SURROGACY – THE AUSTRALIA LEGAL MAZE:
BALANCING THE RIGHTS OF THE CHILD; THE SURROGATE PARENTS AND THE INTENDED PARENTS

An Australian Family Lawyer's Practical Experiences

JULIE REDMAN

ALDERMAN REDMAN, LAWYERS & MEDIATORS

Accredited Family Law Specialist, Adelaide, Australia

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PREFACE

> ***A surrogacy arrangement is one in which, before the child is conceived, the intended parents and the surrogate mother (and her partner, if she has one) agree that the surrogate will become pregnant with the intention that the child will, at birth be given into the care of the intended parents to raise as their own.***[1]

Surrogacy arrangements in Australia today are increasing but remain controversial and give rise to diverse and passionate views.

Every Australian State and Territory and the Commonwealth Government is grappling with how to balance the role of the State in protecting the best interests of children with its reluctance to legislate on aspects of people's lives as personal as reproduction and family formation.

Australian Prime Minister Rudd, however, supports a national initiative to bring uniform surrogacy laws throughout Australia. Recent amendments to the *Family Law Act*[2] and *Regulations*[3] already recognise surrogacy arrangements made under State and Territory laws.

For white Australians the concept of a 'nuclear family' – a mother and father creating through their own union their biological children, has been at the very core of the

[1] Definition used in discussion paper of Standing Committee of Attorneys-General Australian Health Ministers' Conference Community and Disability Services Ministers' Conference Joint Working Group. '*A proposal for a National model to harmonise regulation of surrogacy (in Australia)*', January 2009

[2] *Family Law Act* 1975 (as amended), s.60HB Children born under surrogacy arrangements, commenced March 2009

[3]. *Family Law Amendment Regulations 2009 (No 1)*

fabric of our society. The nuclear family has Christian Anglo-Saxon roots, brought with white settlement of Australia in the 1700's.

Yet some Indigenous Australians, Torres Strait Islanders, along with many other Pacific Island cultures have a customary adoption practice where they regularly permanently transfer (adopt) a child from one extended family to another to bring about balance in families. “People are considered greedy if they have too many children and do not share them with others”.[4]

Islanders’ have been seeking legal recognition of these children as the children of the intended parents for many years in Australia.

The nature of family and our society has been changing radically over at least the past two decades.

- Australia is now a multi cultural, multi faith society
- Women are delaying having children to a median age of 30.5 years[5]
- Infertility is increasing
- Same sex couples are gaining legal recognition and there are more children being born into these relationships
- 49% of marriages in Australia are breaking down leaving many single parent households

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[4] P.Ban, ‘*Torres Strait Islander Customary Adoption*’, Family Matters, Vol. 35, 1993, p. 17
[5] Australian Bureau of Statistics, 2008

- Radical changes to the *Family Law Act* in 2006 now see children living for substantial or equal time with each parent to ensure a meaningful relationship with both parents[6]

I have been involved in the legal issues surrounding the use of reproductive technology in my home State of South Australia since the late 1980's, following the enactment of the *Reproductive Technology (Clinical Practices) Act* 1988 (SA). I sat for five years as a member of the Council of Reproductive Technology and helped to draft the *(Code of Ethical Clinical Practice) Regulations* 1995. Surrogacy was a topic often raised but always considered not in a child's best interests. This remains the legal position in South Australia to this day.

In my family law practice I have advised dozens of interested couples who wished to understand the legal position in relation to surrogacy in South Australia. Altruistic surrogacy is on the increase in South Australia since clinics in Canberra and Sydney thousands of miles from South Australia have commenced accepting infertile South Australian couples for gestational surrogacy arrangements. 'Reproductive tourism' is a reality.

WHAT ARE THE COMPETING VOICES IN THE SURROGACY DEBATE?

1. The Rights and Best Interests of the Child must be paramount

Overwhelmingly there is consensus of all those involved in the surrogacy debate in Australia that the rights and best interests of the child must be paramount.

