If Baby Gammy Came to Live In Adelaide – Legal and Ethical Discussion on the Current State of Recognition of Children Born From Overseas Commercial Surrogacy Arrangements

Julie J. Redman, Alderman Redman Lawyers & Mediators

Have you ever thought about the incredible changes in our society brought about by the advent of assisted reproductive treatment? Australia has led the way in the development of the IVF technique under Professor Carl Wood at Monash University and in clinics of excellence including in South Australia.

The first in vitro fertilisation (IVF) baby was Louise Brown born in July 1978 in Manchester. United Kingdom. Only two years later, Candice Reed was the first IVF baby in Australia. Following this, Professor Wood's team mastered the ability to freeze, thaw and transfer embryo's revolutionizing IVF use.

For those unable to conceive using IVF, in recent years the use of surrogacy has become an option in every Australian State. While commercial surrogacy remains illegal in Australia, access to commercial surrogacy for some Australian citizens travelling overseas has raised new dilemmas and questions.

Who should have access to new techniques and new ways of having a child, and at what cost? There are a lot of ethical, social and legal issues enmeshed in this fast changing area. There have been a plethora of articles, inquiries, changing legislation, court cases both State and Federal since 1978.

Should every person have the right to have a family? Should we set limits?

Where is the paramount importance of the best interests of the child? How do we really determine this?

In April 2016, The Parliament of the Commonwealth of Australia House of Representatives Select Committee on Social Policy and Legal Affairs released its report *Surrogacy Matters Inquiry into the regulatory and legislative aspects of international and domestic surrogacy arrangements* [1] (Parliament Inquiry). It recommends the development of a nationally consistent legal framework for altruistic surrogacy in Australia. They identified four key principles:-

- The best interests of the child must be paramount;
- The surrogate mother must have the ability to make free and informed decisions;
- The surrogate must be protected from exploitation; and
- There must be legal clarity about the resulting parent-child relationships.

[1] Parliament of the Commonwealth of Australia House of Representatives Select Committee on Social Policy and Legal Affairs '*Surrogacy Matters Inquiry into the regulatory and legislative aspects of international and domestic surrogacy arrangements'* (April 2016)

This will take some time.

The parentage of children born of surrogacy arrangements is currently regulated largely through State legislation. The *Family Law Act*[2] can deal with parentage and parenting Orders in appropriate matters. The overlap and interconnection of State and Federal laws in this area is complex. Interestingly, Australian courts generally ignore the potential international law implications of children born in another country when an application is before an Australian Court.

This may change as well.

One of the Parliament Inquiry's recommendations is to amend the *Migration Act*[3] for Australians seeking passports for a young child to return to Australia to be screened to ensure that no Australian or international surrogacy laws have been breached while outside Australia and where breaches have occurred, the Minister for Immigration be given authority to make determinations relating to both the best interests and custody of the child.[4]

They also considered whether the birth certificate of the child should include information on gestational, genetic and intended parents, including a record that the child was born as a result of surrogacy arrangement.[5]

John Pascoe, Chief Justice of Federal Circuit Court told the Parliament Inquiry:-

> *'In some jurisdictions, this has resulted in the child becoming stateless. In some jurisdictions, commissioning parents' names are not recorded on child's birth certificate, leading to difficulties in documents such as passports. Conversely, in other jurisdictions, the birth mother's name is purposely omitted in favour of the commissioning parents, creating difficulties in later identifying the surrogate mother if required. The difference between biological parentage and legal parentage is profound and information regarding both are required to satisfy the right of the child to know his/her parents'.*[6]

The Parliament Inquiry found that the principles espoused in the 2013 Family Law Council's Report on Parentage[7] warranted response and implementation. The Report proposed a Commonwealth Status of Children Act which would aim to provide a clear, accessible and consistent statement of the legal parentage of children for the purposes of all Commonwealth laws and for all courts exercising Federal jurisdiction.

