



Articles

Commercial surrogacy — some troubling family law issues

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Australian state and territory legislation prohibits commercial surrogacy, but the prohibition has been ineffective in preventing some Australians from entering into commercial surrogacy agreements outside Australia, mainly with women in India and Thailand. This article investigates some novel and complex legal issues that may confront the Australian courts after children born in such arrangements are brought back to Australia. The issues include identifying who are the 'parents' of the children, and determining their best interests. The authors call for greater coherence in Australia's legal response to surrogacy.

The aching desire for a child felt by those unable to conceive by normal means, poverty and the profit motive can be a terrible combination resulting in exploitation (especially of the poor), abuse of human rights and the commodification of children.
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Introduction²

Commercial surrogacy has flourished in recent times, apparently increasing by 1000% internationally between 2008 and 2010.³ Countries have responded to the problem in different ways.⁴

In Australia, surrogacy has recently been made the subject of specific legislation in all states and territories apart from the Northern Territory.⁵ The legislation draws a fundamental distinction between altruistic surrogacy and commercial surrogacy (the subject of this article). Surrogacy is commercial if

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1 Chief Federal Magistrate Pascoe AO CVO, 'Intercountry Surrogacy — A new form of trafficking?', paper delivered at LegalWise 2nd Annual International Family Law Conference, Cambodia, 19 September 2012.

2 We are grateful to Helen Rhoades, Belinda Fehlberg, Patrick Parkinson, Elizabeth Keogh and the anonymous reviewer for valuable comments on drafts of this article, and to Cressida Limon for some valuable references, although of course we accept sole responsibility.

3 Permanent Bureau of the Hague Conference on Private International Law, *A Preliminary Report on the Issues Arising from International Surrogacy Arrangements*, Prel Doc No 10, March 2012 (referred to as Hague Conference, *Preliminary Report*), p 8.

4 For a detailed review, see *ibid*.

5 The history of these reforms is described in detail in J Millbank, 'The New Surrogacy Parentage Laws in Australia: Cautious Regulation or "25 Brick Walls"?' (2011) 35(1) *MULR* 165 at 177–86 (since that article was published, the Tasmanian Surrogacy Act 2012 was enacted and has come into effect). The surrogacy legislation which is current as at June 2013 is Parentage Act 2004 (ACT); Surrogacy Act 2010 (NSW); Surrogacy Act 2010 (Qld); Family Relationships Act 1975 (SA); Surrogacy Act 2012 (Tas); Assisted Reproductive Treatment Act 2008 (Vic); Status of Children Act 1974 (Vic); Surrogacy Act 2008 (WA).

the commissioning parents⁶ have agreed to pay the birth mother⁷ more than reimbursement of her expenses incurred in the pregnancy and birth. Under the surrogacy legislation, it is usually a crime to enter into a commercial surrogacy agreement, advertise for surrogacy arrangements, or procure surrogacy arrangements.⁸ In three jurisdictions, the offences are expressly stated to apply with extraterritorial effect,⁹ in order, it has been said, to prevent evasion of the legislation and exploitation of women in developing countries.¹⁰ By contrast, unpaid ('altruistic') surrogacy is permitted, subject to extensive and diverse regulations which are designed to protect the parties to surrogacy arrangements and the children born from them.

Thus, making commercial surrogacy arrangements involves serious criminal offences under the laws of most Australian jurisdictions.¹¹ Yet the

6 The state and territory surrogacy legislation differs on many points, including the use of terminology. The relevant term in New South Wales, Queensland and Tasmania is 'intended parents'; in South Australia and Victoria the term is 'commissioning parents'; in Western Australia it is 'arranged parents' and in the ACT it is 'substitute parents'. In most Australian jurisdictions, single people can be commissioning parents in altruistic surrogacy arrangements.

7 The surrogacy legislation in most Australian jurisdictions uses the term 'birth mother'. In the Victorian legislation, she is referred to as the 'surrogate mother'.

