional requirements contained in s.20 applies to arrangements where the child was conceived via an IVF clinic. Section 23 provides: -

23 Additional requirements for surrogacy arrangements without assistance of registered ART provider

- (1) *This section applies if—*
 - (a) *a surrogacy arrangement was commissioned without the assistance of a registered ART provider; and*
 - (b) *the surrogate mother became pregnant as a result of artificial insemination; and*
 - (c) *the commissioning parents apply under section 20 for a substitute parentage order.*
- (2) *In addition to the matters set out in section 22, the court must also be satisfied—*
 - (a) *that the surrogate mother was at least 25 years of age before entering the arrangement; and*
 - (b) *that the commissioning parents, the surrogate mother and, if her partner is a party to the surrogacy arrangement, her partner have—*
 - (i) *received counselling about the social and psychological implications of making the substitute parentage order, including counselling, if relevant, about any of the matters prescribed for the purposes of section 43(a) of the **Assisted Reproductive Treatment Act 2008**; and*
 - (ii) *received counselling about the implications of the relinquishment of the child and the relationship between the surrogate mother and the child once the substitute parentage order is made; and*
 - (iii) *obtained information about the legal consequences of making the substitute parentage order.*
- (3) *For the purposes of subsection (2)(b), the person must receive counselling from a counsellor within the meaning of section 61(3) of the **Assisted Reproductive Treatment Act 2008**.*

The additional jurisdictional requirements where the child is not conceived via an IVF clinic¹⁴ are as follows: -

1. The surrogacy arrangement was not commissioned via an IVF clinic;
2. The surrogate mother is at least 25 years of age;
3. All parties to the arrangement received counselling about the social and psychological consequences of the arrangement, and of the legal consequences.

As the Victorian legislation only applies to surrogacy arrangements where the artificial conception procedure was carried out in Victoria, the transfer of parentage mechanism provided in this legislation will not capture arrangements involving a surrogate mother where the artificial conception procedure was carried out interstate or overseas.

It is expected that the remaining States and Territories will enact similar laws making provision for the transfer of parentage in surrogacy arrangements.

The problem with the transfer of parentage laws contained in the current laws in the ACT and Victoria is the jurisdictional requirements. The laws can only be accessed by intending parents if they reside in the State or Territory where such laws exist. Provided all of the States and Territories eventually enact transfer of parentage laws in surrogacy arrangements, then this problem will be overcome.

Part 5

Overseas Surrogacy Arrangements

The current state and territory laws providing for the transfer of parentage mechanism in surrogacy arrangements do not apply to overseas surrogacy arrangements, except apparently in WA.

¹⁴ ie, a home donor insemination procedure.

In my experience through volunteering at the Inner City Legal Centre in Sydney and in my own practice, commercial overseas surrogacy arrangements are more common than altruistic surrogacy arrangements occurring within Australia. One of the reasons, I suspect, is that there would probably not be many woman in Australia who would be prepared to undertake the role of carrying a child to be surrendered upon birth, and not receive any reward. No doubt there are other moral ethical and personal views contributing to this.

A few overseas jurisdictions allow commercial surrogacy including India, Thailand, Russia, Canada and California. In my experience with gay male couples and opposite sex couples for that matter, entering into an overseas commercial surrogacy arrangement is far more common.

One of the problems with commercial overseas surrogacy arrangements will include where the arrangement takes place and what laws are in place within those jurisdictions to deal with surrogacy arrangements. For instance, in California not only are commercial surrogacy arrangements legal, contracts for commercial surrogacy arrangements are legally enforceable. I know of a business in Los Angeles named "Growing Generations" which provides a one stop shop service for couples seeking to enter into commercial surrogacy arrangements. The business has its own lawyers who will prepare a contract between the intending parents and Growing Generations to provide the service. The service sources the surrogate mother and a contract is entered into between the intending parents and the surrogate mother. There is a counselling service in the business which will screen the surrogate mother and ensure her suitability for the role, and provide her with counselling after the birth and surrender of the child. The business also has its own IVF clinic providing the IVF treatment.

After the birth of the child the parties, including the intending parents, the surrogate mother and her married or de facto partner, enter into a mechanism whereby a court order is obtained conferring the equivalent of parental responsibility under the *Family Law Act* upon the intending parents. A birth certificate issues naming both intending parents as the parents of the child, even if it is a same sex couple.