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[2] *Family Law Act 1975* (Cth) (as amended)
[3] *Migration Act 1958* (Cth)
[4] Above n1, pg 34
[5] Above n1, pg 19
[6] Above n5, 1.62
[7] Family Law Council '*Report on Parentage and the Family Law Act'* (December 2013) pg 123

Offshore Commercial Surrogacy

Australian's are, in increasing numbers, pursuing offshore commercial surrogacy arrangements often because of the difficulties of negotiating surrogacy in Australia.[8]

Frances Finney of the Department of Immigration and Border Protection submitted to the Parliament Inquiry that the Department deals with approximately 250 offshore surrogacy cases each year.[9]

Queensland,[10] New South Wales [11]and the Australian Capital Territory [12] have each enacted extra-territorial offences in an effort to deter intended parents from accessing commercial surrogacy services overseas. The reality is that no one has been prosecuted under those laws.

Jenni Millbank told the Parliament Inquiry that there has been a '*massive flux'* in the number of Australians choosing particular destination countries as surrogacy laws have changed. She states at page 26 of the Inquiry[13];

> *"What we see is a pattern where 10 years ago all the travel was to America and then about 7 or 8 years ago there was a dramatic shift to India – a huge spike for about 5 years with India. Then India's approach became discriminatory, and then exclusive – first of all of Australians who were not in a married relationship for two years and then Australians altogether. Then you see this dramatic cliff of it dropping off with India and turning to Thailand instead. Then we had the baby Gammy scandal and Thailand closing down, then people turning towards Nepal and then Nepal closing down. Then it moves to Mexico and then turns back to Ukraine, which has been around for quite a while but now looks more attractive. Greece is opening up and a lot of people do fertility treatment in the US but surrogacy in Canada."*

The Australian Human Rights Commission recommended to the Parliament Inquiry[14] that the Australian Government review the regulatory regimes of destination countries to determine whether the rights of the child and the birth mother are properly protected.

There remains a huge potential for exploitation of the birth mother internationally. She is often poor, in debt and sees being a surrogate as a way of improving her standard of living. The concerns include that there is no free and informed consent, that often multiple embryo transfers occur increasing the risk to the mother and abortions are common.

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[8] See discussion in Australian Family Lawyer by Stephen Page '*Avoiding another Baby Gammy'* p.3 (July 2015)
[9] Above n1, 1.69 p22
[10] *Surrogacy Act 2010* (Qld) s.54,s56,s57
[11] *Surrogacy Act 2010* (NSW),s.8,s.11
[12] *Parentage Act 2004* (ACT),s45,s.41
[13] Above n1, 1.92, pg26
[14] Above n1, 1.100, pg28

In Australia increasing social acceptance of families being created by these methods has hardly given us time to have discourse on the ethical issues that such dramatic changes throw up. Statutory and legal changes have been slower but are now moving more rapidly as international concerns increase of the potential for exploitation of surrogate mothers and risks to the welfare of the children born.

How should we consider the social, ethical and legal issues involved in a case like Baby Gammy?

Let's look at the case widely known as 'Baby Gammy' with a particular focus on the April 2016 decision of Chief Justice Thackray of the Family Court of Western Australia. The case is cited as ***Farnell & Li & Chanbua.***[15] *(Farnell)*

I then want to ask, if this case had occurred in South Australia would the outcome have been different.

Twins Gammy, a boy and Pipah a girl were born in Thailand in December 2013. Pipah was brought to Western Australia to live with David John Farnell (**F**) and Wenyu Li (**L**) while Gammy remained in Thailand with the birth mother Pattaramon Chanbua (**C**). Gammy has Downs Syndrome.

This case involved the competing applications of **F** and **L** who sought an Order for Pipah to continue living with them and **C** who sought an Order for Pipah to live with her in Thailand together with her twin brother, Gammy. Her application had been precipitated after hearing that **F** was in fact a convicted paedophile.

F and **L** had returned to Australia with a birth certificate for Pipah issued in Thailand which did not acknowledge **F** as the father. However, a passport was issued by the Australian Embassy for the child to live in Australia as an Australian by descent.

The Applicants **F** and **L** entered into a surrogacy arrangement with **C** in Thailand. The parties resorted to a surrogacy arrangement using **F's** sperm and eggs from an unknown donor. The surrogacy agreement was not signed until *after* the birth of the children.