[6] *Family Law Act* 1975 (as amended), s.60CC

The premise that the rights and bests interests of the child should be paramount is found in various articles under the United Nations Convention on the Rights of the Child (UNCROC).[7]

Article 7.1 the child shall be registered immediately after birth and shall have:-

(a) the right from birth to a name,

(b) the right to acquire a nationality; and as far as possible

(c) ***the right to know and be cared for by his or his parents****.*

Article 8.1 states parties undertake to respect the right of the child, to preserve his or her identify including nationality, name and family relations as recognised by law without unlawful interference.

Article 9.1 states parties shall ensure that ***a child shall not be separated from his or her parents against their will except when competent authorities subject to judicial review determine*** *in accordance with applicable law and procedures that* ***such separation is necessary for the best interests of the child****. Such determination may be necessary in a particular case such as one involving* ***abuse or neglect*** *of the child by the parents or one where the* ***parents are living separately*** *and a decision must be made as to the child's place of residence.*

However UNCROC was drafted before the development of Assisted Reproductive Technologies (ART) now available to assist people to have children today. For

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[7] Australia ratified this convention in September 1990

example Article 7.1 the right of a child to know or be cared for by his or her parents has no easy application.

In surrogacy it is possible for a child to have potentially six parents:-

- the surrogate mother and her partner;
- the intended parents; and
- sperm and egg donors, if the donor gametes used are not the intended parents.

Both the birth mother and the intended mother could be biological mothers if the intended mother has donated her egg. The egg donor if not the intended mother could also be considered a biological parent. Both will have contributed to the creation of the child.

Yet the birth mother in every Australian jurisdiction, irrespective of whether her egg has been used, is recognized at law as the legal mother of the child.

The partner of the surrogate mother is by law the father of the child. This is even more curious but laws were enacted largely in the mid 1970s to protect semen donors from having to take any responsibility for the child they helped to create. In many jurisdictions donors could remain anonymous and no identifying information could be provided to the child or the parents. This clear denial of a child's right to know their identity is slowly being changed to require donors to be identified.

Opponents to the practice of surrogacy argue that the rights of the child, if applied correctly, should prohibit the use of surrogacy in Australia. Many of these opponents

argue that the rights of a child should be asserted preconception. This would lead to a rejection of the use of surrogacy on the grounds that it was not in the best interests of the child, yet to be conceived, as there will be confusion for the child as to who in fact is their parent.

Others argue that the rights and best interests of the child to be born are not served by the practice of surrogacy because it impacts negatively on their wellbeing.[8] These arguments tend to relate to the separation of the child from its birth mother. The possibility of the child being raised by non biological parents may lead to 'genealogical bewilderment' which will not be in the child's best interest, others argue. This has been refuted by a review of empirical studies carried out over the last 20 years where the authors assert "where adoptive children are in loving homes there may be a desire for ancestral knowledge but this is not indicative of poor mental health".'[9]

Supporters of surrogacy also utilise *UNCROC* by arguing that it is the right of the child to know and be cared for by his or her parents and to this end, it is necessary for the State to legislate to declare who will be the child's parents and ensure that the child will have a right to know and be cared for by them, whether they be biological or social parents. The determination of who will be declared the parents of the child

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[8] *Wellbeing* of a child is measured by considering their social, emotional, physical health and school related functioning. See Australian Institute of Family Studies; *Child Wellbeing Sept. 2005 Growing up in Australia, Longitudinal Studies of Australian Children, Technical paper no.2 Sanson, A., Mission, S.,* and other members of the Outcome Index Working Group.

[9] Lucy Firth, *'Gamete Donation and Anonymity: The ethical and legal debate*', Human Reproduction,Vol.16, No.5, 818-824, May 2001

will be based on what is in the child's best interests. This must be determined by the appropriate court when the parties are in dispute.

Professor Jenny Milbank argues that "it is in the best interests of the children to have a legal relationship, a relationship of care and responsibility that is protected by law within the household in which they live with the intended parents who have brought them into the world”.[10]

2. Interests of the surrogate mother

In all jurisdictions in Australia because the birth mother (or surrogate mother) is the legal mother of the child, she cannot be forced to relinquish the child if she chooses not to. No jurisdiction permits enforceable surrogacy contracts and any disputes at the time of the birth of the child must be determined by the Family Court of Australia as to what is in the child's best interests at that time.

