

Children's Involvement in the 6th World Congress

One of the highlights of the World Congress was the involvement of the children. The 6th World Congress was delighted to partner with Operation Stitches a non-profit charity working with children from in the inner city housing commissioner flats in Melbourne. Operation Stitches runs various programs which teach good life choice with an anti-crime, anti-drug, anti-violence emphasis. Linda Rayment organised for the children to be flown to Sydney and set up an interactive TV Channel that saw the voice of children being heard on various children's issues including bullying.

Three children from Operation Stitches interviewed delegates and

speakers whilst being mentored by industry professionals in different aspects of media including directing, presenting, script writing and sound.

Linda and the children visited the set of Home and Away as part of their mentorship experience and ultimately presented a package from the kids TV channel at the closing company. The video was very well received and it was fantastic to hear from the next generation of leaders as to what needs to be done in their opinion to help protect and promote the rights of children.

The 6th World Congress was an extremely successful event and Linda and Sally are excited to continue working with the World Congress to promote and protect the rights of children.



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NICHOLE'S NEWSLETTER

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NICHOLE'S
Family Lawyers

#29 -- May 2013 Edition

NEWSLETTER
NICHOLE'S
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What's new?

We welcome both partner Monica Blizzard and associate Kate Ettershank back from maternity leave on Monday 6 May 2013 and 21 May 2013 respectively.

Sally Nicholes and associate Linda Rayment attended and participated in the World Congress on family law and children's rights that took place in Sydney from 17 to 20 March 2013. Our firm provided significant operational support to the World Congress as well financial sponsorship given the extraordinary achievements progressed from this organisation every 4 years from a human rights perspective; in particular for children. A list of some of the achievements of the World Congress including the youth forum on cybersafety is highlighted at page 6 below.

Kristina Antoniadis of our office is now an Accredited Family Dispute Resolution Practitioner gaining her accreditation through the Attorney General's department. This additional qualification compliments Kristina's growing Mediation practice and she is available to see parties post separation in an attempt to facilitate agreement without the parties need to proceed to protracted litigation through the Family Court. As many existing mediation and family dispute resolution government funded services across Victoria are fully booked and have lengthy waiting lists, Kristina is

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available to offer her services as a fully-qualified and accredited mediator and family dispute resolution practitioner. As an Accredited Family Dispute Resolution Practitioner, Kristina is able to issue Section 60I Certificates to parties which is the prerequisite to any party seeking to commence parenting proceedings before the Court.

This newsletter is otherwise devoted to the topical issue of surrogacy.

What is Surrogacy?

Surrogacy is an arrangement whereby a single person or couple (“the intended parent(s)”) enter into an arrangement with a woman (“the surrogate mother”) who will carry their child, and then surrender the child to the intended parents upon birth with the intention that the intended parents will raise the child as their own.

Traditional v Gestational

There are two forms of surrogacy, traditional and gestational. Traditional surrogacy involves the surrogate mother undergoing donor insemination and utilises her own ovum to conceive the child. It should be noted that this form of surrogacy does not ordinarily occur in Assisted Reproductive Treatment facilities in Australia but usually occurs through home self-insemination. Gestational surrogacy involves the harvesting of the ovum from a third person (or one of the intended parents depending on the circumstances) and fertilized by using the sperm donated from the

intended parent or a third person. Once fertilised, the embryo is then implanted in the surrogate mother.

Altruistic v Commercial

These forms of surrogacy can then be further categorized into either Altruistic or Commercial surrogacy arrangements. Altruistic surrogacy arrangements are privately organised but save for the payment of expenses that are legislatively sanctioned; there is no other payment allowed for this arrangement. Altruistic surrogacy is legal in all states and territories of Australia. Whilst being legal in all states and territories there are some variations regarding Altruistic surrogacy i.e. in the ACT those wishing to enter into Altruistic surrogacy arrangements must be a couple and the surrogate must also be a couple.

In South Australia Altruistic surrogacy whilst being legal is only available to heterosexual relationships and in Western Australia, Altruistic surrogacy is only available to married, defacto or single women but is not available to same sex relationships or gay individuals. In commercial surrogacy arrangements, the surrogate mothers are paid a fee for carrying the child. Commercial surrogacy is outlawed in all states of Australia, except for the Northern Territory, with NSW, QLD and the ACT taking a step further imposing extraterritorial criminal sanctions for those who engage in commercial surrogacy overseas and return with the child.

Mary of Denmark as their patron.

The 6th World Congress brought together organisations such as the Alannah and Madeline Foundation, the Australian Federal Police, Facebook, Children’s Rights International (CRI) and Operation Stitches to raise awareness of various issues including cybersafety, child trafficking, domestic violence to name a few.

Child Friendly Court System in Cambodia

CRI works on a number of advocacy projects including working with the government of Cambodia to establish a child friendly court system in circumstances where only 35 years ago approximately 2.3 million Cambodian people were decimated in the genocide. This included the majority of lawyers, judges and professors. A major highlight of the World Congress was hearing from Her Excellency, Secretary of State, Judge Chan Sotheavy in relation to rebuilding the children’s court system in Cambodia and the pilot Child Friendly Court Project in Battambang province, which will hopefully lead to changes across the juvenile justice system in Cambodia.