F is 58 years old and a self-employed electrician. He has lived in Bunbury, Western Australia, most of his life. He was married to Penelope Farnell for many years. The marriage ended when in the late 1990's he was convicted of 22 child sex offences and spent 12 months in gaol.

F is now married to **L** who is 50 years old. She is a Chinese citizen with permanent residency in Australia since marrying **F** in 2004. The family have a close extended family living in the Bunbury area of Western Australia.

[15] *Farnell & Li & Chanbua* [2016] FCWA 17

C is 22 years old and was born in Thailand. She has recently set up a small business in her home and cares for Gammy and her two other children, Game, born April 2008 and Gam, born September 2010. She is married to Nid Chanbua who is 39 years old. He works as a painter 6 days a week. They were married in February 2014, just after the birth of the twins. Thackray CJ was persuaded that the couple were in a 'marriage like relationship' when **C** underwent the surrogacy procedure.[16] Under Thai law they are both the legal parents of the children.

The case received a lot of attention and interest and seen as being of such importance that the Department for Child Protection and Family Support, Australian Human Rights Commission and the Attorney General for Western Australia intervened in the proceedings. An Independent Children's Lawyer was appointed for Pipah. Baby Gammy was not the subject of these proceedings. He remained in Thailand.

How are Pipah's human rights recognised?

Many of the rights in the Convention on the Rights of the Child[17] have been incorporated into Australian Acts.

The Convention and the Acts share a common purpose; namely, that decisions be made in the *best interests of the child*. The United Nations Committee on the Rights of the Child (UNCRC) has explained that one of the ways in which effect can be given to the child's best interest, is by ensuring that if a legislative provision is open to more than one interpretation, the interpretation which most effectively serves the child's best interest should be chosen. Consideration must be given to the short, medium and long term effects of the actions relating to the development of the child over time.[18]

Paragraph 335 of the *Farnell* case sets out the relevant articles that can be picked up out of the Convention on the Rights of the Child.[19] In summary, Pipah has a right to a name and a nationality, and as far as possible, the right to be known and cared for by her parents.

We have obligations, at an international level, to observe many International Covenants.

[16] Above n15, at [87]
[17] Convention on the Rights of the Child 1989
[18] Committee on the Rights of the Child, *General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration,* 62nd sess, UN Doc CRC/C/GC/14 (29 May 2013) 6
[19] See Article 3(1), Article 7(1), Article 8(1), Article 9(1), Article 16 and Article 19.

Public Policy Issues

In the case of *W and C*[20], Crisford J said of public policy issues:-

> "*In recent years the use of artificial insemination procedures has risen dramatically, both here and overseas. They were once procedures of last resort for infertile heterosexual married couples. They have now become mainstream solution for various reproductive challenges including absence of a heterosexual partner. New groups such as single women seeking to raise a child alone, same sex couples and gay men who have arranged for a mother to carry their child have used these procedures.*"[21]

The public policy considerations that Thackray CJ found were relevant in *Farnell* are:-

1. Commercial surrogacy arrangements are forbidden by the law of every State in Australia[22].

2. The law of the Commonwealth in section 21 of the *Prohibition of Human Cloning for Reproduction Act*[23] makes it an offence punishable by 15 years imprisonment to give or offer valuable consideration for the supply of a human egg[24].

3. Altruistic surrogacy is allowed in Australia. Permitted only subject to conditions and the rights of the birth mother and can only be extinguished by Order of a court.[25]

4. The various surrogacy laws insist upon counselling assessment and informed consent and make it clear that the public policy considerations are driven by a desire to protect the vulnerable.[26]

Thackray CJ then compared this to Citizenship laws.[27] Australian citizenship is conferred automatically by descent for a child born as result of surrogacy arrangements, provided that there is a biological link between the child and the commissioning parent, or where an Australian citizen is a parent. This is how Pipah and Gammy both became Australian citizens.