Altruistic gestational surrogacy, at the present time in Australia, is the only likely surrogacy arrangements to be recognised.

Commercial surrogacy is illegal in all Australian States and jurisdictions.

This leads to a concern as to the well being and interests of the surrogate mother. All States advocate for intensive counselling of the surrogate mother and, in fact, all parties involved in a surrogacy arrangement both prior to conception and after the birth of the child.

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[10] University of Technology (Faculty of Law), Sydney, in evidence given to Standing Committee on Law and Justice legislation on altruistic surrogacy in New South Wales, May 2009, p.34

The opponents of surrogacy arrangements, however, argue there is a potential to exploit a vulnerable surrogate mother. The motives for the surrogate mother must be explored carefully in counselling. The decision to become a surrogate is based on many complex psychological issues. Some suggest feelings of regret from having a prior abortion, the desire to obtain approval of others, the joy of being pregnant are but a few.

In my experience providing legal advice to surrogate mothers, they largely seem to have agreed to these arrangements due to a close friendship or family relationship with the intended parents and their desire to assist those parents to have a child. None of the 20 or so surrogate mothers I have talked to pre and post birth have had any difficulty relinquishing the child. In 3 of these cases the surrogate mother was also the genetic mother, hence an altruistic traditional surrogacy rather than an altruistic gestational surrogacy.

Associate Professor Roger Cook, Director of Psychology Clinic at Swinburne University of Technology, Victoria in his evidence to the New South Wales Standing Committee on Law and Justice in March this year stated "that from his research relating to gestational surrogacy, birth mothers benefit from the cognitive protection and emotional cut off arising from being very clear that are not carrying their own child ... they do not have the sense of belonging to the embryo, if you like".[11]

[11] NSW report, p. 47

3. Interests of the intending parent

Some of the questions posed by opponents to legalizing surrogacy arrangements are:-

(a) Should we be providing new and alternative ways to allow infertile or single people in Australia today to have children irrespective of their marital status? There remains a strong religious pressure particularly from the Catholic Church which may negatively impact on intending parent's decisions. They are giving up the right to become a father and a mother only through each other.

(b) Should we be allowing women who have put off their child bearing years to pursue career or financial security, and then find themselves infertile, be able to utilize valuable medical resources to pursue their late desire for a child?

(c) Should we be supporting gay and lesbian couples to have children by self insemination or ART where there may be no acknowledged father or mother in the child's life. The case of *Re Patrick*[12] a gay couple who did not wish to recognize the sperm donor as the child's father and argued it was agreed pre conception he was to have no role in the child's life. The Court, however, found the position was not one in the child's best interest, which was the paramount consideration. Orders were made for the father to spend time with the child. Unfortunately subsequent to this decision, the birth mother took the life of herself and the child.

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[12](2002) 28Fam LR 579

I would like to share one of my intended parents journeys with you to highlight the unsatisfactory state of legislation in my home State of South Australia. I will then highlight the different legal situations had my intended couple resided in other States of Australia.

Stage One – Legal Advice Pre-Conception

I begin the story with the intended parents John & Jill both in their late 30's with a nine year old child of their own. Tragically they lost a daughter in a motor vehicle accident and Jill's sister Ann, who already had five children, has offered to carry a child for them. Jill is unable to have anymore children, having had a hysterectomy prior to the death of her daughter. John & Jill being infertile are therefore eligible to be assisted by the Artificial Reproductive Technology (ART) clinics in Canberra and Sydney.

Ann lived in Victoria, another State of Australia some 800 kilometres away from John & Jill in Adelaide, South Australia. It was proposed to create an embryo using IVF technology for the collection of eggs and sperm from the intended mother and father. The embryo would be implanted into Ann's uterus for gestation. It was to be a gestational surrogacy arrangement.[13] These arrangements receive no Medical insurance cover and cost the parties around $40,000 depending on the number of trips required to achieve pregnancy.

[13] Gestational surrogacy is where a woman carries one or more foeti for another woman or couple but does not produce the ova to create the pregnancy

I first met John & Jill, intended parents, in 2000 prior to the couple, the surrogate mother and her partner deciding to proceed with a gestational surrogacy arrangement.