Taking the example of an overseas surrogacy arrangement entered into in California, which was the subject of *re Mark*, a number of questions arise. Can the order obtained in the Supreme Court of California be registered in the Family Court of Australia and have effect here as an ‘*overseas child order*’. Section 4 of the *Family Law Act* provides a definition of ‘*overseas child order*’ as follows:

"overseas child order" means:

(a) an order made by a court of a prescribed overseas jurisdiction that:

(i) however it is expressed, has the effect of determining the person or persons with whom a child who is under 18 is to live, or that provides for a person or persons to have custody of a child who is under 18; or

(ii) however it is expressed, has the effect of providing for a person or persons to spend time with a child who is under 18; or

(iii) however it is expressed, has the effect of providing for contact between a child who is under 18 and another person or persons, or that provides for a person or persons to have access to a child who is under 18; or

(iv) varies or discharges an order of the kind referred to in subparagraph (i), (ii) or (iii), including an order of that kind made under this Act; or

(b) an order made for the purposes of the Convention referred to in section 111B by a judicial or administrative authority of a convention country (within the meaning of the regulations made for the purposes of that section).

The definition of ‘*overseas child order*’ does not include any order, however described, conferring parental responsibility. Therefore any order obtained in the Supreme Court of California conferring the equivalent of parental responsibility upon the intending parents will not have any effect in Australia if registered in the Family Court of Australia.

The “*prescribed overseas jurisdiction*” referred to in the definition of “*overseas child order*” is dealt with in regulation 14 of the Family Law Regulations as follows: -

Meaning of prescribed overseas jurisdiction

*For the purposes of the definition of **prescribed overseas jurisdiction** in subsection 4 (1) of the Act:*

(a) each country or part of a country, set out in column 2 of an item in Schedule 1A is declared to be a prescribed overseas jurisdiction for the purposes of:

(i) subsection 4 (1) of the Act, in relation to the definition of **overseas child order** ; and

(ii) sections 70M and 70N of the Act; and

(b) each country, or part of a country, set out in Schedule 2 as a reciprocating jurisdiction is declared to be a prescribed overseas jurisdiction for the purposes of:

(i) subsection 4 (1) of the Act, in relation to the definition of **overseas maintenance agreement** ; and

(ii) paragraph 89 (b) of the Act.

Column 2 of Schedule 1A of the *Family Law Regulations* only lists the various States of the United States of America as a prescribed overseas jurisdiction for the purpose of registering an “*overseas child order*”.

What about the birth certificate issuing in California naming both the gay male couple, the intending parents, as parents of the child. Does the presumption of parentage under s69R of the *Family Law Act* apply to this?

Applying the decision in *re Michael: surrogacy arrangements*, and the operation of the presumptions of parentage under s60H of the *Family Law Act*, despite the birth registration details the presumption of parentage under s60H applying to the surrogate mother and her married or de facto partner prevail over that under s69R to the intending parents.

The solution for the intending parents in this scenario is to apply to the Family Court of Australia for a parenting order conferring parental responsibility upon them and providing that the child live with them. It is the same scenario that presented as in the case of *re Mark*.

Applying for the parenting order where there is an overseas surrogacy arrangement presents its own logistical problems. Who are the necessary parties to the application? The *Family Law Rules* provide in rule 6.02(2), as to the necessary parties to any application, as follows:

Necessary parties

(1) *A person whose rights may be directly affected by an issue in a case, and whose participation as a party is necessary for the court to determine all issues in dispute in the case, must be included as a party to the case.*

Example

If a party seeks an order of a kind mentioned in section 90AE or 90AF of the Act, a third party who will be bound by the order must be joined as a respondent to the case.

(2) *If an application is made for a parenting order, the following must be parties to the case:*

(a) *the parents of the child;*

(b) *any other person in whose favour a parenting order is currently in force in relation to the child;*

(c) *any other person with whom the child lives and who is responsible for the care, welfare and development of the child;*

(d) *if a State child order is currently in place in relation to the child — the prescribed child welfare authority.*

(3) *If a person mentioned in subrule (2) is not an applicant in a case involving the child, that person must be joined as a respondent to the application.*

Note *The court may dispense with compliance with a rule (see rule 1.12).*

Under sub rule 2 where a parenting order is sought the parties must include the parents of the child, any other person whose favour a previous parenting order has been made or any person with whom the child lives and who is responsible for the care, welfare and development of the child.