CRI in conjunction with Legal Aid Cambodia, have worked tirelessly to advocate for better treatment of juveniles in Cambodia’s criminal justice system through meetings with government officials, community legal education and judicial education programs.

Voice of Women

Another inspiring plenary speaker was Suraya Pakzad, Executive Director of Voice of Women in Afghanistan. Suraya has been working for several years, at huge risk to her life and family, to protect and care for women in Afghanistan. Suraya spoke how many women are married at a very young age (often 13 to 16 years old) in Afghanistan, denying them of their right to education and often being subjected to domestic violence. Suraya has set up many refuges for these girls; providing them with much needed safety and education and helping them to divorce their much older husbands allowing them to enjoy their childhood. She shared how many of the refuges often come under physical attack and receives no support or funding from the Afghanistan government.

Other matters

There were many challenging and inspiring workshops run on issues including, surrogacy, international adoption, child abduction and the Hague Convention, international enforcement of child support, the need for a Family Drug Treatment Court, domestic violence and sexual abuse allegations in family law matters.

Papers will be available on the World Congress website at www.wcflcr2013.com.

Victoria in circumstances where a licensed ART was not used, thus the parenting orders will fail.

- In NSW, Queensland, Tasmania and WA the requirement that the birth mother obtain counselling and legal advice may be waived if it is in the child's best interest. However in WA this requirement can only be waived if the birth mother is not a genetic parent and at least one of the intended parents is.
- Within the jurisdiction of NSW, Queensland, Tasmania, Victoria and WA the courts, in exceptional circumstances, may make parenting orders concerning the child after it has reached 6 months. However in the states of the ACT and SA no such discretionary power is available to the courts.

As evidenced by the examples above, there is a myriad of legislative differences between all states within the nation. This has the potential of leading many intended parents to be unable to gain parenting orders due to technical non-compliance of pre-arrangement requirements. It is hoped that this issue of jurisdictional variation is addressed in the forthcoming review by the Family Law Council and stands as a reminder to intended parents to make sure they seek specialist legal advice before entering into surrogacy arrangements both in Australia and outside of our jurisdiction.

6th World Congress on Family Law and Children's Rights

On 17 March 2013, Sydney hosted the 6th World Congress on Family Law and Children's Rights which spanned across three (3) days, with over 200 speakers travelling from 30 countries to raise awareness and provoke discussion around family law and children's rights.

Sally Nicholes, Deputy Chair of the World Congress along with Linda Rayment worked tirelessly to help organise the 6th World Congress. Running every four years, the World Congress aims to partner and facilitate various governmental and non-governmental initiatives whose concern is child protection and making the rights of children recognised by the United Nations Convention on the Rights of the Child, a reality.

The World Congress has developed into a major international event bringing together a range of highly regarded individuals ranging from Judges, government officials, legislators, policy makers, senior representatives of law enforcement agencies, practicing and academic lawyers, doctors and health care professionals, as well as educators and Human Rights Organisations to seek outcomes that promote and protect the rights of children from all around the world.

Previous World Congresses have taken place in Cape Town, San Francisco, England, Bath and Canada. The 6th World Congress was thrilled to have Her Royal Highness Crown Princess

The new s 60H and its effect on Surrogacy Arrangements

In November 2008 the *Family Law Amendment (De Facto Financial Matters and Other Measures)* Act 2008 repealed s60H of the Family Law Act and inserted two new sections 60HA ("Children of de facto partners"), and 60HB ("Children born under surrogacy arrangements). Under the previous legislation the Sperm Donor in Assisted Reproductive Treatment (ART) and Surrogacy Arrangements was considered a legal parent under the law and the presumption of equal shared parental responsibility prevailed to the exclusion of any non-biological parent. The Full Court stated in *Aldrige and Keaton* that the intention of the amendments to section 60H was that children should have the same rights and protections to receive proper parenting from the biological parent and that parent's partner, including a same sex parent.

Benefits of the new section 60H and 60H(1) to Lesbian Couples

According to Section 60HA (1) (a), the 'other intended parent' is the spouse or de-facto partner of the biological mother, resulting from ART. This is paramount for lesbian couples who conceive a child through an artificial conception procedure. Further to ss 60H(1) and (2), if a child is conceived through an artificial conception procedure then, the non-biological mother is deemed to be the 'other intended parent' if she was in a de-facto relationship with the biological mother when the child was conceived and she consented to the procedure

being undertaken to conceive the child.

Pursuant to s 60 H(1) (d), the sperm donor is precluded as a parent under the law, that is, they have no legal responsibility for any child born as a result of assisted reproductive technology. This eliminates the complications of the non-biological mother being precluded from parental responsibility and decision making in regards to the child.