They were referred to me by a doctor from a licensed ART Clinic in South Australia who is not permitted under their licensing regulations to promote or foster surrogacy.

However John & Jill had been advised of the possibility of having a child using Ann as their surrogate mother using clinics in Canberra or Sydney. These two clinics, one in the Australian Capital Territory and one in New South Wales were openly offering assistance with surrogacy arrangements provided they had first been accepted by the IVF Surrogacy Review Panel.

The requirements to satisfy the Review Panel were onerous and included:-

- an independent specialist obstetrician report;
- an independent specialist psychiatrist report;
- a written opinion on the psychological state of the infertile couple and the intended surrogate and her partner from an independent psychologist;
- a written account of the circumstances of the intended couple and the surrogate mother's existing family and relationships; and
- a written confirmation from lawyers experienced in family and adoption procedures of their particular legal circumstances for the State in which they were resident.

The couple were required to have a suitable life insurance policy in place for dependents of the surrogate mother in the event that there was death or permanent disability from complications of pregnancy. They had to clearly define financial obligations for medical and other expenses.

I proceeded to give the intended parents John & Jill written legal advice to satisfy the clinics requirements. Ann was referred to another lawyer for independent advice.

In South Australia the *Family Relationships Act* 1975 is the relevant legislation that deals with surrogacy.[14]

John & Jill did not consider their agreement breached the provisions of the Act, which prohibits a commercial surrogacy contract, expenses paid for Ann related soley to her medical expenses, travelling costs and some cleaning and childcare during her absences from home for treatment interstate.

John, Jill and Ann agreed to an altruistic surrogacy arrangement recognizing there was no enforceable contract and the success of the arrangement relied entirely on the goodwill of Ann to relinquish the child at birth.

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[14] Section 10F of the Act defines three key terms:-

Procuration contract means a contract under which-

(a) a person agrees to negotiate, arrange, or obtain the benefit of, a surrogacy contract on behalf of another, or
(b) a person agrees to introduce prospective parties to a surrogacy contract.

Surrogacy contract means a contract under which:-

(a) a person agrees:-
(i) to become pregnant or to seek to become pregnant; and
(ii) to surrender custody of, or rights in relation to, a child born as a result of the pregnancy; or
(b) a personal who is already pregnant agrees to surrender custody of, or rights in relation to, a child born as a result of the pregnancy.

Valuable consideration, in relation to a contract, means consideration consisting of money or any other kind of property that has a monetary value.

Under Section 10G of the Act

(1) A surrogacy contract is illegal and void.
(2) A procuration contract is illegal and void.

Pursuant to s. 10C *Family Relationships Act* 1975 (SA) Ann, the surrogate mother who gave birth to the child, would be the legal mother of the child notwithstanding that the child, Baby L, was conceived by fertilisation of an ovum taken from Jill and from donor sperm from John. For the purposes of the law of the State, John is conclusively presumed not to have caused the pregnancy and is not the father of the child.

Neither Sydney nor Canberra IVF Clinics will currently offer traditional surrogacy where the intended surrogate is the genetic mother of the child and semen from the partner of the infertile woman is used. The IVF embryos must be from the infertile couple. After the parties have travelled interstate on up to ten occasions for collection of the egg, counselling and other requirements the cost of a gestational surrogacy using one of these interstate clinics is prohibitively high for the majority of infertile couples considering this option.

Not only are the clinic costs involved but the cost of accommodating parties interstate, the loss of employment whilst they are interstate, leaving behind other family and children has a huge impact on families in South Australia who choose to assist in surrogacy arrangements.

Stage 2 – Family Court of Australia; Parenting Orders

The child was successfully conceived in Sydney and nine months later born in South Australia. The child, Baby L, was handed over to John & Jill in the hospital immediately at the time of her birth.

John signed the birth certificate as the father of the child which was an offence under the *Births Deaths & Marriages Registration Act* 1996, as he was in fact a sperm donor for his own child and therefore not eligible to be declared the father on the birth certificate. There have, however, been no prosecutions for fathers who do this. The only legal way either biological parent, John or Jill, can have their details included on the birth certificate of the child is through subsequent adoption of the child and an application to change the details of the birth certificate following adoption.