Where an overseas surrogacy arrangement is concerned, the parties to the parenting application will of necessity include the intending parents, the surrogate mother and her married or de facto partner.

If the parenting order is made by consent, then it is recommended the intending parents file an initiating application with an affidavit of both intending parents in support detailing the factual history leading to the surrogacy arrangement, the

conception and subsequent birth of the child, and the surrender of the child. Any written surrogacy agreements or communications concerning the arrangements should be annexed to the affidavit material. The application will then need to be served upon the surrogate mother and or her married or de facto partner. In most cases the orders will be made by consent and the surrogate mother and her married or de facto partner will need to sign the consent orders.

If the surrogacy arrangement occurred in a country where the first language is not English, such as India or Thailand, then consideration will need to be given as to whether the surrogate mother and her married or de facto partner speak English. If not, then the consent orders, the initiating application and affidavit material in support will need to be translated into the relevant language.

My advice to parties entering into overseas surrogacy arrangements is to ensure that the surrogate mother and her married or de facto partner are well aware of the necessity to follow through with the legal mechanism through the Family Court of Australia, to seek their cooperation, and to have parenting orders prepared in advance for them to sign shortly after the birth and surrender of the child.

There will also need to be consideration as to service of the application and affidavit in support upon the surrogate mother and her married or de facto partner after it is filed in the Family Court.

If the surrogate mother and her married or de facto partner cannot be located after filing the application, or if they do not cooperate, then consideration may need to be given to an application for dispensation of service or substituted service, and then proceeding with the application as though it is either contested, or undefended.

Apart from the issue of obtaining a parenting order conferring parental responsibility upon the intending parents, they will also need to consider applying for citizenship by descent for the child, and having an Australian passport issue for the child. In order to obtain this in India, for instance, there will need to be evidence that one of the

intending parents is the 'biological parent'¹⁵. This will involve the party providing the sperm donation undergoing DNA testing to establish the biological link to the child and that he provided the DNA for the child. The parties will also either need to obtain a court order in India declaring the intending parents to be parents of the child, if that mechanism actually exists, or alternatively a written advice from a family law expert in India advising that the intending parents are considered the parents of the child under Indian law. Therefore in these arrangements the intending parents will need to obtain legal advice from the place where the child is born as to their status under the local law.

In my experience, parties entering into surrogacy arrangements in India often deal with an agent who will source the surrogate mother, make arrangements for her IVF treatment at an IVF clinic, make arrangements for her counselling, arrange a lawyer to provide the necessary legal advice, and make the travel and accommodation arrangements for the intending parents.

Some overseas places will issue a birth certificate naming both intending parents to a surrogacy arrangement, where they are an opposite sex couple, as the child's parents. The birth certificate does not say the child was conceived by an artificial conception procedure, that it was a surrogacy arrangement, or who provided the genetic material for the child. Although in these cases the intending parents are strictly speaking not parents by operation of the various provisions of the *Family Law Act*, anecdotally I understand that intending parents both named on the birth certificate do not follow up and obtain parenting orders conferring parental responsibility upon them because no-one would know they are strictly speaking not parents.

Part 6

Law Reform

¹⁵ This usage of the word parent does not involve the application of the presumptions of parentage under the Family Law Act

Although the enactment of uniform legislation in the States and Territories around Australia dealing with altruistic surrogacy arrangements is a welcome advance, there is still more work to do. There are jurisdictional variations between the current laws of the ACT, WA and Victoria, but essentially the transfer of parentage mechanism is largely uniform.

It is with respect to overseas surrogacy arrangements where intending parents cannot take advantage of State and Territory laws making provision for the transfer of parentage mechanism. In those cases the intending parents would need to apply to the Family Court of Australia for a parenting order conferring parental responsibility upon them. This does not give the intending parents the status of *parent* for the purposes of the *Family Law Act*, and all of the rights and privileges that parents enjoy under other areas of law.

One possible solution to the deficiency in the laws dealing with overseas surrogacy arrangements might be if the transfer of parentage laws concerning surrogacy arrangements were dealt with at a Federal level in the *Family Law Act*. This would require the states and territories conferring upon the Commonwealth the power to make laws with respect to children conceived by way of an artificial conception procedure in surrogacy arrangements. The laws could provide for, at a Commonwealth level, the mechanism for the transfer of parentage from the surrogate mother and her married or de facto partner to the intending parents, whether the arrangements occurred within the one state or territory, interstate, or involving an overseas arrangement.