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[20] *W and C* [2009] FCWA 61
[21] Above n20, at [1]
[22] Above n15, at [345]
[23] *Prohibition of Human Cloning for Reproduction Act 2002* (Cth)
[24] Above n15, at [346]
[25] Above n15, at [347]
[26] Above n15, at [348]
[27] Above n15, at [349]

Citizenship laws have not been harmonised with State laws which would exclude men in the position of **F** from being treated as the father of such children, being the sperm donor.

Thackray CJ posits at [353]:-

> *"Whilst the public policy considerations are strong, I accept that the circumstances in which they can be applied to an individual child are nevertheless limited, since the interests of the child are the paramount consideration when making parenting orders."* [28]

His Honour then went on to adopt the views expressed by Hedley J in the case of *In Re X & Y*[29]:-

> *"What the court is required to do is balance two competing and potentially irreconcilably conflicting concepts."*

The Australian Parliament is attempting to legislate against commercial surrogacy but this may be mitigated by an application of the consideration of a child's welfare.

Thackray CJ noted that if public policy is to be enforced, it needs to be enforced at a much earlier stage.[30]

Child Protection Issues

The Department of Child Protection in Western Australia (the DCP) became aware of concerns about Pipah on 15 May 2014 when it was discovered she was living with **F**, a convicted paedophile. The DCP found that **L** was providing the primary care of Pipah and the close family and community, who were aware of his sexual offending, were providing a safety net.

However, the DCP after investigation in 2014 sought to ensure[31]:-

- That Pipah would never be left alone in the company of **F**;
- That **F** underwent further psychological assessment to understand more about his risk of reoffending;
- That **L** undertake parenting capacity assessments to establish her ability to protect Pipah from sexual harm;
- To establish interventions to reduce this risk including a photobook to be read to the child every three months explaining why she could not be left alone with her father ever.

[28] *Re D and E (2000) 26 FamLR 310 at [21]*
[29] *In re X & Y (Foreign Surrogacy) [2008] EWHC 3030 at [24]*
[30] Above n15, at [353]
[31] See discussion about *Children and Community Services Act* issues in *Farnell* at Part 11, [636] onwards.

When this report was prepared, **C** had not yet applied to have Pipah returned to her.

A safety plan was developed for Pipah and the DCP have a close ongoing relationship with the family. After it was known that **C** was seeking Pipah be returned to her, a report in September 2015 by a caseworker with the DCP wrote:-

> *"Our view is that the risk of abuse to Pipah is currently low and that it is in her best interests to remain living within her family supported by their network…That as long as the family continue to implement all aspects of the safety plan, then the risk of abuse to Pipah or her future friends visiting the home, is low."*[32]

If Pipah had come to live in South Australia, child protection issues could have been dealt with under the South Australian ***Children's Protection Act.***[33]and ***the Child Sex Offenders Registration Act 2014.***[34]

Pursuant to s.66JA of the Sex Offenders Act the Commissioner of Police can apply to the Magistrates Court for a control order and an Order will be made if on the balance of probabilities the registerable offender poses a risk to the safety and well-being of a child, and making an order will reduce that risk.

The Magistrates Court could have set in place very specific orders in the terms of the WA safety plan for Pipah or been even more protective and prevented F from living in the home or coming into contact with Pipah.

In addition pursuant to **s99AA Summary Offences Act 1921** a police officer can seek a Paedophile restraining order if the Court is satidfied that the making of the order is appropriate.

Families SA and SAPOL have far closer scrutiny of these matters now due to our recent spate of high profile paedophile inquiries and convictions

The credibility of **F** and **L** was badly damaged by them falsely informing members of the family that **L** was genetically the mother of the children. They also informed the family that Gammy had died. They further deposed in their Initiating Application Supporting Affidavit that the Thailand surrogacy arrangement had been signed *prior* to the birth of the twins. This was as previously noted, not the case.