John & Jill then returned to see me, seeking to make an application to the Family Court of Australia for them to have the joint parental responsibility of the child to the exclusion of Ann. They also sought an Order that the child, Baby L, live with them and spend time with Ann.

I encouraged John & Jill to wait until the child was 12 months of age before bringing an application for parenting orders in the Family Court of Australia. At that stage in 2001, no other State had legislation explicitly recognising parentage orders for surrogacy arrangements. I was concerned of the uncertainty of the Family Court's decision given re Evelyn.[15] This case, however, involved a dispute over the care of a child born to the birth mother in a traditional surrogacy arrangement.

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[15] *Re Evelyn (no.2)* 23 FamLR 73 (Full Court of Family Court of Australia). A traditional surrogacy arrangement where the birth mother relinquished the child but when the child was 18 months successfully contested the parental responsibility of the child; Judge returned the child to the birth mother determining the birth mother in the long term was best placed to assist the child in the knowledge of her birth and the issues this would raise

I considered the attachment and bonding of the child Baby L to John & Jill ought to be without doubt and that the relinquishing surrogate mother Ann, ought to be given adequate time to ensure she had no unresolved issues following relinquishment. I note the current thinking as States in Australia pass surrogacy legislation that applications must be brought by the intending parents when the child is between 28 days and 6 months.

In the case of John, Jill, Ann and Baby L affidavits detailing the surrogacy arrangement, annexing the psychologist reports, my legal advice and the permission granted by the ART review panel in Canberra were filed with the application for parenting orders. Ann filed a short affidavit consenting to orders in favour of John & Jill for sole parental responsibility residence and care of the child.

Residual rights remained however with Ann, the surrogate mother, to allow her to spend time with the child and if there was a significant change of circumstances to apply for the decisions to be reversed in her favour at a later date. Baby L's birth certificate recorded Ann as the mother and could not be changed by Order of the Family Court of Australia.

Stage 3 – Adoption

Three years later John & Jill were keen to explore the possibility of adoption to have total security that Baby L was and would remain their child. The Adoptions Service in South Australia was not prepared to consider Baby L for adoption due to the nature of her birth and the prearrangement for this child to be handed over at birth.

The *Adoptions Act* was not considered to be the appropriate vehicle for securing final parentage orders for a child born of surrogacy. Section 60G of the *Family Law Act* allows parties to apply to the Family Court of Australia for leave to adopt a child. No consideration or evidence is required at this stage as to whether the Adoptions Service have received an application to adopt.

However, it is necessary to convince a Judge that it will be in the child's best interests for leave to adopt to be granted. The Judge required lengthy affidavits as to the intended arrangements for the child should leave to adopt be granted recognising that the surrogate mother, at the point of adoption, does lose all legal relationships with the child, a very serious step. Leave to adopt was granted.

John & Jill then brought an application in their own right to seek an adoption order in the Youth Court of South Australia without the involvement of the Adoptions Service. We argued that the counselling, legal advice, psychological testing and lengthy approval process that the surrogate mother and intended parents had already undertaken through the ART Clinic in Sydney and the Family Court on two occasions should be sufficient evidence to convince the Judge that Adoption was the appropriate way forward.

His Honour Senior Judge Moss heard the application and The Crown appeared on behalf of the Chief Executive of the Department, Children, Youth & Family Services (Adoptions Service). Pursuant to s.15 of the *Adoption Act*, a person authorised by the Chief Executive must have counselled the parent at least three days before the

giving of consent to adopt, and the parent must appear to understand the consequences of adoption and the procedures for revoking their consent.

The birth mother had obtained no counselling authorized by the Chief Executive so, despite our submissions that counselling had been extensive with psychologists already, His Honour accepted our right to bring a private application to the Court but adjourned the matter for the birth mother and her family to be counselled. The birth mother lived some 800kms away in Victoria so officers travelled to Melbourne and spent a day "counselling" not only the birth mother but her five children as to whether her consent to adopt was genuine. By this stage Baby L was four years of age and had only a remote relationship to the birth mother, her auntie.