Amendments' Effect upon Co-Parental Arrangements

Arrangements between gay fathers and mothers, entering into private co-parenting arrangements in order to conceive a child are becoming increasingly popular. It is very common practice amongst lesbian mothers who seek a known donor to conceive a child through assisted reproductive technology. Although in theory these arrangements appear to work for all parties with a child born to two loving parents (or four, depending on the parental relationship status), it leaves co-fathers vulnerable by virtue of s 60H, to the co-mother to determine their relationship with the child despite the parties intention at the date of conception.

At best, under the provisions within the FLA, a co-father relationship with the child would be determined by section 65C of the FLA as a person concerned with the 'care, welfare and development' of the child but not as a parent. The presumption of equal shared responsibility pursuant to s 61DA does not apply, as the

sperm donor is not deemed a parent given the means of conception. This highlights that whilst the provisions greatly benefit lesbian couples utilising ART and other artificial conception procedures, the law still has a long way to go in regards to protecting gay father's rights stemming from sperm donation.

Commercial Surrogacy: Should it be legal?

There has been increasingly more attention paid to whether or not the time has come to provide a unified legal framework within Australia to deal with surrogacy arrangements. Most predominantly the Chief Federal Court Magistrate John Pascoe has called for amending state legislation to allow for commercial surrogacy. Whilst leading bioethicist Leslie Cannold, heavily opposes the proposed amendments by the Chief Federal Magistrate arguing that Australia should not create a situation where people are economically coerced to enter into surrogacy arrangements.

In 2009 the Australian Standing Council of the Attorneys-General (SCAG) noted that commercial surrogacy "commodifies the child" and "risks the exploitation of poor families for the benefit of rich ones." According to SCAG, this potential for harm justifies criminalising the practice of commercial surrogacy. These harms are evident in surrogacy practices internationally, which is the major premise of Chief Magistrate

Pascoe's proposal. Chief Magistrate Pascoe remains against international surrogacy but argues that legislation will be able to provide a system that guarantees the safety and care of the surrogate mother, intended parents and surrogate child alike. This would be done through best practice guidelines and thorough records.

Former Attorney-General, Nicola Roxon charged the Family Law Council to review the surrogacy laws within Australia and report back by December 2013. Hopefully this will provide a comprehensive look at the issues created by commercial surrogacy in Australia and address the issues facing surrogate parents today.

Indian Reforms

At the end of 2012, the Indian government changed their Policy on the access of commercial surrogacy within the nation by foreigners. The new policy states that foreigners entering India to access commercial surrogacy must do so on a medical visa. A medical visa will only be available to heterosexual couples married for at least two years and provided that the couple's home country's foreign ministry or embassy will certify that they recognise surrogacy. This means that commercial surrogacy is currently not available to same sex or unmarried Australian couples or heterosexual Australian couples who have been married for less than two years. As a result of the current policy in place, foreigners initially visiting fertility

clinics in India must now do so on a medical visa as they consider such visits "treatment".

In order to obtain a medical visa a marriage certificate must be provided. A recent surrogacy conference held in Melbourne and attended by some of our lawyers shed some light in relation to the issues surrounding the legality of commercial surrogacy in Australia and how this affects jurisdictional issues. Several Indian surrogacy lawyers commented that the Australian High Commission is presently drafting a letter which will be available to heterosexual couples who qualify to obtain a medical visa in order to enable them to travel to India to access commercial surrogacy arrangements. Whilst at present the policy has ruled out commercial surrogacy being available to defacto, same sex, single sex and heterosexual couples married for less than two years, but there is positive discussions that a 2010 draft ART Regulation Bill which has not yet been passed in India will in the not too distant future be presented for judicial intervention forcing the Indian Government to pass the ART Regulation Bill and allow commercial surrogacy in India to all couples, heterosexual, defacto, same sex and singles.

This means that all Australian couples will be ineligible to utilise the service as commercial surrogacy is outlawed in all states of Australia and is illegal in NSW, QLD and the ACT.

The recent changes have meant many same sex couples, defacto and singles currently engaged in commercial surrogacy arrangements in India are in limbo unaware as to whether they will be permitted to take their

children back to Australia, despite the changes coming into effect after the arrangements were entered into. Indian surrogacy lawyers are confident and have provided assurance that all children born from commercial surrogacy arrangements entered into prior to the policy coming into effect will be able to return to Australia with their children. It is still early stage, however many Australian couples are eagerly waiting to see the outcome of the practicality and enforcement of the recent reform.

State v State- Call for review

Further to the jurisdictional variance of the extraterritorial criminality of commercial surrogacy, all Australian states have different and even more detailed substantive requirements as well as mandatory pre-conception processes. Due to this the likelihood of mistaken non-compliance increases dramatically. This can result in parentage orders not being granted.

The degree of jurisdictional variation concerning which requirements can be waived by the courts in certain states and which cannot, can create a large amount of confusion for both prospective parents and legal practitioners alike. For example;

- In Queensland, the requirement that the birth mother be over the age of 25 years can be waived in exceptional circumstances when granting parenting orders. However this requirement cannot be waived in NSW or WA, nor in