They sought for their Application to be heard ex parte seeking not to serve **C** in Thailand. It was made clear in the 2012 case of ***Ellison and Karnchanit***[35] by Ryan J that these matters should not be ex parte

> "*For all the Courts knew, the children may have been victims of child trafficking for whom unidentified parents searched in vain."*[36]

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[32] Above n15, at [110]

[33] *1993* (SA)

[34]

[35] [*2012] 48 FLR 33*

C did not speak English and required assistance of interpreters. **C** suggests that **F** and **L** abandoned Gammy and wanted her to have an abortion when they found out he has Downs Syndrome. **F**'s name was not placed on the birth certificates of the children and hence the Australian Embassy had no record of **F** being the father. As an aside, Thackray CJ did not find any truth in the allegations Baby Gammy had been abandoned nor that **F** and **L** had sought **C** have an abortion when they discovered Gammy had Downs Syndrome.[37]

The Legislative Framework

There were no less than 14 pieces of relevant legislation that Thackray CJ had to consider in his interpretation of the relevant statutory provisions.

The Family Court of Western Australia is unique in the Australian legal system in that it is the only State Family Court. In all other States in Australia, family law is determined in a Commonwealth Family Court system. The 275 page judgment traverses in great detail the interrelationship of the relevant Western Australian laws and the *Family Law Act*. I recommend reading this.

Thackray CJ found there was no jurisdiction to make parentage orders pursuant to their State Surrogacy Act.[38] Mr and Mrs C remained the legal parents of Pipah.

But what If Pipah had returned to live in South Australia?

Could F and L seek any access to parentage Orders via the Family Relationships Act surrogacy provisions in South Australia?

In 2009, amendments to the South Australian *Family Relationships Act*[39] recognised altruistic surrogacy arrangements and set up strict criteria to access parentage orders following the birth of a child pursuant to a Recognised Surrogacy Arrangement.[40]

Importantly, surrogacy is only available to heterosexual couples in a recognised relationship and the commissioning mother must be infertile, unable to carry a pregnancy or to give birth or there appears to be grave risk to a potential child.

It is not open to same sex couples or single people.

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[36] Above n32, at [4]
[37] Above n15 at [169] and [170]
[38] See discussion in *Farnell* at [191] *The Family Court of Western Australia and its powers*
[39] *Family Relationships Act* 1975 (SA)
[40] See section 10HA of the *Family Relationships Act* 1975

It is not the intention of this paper to canvas in detail the criteria in the Act. I refer you to the Law Society of South Australia Bulletin May 2015 *'Paving a way forward to surrogacy arrangements in South Australia'*[41] for a detailed discussion.

The South Australian Law Reform Institute (SALRI) based at the University of Adelaide has released an Audit Report in September 2015[42] and a Roundtable Report in March 2016[43] recommending reform of the current legislation for Assisted Reproductive Treatment and Surrogacy to remove the discrimination of access on the grounds of sexual orientation, gender identity and relationship status.

Importantly, in South Australia under the *Family Relationships Act* and the 1988 *Assisted Reproductive Treatment Act,*[44] a woman who gives birth to a child conceived by assisted reproductive treatment is the mother of the child, whether or not the child was conceived by the fertilisation of an ovum taken from another woman[45].

In 2014, in the shadow of the 'Baby Gammy' case, a number of amendments to the South Australian surrogacy laws were initiated.[46]

The 'improvements' as described by The Hon. John Dawkins in his second reading speech included

> *"…Making accessibility of surrogacy availability in this jurisdiction wider, to limit overseas use of the commercial surrogacy process, and to ensure that commercial surrogacy remains banned in South Australia".*[47]

Note that local commercial surrogacy is to remain banned but overseas commercial surrogacy is limited (not banned). Compare this to the bans enacted in Queensland, New South Wales and the Australian Capital Territory. The Federal Inquiry noted these bans were not acting as a deterrent for people seeking to use commercial surrogacy overseas and no prosecutions had resulted. Attorney General Department, Department of Foreign Affairs and Trade (DFAT) and Department of Immigration and Border Protection (DIBP) show no desire to manage the offshore commercial surrogacy arrangements.