Pursuant to s. 22 of the *Adoption Act*, the Youth Court must also consider a report on the suitability of the adoptive parents and the Crown argued this should occur. The Crown argued John & Jill should undertake DNA testing to ensure the child was their biological child. Understandably John & Jill were extremely frustrated by this stage, not only being the gestational parents but having the care of their daughter for four years. His Honour accepted our submission to dispense with this further process and granted adoption orders. The birth certificate of the child now states John & Jill are the parents of this child.

His Honour made the following comments: "This adoption was brought as a private matter and the parties did not use the services of the Adoption and Family Information Service (AFIS). The *Adoption Act* is essentially based upon the premise

that the Chief Executive Officer will be the Applicant … It is not really possible to exclude the Department."[16] Despite this he granted the application.

I have advised all further surrogacy clients to approach the Adoptions Service to apply for adoption after we have obtained parenting orders and later, leave to adopt in the Family Court of Australia. All applicants are still waiting for their Adoptions to proceed due to the extreme reluctance of the Department to condone adoption for gestational surrogacy arrangements. Apart from John & Jill all other children in South Australia born as a result of an altruistic surrogacy arrangement have no way of presently having their birth certificates record their biological parents.

In 2007, the Social Development Committee of the South Australian Parliament made an enquiry into gestational surrogacy following the introduction of a Surrogacy Bill by a private member.

The Committee indicated they did not believe the use of the adoption process was appropriate in transferring parenthood to the commissioning parents. They said:

> *"there are clear differences between the two processes in the case of adoption, a family is sought for an existing child – the parenting arrangements are not known before conception. In the case of gestational surrogacy the child has been planned as a surrogate mother has agreed to gestate the child for another couple with a clear intent of that couple taking parental responsibility. In most*

[16] Unreported judgment of Senior Judge Moss File no.ACC05-44; see also Application of *A and B* (2000) NSWCSC 640 (July 2000) where Bryson J. granted an adoption in NSW despite the opposition to surrogacy in the community as it was in the child's best interests

> *adoption cases it is highly unlikely for adoptive parents to have a genetic link to their adopted child where as in surrogacy cases a genetic connection is likely.*"[17]

The recommendation of that Committee was that the South Australian Government should, as soon as possible, introduce a process that recognises the rights of intended parents and transfers the parentage of children born through surrogacy arrangements to them without requiring them to adopt their own genetic child. The transfer would require the consent of the surrogate and should provide an opportunity for a Court to review a case where there was doubt as to whether it was in the best interests of the child. They suggested Birth Certificates then be amended to reflect this transfer.

The Committee considered *"that parents of children born through gestational surrogacy should not be subjected to legal ambiguity about their parental status."*

Equally the Committee considered proper safe guards needed to be put in place to ensure that children born through surrogacy arrangements and living in South Australia were legally protected and had access to their full birth records. That Committee recommended that our *Family Relationships Act* 1975 be amended to recognise the rights of children born through gestational surrogacy arrangements. Surrogacy arrangements, however, were to be restricted to married couples or couples who had lived together for at least 5 years. The surrogate mother was to be a relative of the intended parents.

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[17] Inquiry into gestational surrogacy in South Australia (Nov.2007), p. 38

Unfortunately the Surrogacy Bill has not been passed. It appears unlikely that any amendments are likely to the State Legislation in the near future due to the current conservative attitude in our State to recognition of surrogacy arrangements and the concern as to whether the best interests of the child have been considered.

If John & Jill had resided in other Australian States today they would have been able to obtain parentage orders that allow immediately for the recognition of their surrogacy arrangement and confirmation of themselves as the legal parents of Baby L. The birth certificate of Baby L could have been changed with relative ease compared to the process they had to undertake in South Australia.

Australian Capital Territory

If they resided in Canberra, the Australian Capital Territory, today they could have applied for a parentage order as Baby L was conceived following a substitute parent agreement.[18] That is, had the Supreme Court been satisfied making the order was in the child's best interests and the birth parent agreed to the making of the order. The parentage order applies as if the child were adopted and the birth certificate can be changed. Only altruistic gestational surrogacy arrangements are permitted. The application could only be made if the child was between 6 weeks and 6 months.