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[41] Julie Redman and Matilda Redman-Lloyd, '*Paving a way forward for surrogacy Arrangements in South Australia'* Law Society Bulletin May 2015,
[42] South Australian Law Reform Institute '*Discrimination on the grounds of sexual orientation, gender, gender identity and intersex status in South Australian Legislation'* (Audit Report, September 2015)
[43] South Australian Law Reform Institute *'Removal of Discrimination with Respect to Access to Surrogacy and Assisted Reproductive Treatment'* (Roundtable Report, March 2016)
[44] *Assisted Reproductive Treatment Act* 1988 SA
[45] Section 10C(1) of the *Family Relationships Act* 1975
[46] See *Family Relationships (Surrogacy) Amendment Bill 2015*.
[47] South Australia, *Parliamentary Debates*, Legislative Council, 12 November 2014, 1567-58 (John Dawkins)

The amendments to the South Australian *Family Relationships Act* enable a *'Recognised Surrogacy Agreement' to include a 'Prescribed International Surrogacy Agreement'*.[48]

A '*Prescribed International Surrogacy Agreement'* under the Act

> *'An agreement of another country declared by the Regulations, or, an agreement between South Australian commissioning parents and an overseas resident, approved by the Minister.'*[49]

Presently, the Regulations do not contain any declarations in relation to the provision; and the Attorney General's Department (the responsible Minister) confirmed that no process currently exists to gain such approval by the Minister.[50]

Given the South Australian Attorney General as the relevant Minister has no process for recognising or approving an overseas commercial surrogacy agreement, the Farnell's in the Baby Gammy case would have no greater support in South Australia. However, the legislation is in place to recognise some overseas commercial surrogacy arrangements in the future.

The other major 'improvements' include the creation of a Framework for Surrogacy and a Surrogate Register. Whilst both of these are still being developed with the Attorney General's Department, the recent Parliament Inquiry commended the South Australian government for this initiative.[51]

If **F** and **L** were able to fall within the recognition of limited overseas commercial surrogacy arrangements, they could bring an Application for parentage Orders to the Family Court of Australia. They would also be able to direct the Registrar of Births, Deaths and Marriages (SA) to change the birth certificate of Pipah to recognise them as Pipah's parents and **C**'s would thereafter no longer be the parents of the twins.

Who are Pipah's parents?

It is the law rather than genetics which imposes the obligations and responsibilities attached to parenthood. Therefore, the law must determine which individuals are to be regarded as parents of a child.

F and **L** did not qualify for a parentage transfer under the Western Australian *Surrogacy Act*[52] as they did not enter into a surrogacy agreement in accordance with the Act. As there was donation of **F's** sperm to **C,** then **C** and her husband are the father and mother respectively of Pipah.

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[48] *Family Relationships Act 1975* (SA) s 10F.
[49] Ibid.
[50] Personal Communication, Friday 13 May 2016.
[51] Above n1 at [1.56-1.57]
[52] 2008 (WA)

The only other way to change the legal status of the **C's** as parents of Pipah would have been adoption under State law.

This is the same in South Australia.

Having concluded the State Act had no ability to determine **F** and **L** were parents of Pipah, Thackray CJ turned to the federal jurisdiction, the Commonwealth F*amily Law Act*. The objects of the *Family Law Act* and the principles underlying them must guide his considerations.

Why is legal parentage important?

In the 2011 case of *Dudley & Chedi*[53] Watts J stated at [22]:-

"Persons wishing to be declared a parent do so because of the impact non-recognition might have in areas such as:

- *Medical treatment for the child;*
- *Registering with Medicare and health funds;*
- *Applications for things such as passports or school that require a birth certificate specifying the child's parents;*
- *Rights for a child arising upon the death of a parent, including rights to an intestacy and superannuation;*
- *The ability of a child to be referred to as a 'child' in a will; and*
- *Complications in relation to recognition as to entitlements and liabilities under the child support regime and recognition of a child's rights to entitlements on injury or death of a parent in schemes of workers' compensation."*

Parental responsibility Orders do not provide the same level of protection to a child as having legal parents. Parenting responsibility gives a person decision-making responsibility for the welfare of the child until it reaches 18 years of age

[53] *Dudley & Chedi [2011] FamCA 502*

What are the relevant provisions that assist us to determine parentage in the *Family Law Act*?

Surprisingly there is no definition of parent in the Act.

In the 1999 case of ***Tobin v Tobin***[54], the Full Court of the Family Court of Australia held the natural meaning of the word 'parent' is a person who has *'begotten or borne a child'*[55] a father or mother. Hence biological father and mother of a child and not a person who stands in loco parentis.

But how should this be applied to F and L?

Under State law a donor of sperm in Western Australia and South Australia is not the father of the child unless he is deemed the father under a recognised surrogacy agreement.

Keyes and Chisholm[56] suggest in the absence of any legislation specifically dealing with the question, in a gestational surrogacy situation the male commissioning parent who supplied the sperm would probably be the legal father under the *Family law Act*, but it would be uncertain whether the mother would be the birth mother or the egg donor.
In the case of **L,** she is neither.

The *Family Law Act* contains a number of presumptions of parentage.

A child born to a married woman during the marriage is presumed to be the child of the woman and her husband.[57]

A child born to a woman in a de facto relationship is presumed to be the child of the woman and her partner.[58]

A child is presumed to be the child of a person named as a parent on the child's birth certificate.[59]

All these presumptions are rebuttable.[60] But are these presumptions applicable to children born outside Australia in commercial surrogacy situations? It would seem not.

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[54] *[1999] FLC 92-848*
[55] Above n53, at [40]
[56] Mary Keyes and Richard Chisholm '*Commercial Surrogacy - Some troubling family law issues'* (2013) p8
[57] See *Family Law Act 1975* (Cth) section 69P
[58] See *Family Law Act 1975* (Cth) section 69Q
[59] See *Family Law Act 1975* (Cth) section 69R
[60] See *Family Law Act 1975* (Cth) section 69U

The determination of parentage where there has been artificial conception procedures and surrogacy is determined by section 60H[61] and section 60HB[62] respectively. Ryan J in *Ellison* [63] believed these provisions had extra territorial effect and could apply to international surrogacy cases.

In the case of **F** and **L** and **C**, section 60HB cannot apply because the section limits its operation to surrogacy arrangements if a Court has made an Order under a prescribed law of a State or Territory law.

Could section 60H apply? While Pipah was born as a result of artificial conception procedures the effect of applying that section would be to deem **C** and her husband the parent of Pipah which is the same effect under Thai and Western Australian law in any event.

In *Farnell,* Thackray CJ rejected the 2013 case of ***Blake and Anor***[64] where Crisford J gave an expanded meaning of 'parent' to incorporate the sperm donor in a commercial surrogacy arrangement[65]. In that case, the sperm donor's male de facto partner had applied to adopt the resulting twins. Sperm donor could not come within the definition of birth parent. She left room for an expanded definition.

He did not believe the intention of the sperm donor made a difference and would create yet another layer of uncertainty of definition of parent.

Sections 69V and 69VA[66] may be of assistance. Evidence can be given to prove parentage. This is usually evidence of DNA testing. Care must be taken to comply with the regulations made under section 69C of the Family Law Act as to these testing procedures and who has authority to take DNA samples from a child. Under Thai and Australian law, only the birth mother **C** and her husband had parental responsibility and were the only ones permitted to authorise a DNA sample. See *Ellison*[67] for a lengthy discussion on these issues.

Having determined that that he was unable to declare **F** and **L** parents or to provide a declaration of parentage, Thackray CJ directed his attention to whether parenting Orders should or could be made in favour of **F** and **L**. Remember that Pipah has now been living with **F** and **L** for nearly 3 years.

It is well known that the objects of the Family Law Act s.60B require the Court to ensure the best interests of children are met by (a) ensuring that children have the

[61] See *Family Law Act 1975* (Cth) section 60H
[62] See *Family Law Act 1975* (Cth) section 60HB
[63] Above n34 at [49]
[64] *[2013] FCWA 1*
[65] Above n15 at [370]
[66] See Family Law Act 1975 (Cth) section 69V and 69VA
[67] Above n34

benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child; and

(b) protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence; and

(c) ensuring that children receive adequate and proper parenting to help them achieve their full potential; and

(d) ensuring that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.