Western Australia

In Western Australia the *Surrogacy Act* 2008 came into operation on 1.March 2009. John & Jill's surrogacy arrangement could now be approved provided Ann was 25 years of age and she had at least one live child before Baby L.

The agreement must be in writing signed by all parties. All parties at least 3 months prior to the agreement and prior to conception of the child, must have received counselling, psychologists' assessments, legal advice about the effect of the surrogacy agreement and approval of the Western Australian Reproductive technology Council.[19]

After the child is 28 days old but less than 6 months, parentage orders can be made after an application in the Family Court of Western Australia.[20] The Judge must be satisfied the parentage orders are the result of an approved altruistic gestational surrogacy agreement, that it is in the child's best interests to make the order and an approved parenting plan has been made between the parties, balancing the rights and responsibilities of the parties to the plan and promotes child's long term interests.[21] After orders are made a child's birth certificate can be changed.

Victoria

If John & Jill had lived in Victoria they will soon have the benefit of the *Assisted Reproductive Technology Act* 2008, which is to commence later this year. Surrogacy arrangements with the approval of the Patient Review Panel will be formalised after meeting requirements similar to the W.A. and Act. legislation.

For approval of an altruistic gestational surrogacy arrangement it must be for the benefit of a couple, who are unlikely to become pregnant or whose pregnancy may

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[18] ss. 25, 26 *Parentage Act* 2004 (ACT) (as amended).
[19] ss.16, 17 *Western Australian Surrogacy Act* 2008.
[20] ss.20, 21 ibid
[21] s.22 ibid

place mother or child at risk. The surrogate must be at least 25 years of age already having a live child.

Child protection and criminal checks are required from all parties to the surrogacy arrangement.[22] The status of children born in surrogacy arrangements and the ability to apply for substitute parentage orders are also covered in this legislation by amending the *Status of Children Act* 1974.[23]

New South Wales

New South Wales may soon make amendments to their *Assisted Reproductive Technology Act* 2007 (NSW) to specifically legislate on altruistic surrogacy following the release of the Standing Committee on Law and Justice Report in May 2009. Altruistic surrogacy has been offered in ART clinics in NSW for many years without regulation other than stringent internal clinic guidelines (based on guidelines issued by the National Health and Medical Research Council (NHMRC) set out earlier as having being required before John, Jill and Ann could be accepted into the Sydney clinic). They have also recommended the ability to obtain parentage orders in the NSW Supreme Court.

Tasmania

The Tasmanian Legislative Council Select Committee on Surrogacy reported in July 2008 and recommended changes to the *Surrogacy Contracts Act* 1993 which prohibit access to technical and professional services where surrogacy arrangements had been entered into by ‘reproductive tourism’ to Canberra and

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[22] ss.39-45 *Victorian Assisted Reproductive Treatment Act* 2008

Sydney. No changes have yet been made. The committee supported future legal recognition of parentage orders preferably by uniform federal legislation, using the Family Court of Australia.

Queensland

The Queensland *Surrogate Parenthood Act* 1988 (QLD) makes it an offence to enter into a surrogacy contract. However in October 2008, a Queensland Parliamentary Select committee recommended decriminalising altruistic surrogacy.

Northern Territory

Northern Territory has no legislation. The birth parents remain the legal parents in a surrogacy arrangement.

National Model

In January 2009, a joint working group of the Standing Committee of Attorneys General, Australian Health Ministers Conference, Community and Disability Services Conference released a discussion paper proposing a National model to harmonise the regulation of surrogacy in Australia. It is actively debating surrogacy in all the jurisdictions.

It is hoped that uniform legislation throughout the country will assist in focussing on the best interests of children being born throughout Australia as a result of altruistic surrogacy arrangements. At the time of writing, however, the prospect of uniform agreement from all States and Territories seems remote. The results of the national

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[23] s.147 ibid (amendments to s.20-s.40 *Status of Children Act* 1974)

discussion for uniform surrogacy laws will be released during August 2009. Australia joins many other Western countries in the surrogacy debate.

Whatever happens we must not lose sight of the paramount interests of the children born from these arrangements. The pertinent sections of the *Conventions on the Rights of the Child* remain an excellent starting point for consideration of these issues worldwide.