(2) The principles underlying these objects are that (except when it is or would be contrary to a child's best interests):

(a) children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and

(b) children have a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other people significant to their care, welfare and development (such as grandparents and other relatives); and

(c) parents jointly share duties and responsibilities concerning the care, welfare and development of their children; and

(d) parents should agree about the future parenting of their children; and

(e) children have a right to enjoy their culture (including the right to enjoy that culture with other people who share that culture).

The Court looks to section 60CC of the *Family law Act* to assist in determining what is in a child's best interests.

What happens where there is a dispute between parents and non-parents? The approach was laid down by the Full Court in the 2010 case of ***Donnell & Dovey***.[68] At [101]:-

"In a particular case, the maintenance of a meaningful relationship with a non-parent may be equally important or more important than the maintenance and establishment of such a relationship of a parent. As with the additional considerations it is not necessary to classify a non-parent as a 'parent' to ensure that clearly relevant matters are given appropriate weight".

See also Re C and D (1998) FLC 92-815; *Aldridge & Keaton* (2009) FLC 93-421.

[68] *Donnell & Dovey* (2010) FLC 93-428

Thackray CJ at [414] agreed with the Full Court in the 2013 case of *Valentine & Lacerra*[69] that:

> "*The paragraphs in section 60CC(2)-(3) of the Act are in reality only a means to an end, namely to ascertain where the best interest of the child or children might lie." The considerations in section 60CC are only considerations and are a means to an end to determine what is in the best interests of a child.*

Thackray CJ at [417] then agreed with the Full Court in the 2013 case of ***Yamada & Cain***[70] that:

> *"The broad inquiry as to best interests contemplated by the Act recognises that it is not parent*hood *which is crucial to the best interests of the child, but parenting – and the quality of that paren*ting *in the circumstances in which it is given or offered by those who contend for parenting orders." (Original emphasis)*

Balancing competing interests

[353] Adopting the views expressed by Hedley J when discussing the law in the UK in *In re X & Y (Foreign Surrogacy)* [2008] EWHC 3030 at [24] (emphasis added): …the court's discomfort in balancing two competing and potentially irreconcilably conflicting concepts - Parliament's entitlement to legislate against commercial surrogacy vs the best interests of a child. The former must be mitigated by the application of a consideration of the welfare of a child, because that approach is both humane and intellectually coherent. The difficulty is that it is almost impossible to imagine a set of circumstances in which by the time the case comes to court, the welfare of any child (particularly a foreign child) would not be gravely compromised (at the very least) by a refusal to make an order.

The point of admission to this country is in some ways the final opportunity in reality to prevent the effective implementation of a commercial surrogacy agreement.

The Courts decision

Thackray CJ decided Pipah should not be removed from
the only family she has ever known, in order to be placed with people who would be total strangers to her, even though he accepted they would love her and would do everything they could to care for all her needs.

He took into account the strong attachments that Pipah had now formed with the Farnells and many others in Bunbury, as well as the quality of the care she was receiving. He stated while it is a matter of grave concern to leave any child in the home of a convicted sex offender he accepted the expert evidence that while there is a low risk of harm if Pipah stayed in that home, there is a high risk of harm if she were removed. He also also took into account the measures that can be put in place to ensure Pipah is kept safe. There were only two options. He chose the one least unsatisfactory for Pipah, whose best interests are the paramount consideration.

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[69] *Valentine & Lacerra* (2013) FLC 93-539 at [53]

[70] *Yamada & Cain [*2013] FamCAFC 64 at [27]

In summary F&L as non parents of Pipah have been recognised as having parental responsibility for Pipah and have orders to secure she live with them[71]They have not obtained any orders for parentage.

There are some very important changes mooted through the Parliamentary Inquiry to protect children such as Pipah. The laws both Nationally and Internationally in relation to children born of commercial surrogacy arrangements will continue to change as the World attempts to grasp the realities of evermore forms of family creation and the need to protect those vulnerable the children and the birth mother's from exploitation. Throughout the World however the welfare of the children born will remain the paramount consideration .Such is the importance of United Nations Conventions and the anticipated Hague Inter-country surrogacy convention currently under discussion.

Julie Redman May 2016

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