8 See M Keyes, 'Cross-border surrogacy agreements' (2012) 26(1) *AJFL* 28 at 40–1. The relevant offences and related penalties are described in n 11 below. There is no legislation relating to surrogacy specifically in the Northern Territory, and the South Australian legislation does not criminalise the commissioning parents' or birth mother's actions in entering into the surrogacy agreement. In Victoria, the relevant offence is the receipt by the birth mother of payment in excess of reimbursement of her expenses: Assisted Reproductive Treatment Act 2008 (Vic) s 44(1).

9 Parentage Act 2004 (ACT) s 45(1) (applying to ordinary residents of the ACT); Surrogacy Act 2010 (NSW) s 11(2) (applying to those ordinarily resident or domiciled in the state); Surrogacy Act 2010 (Qld) s 54(b) (applying to Queensland ordinary residents). In addition, the ACT and NSW legislation specifically incorporate the general nexus provisions of the criminal law: Parentage Act 2004 (ACT) s 45(2) (referring to the Criminal Code 2002 (ACT) s 64(2)); Surrogacy Act 2010 (NSW) s 11(1) (referring to the Crimes Act 1900 (NSW) s 10C). This has the effect of extending the application of the surrogacy offences to activities done outside of the territory which have effects within the territory. The surrogacy legislation in the other jurisdictions does not contain any reference to nexus provisions, and would apply subject to the generally applicable rules about extraterritoriality of offences under Australian legislation. Generally, this means that if an act which is done outside the jurisdiction has an effect within the territory, the criminal law of the territory will apply: eg, Criminal Law Consolidation Act 1935 (SA) s 5G(2)(c). As to whether entry into a surrogacy arrangement outside the jurisdiction can be said to have effects within the jurisdiction, see *Hubert & Juntasa* [2011] FamCA 504; BC201150421 at [13] and *Johnson & Chompunut* [2011] FamCA 505; BC201150420 at [12].

10 See NSW Legislative Assembly, *Hansard*, 10 November 2010, p 27,583 (Ms Burney).

11 The penalties differ between the jurisdictions in which entry into a commercial surrogacy agreement is criminalised. In every jurisdiction except Tasmania, this offence may be penalised with imprisonment. In New South Wales, the maximum penalty for entering into, or offering to enter into, a commercial surrogacy arrangement is 1000 penalty units or imprisonment for 2 years (or 2500 penalty units for a corporation): Surrogacy Act 2010 (NSW) s 8. In Queensland, the maximum penalty for the same offence is 100 penalty units or 3 years imprisonment: Surrogacy Act 2010 (Qld) s 56. In Western Australia, the maximum penalty for entering into a commercial surrogacy arrangement is \$24,000 or 2 years imprisonment: Surrogacy Act 2008 (WA) s 8. In the ACT, the maximum penalty for intentionally entering into a commercial surrogacy agreement is 100 penalty units, 1 year imprisonment or both: Parentage Act 2004 (ACT) s 41. In Victoria, the receipt by the birth

Family Court has seen an increase in applications for parenting and other orders under the Family Law Act 1975 (Cth) arising from commercial surrogacy arrangements, mainly involving children from Thailand and India,¹² where such arrangements are (as yet) permitted by law¹³ and where poor women¹⁴ can be found who, for a payment, will donate eggs, or carry and give birth to a child, and then relinquish the child forever to the Australian commissioning couple, who return to Australia with the child. In most of the cases, the male commissioning parent (or one of the male commissioning parents in the case of same-sex applicants) is the genetic father of the child. In the published cases, the applicant commissioning parents then come to the Australian family courts seeking orders that they have parental responsibility, and, less commonly, that the applicant who has donated the sperm from which the child was born should be found or declared to be the child's father. At the time of writing there were 16 reported cases in which commissioning parents had applied to the Family Court for parenting orders.¹⁵

mother of 'any material benefit or advantage' is the relevant crime, and the maximum penalty is 240 penalty units or 2 years imprisonment or both: Assisted Reproductive Treatment Act 2008 (Vic) s 44(1). In Tasmania, the maximum penalty for entering into or offering to enter into a commercial surrogacy agreement is a fine not exceeding 100 penalty units: Surrogacy Act 2012 (Tas) s 40.

- 12 Of the 16 cases which have been published as at June 2013 (listed below at n 15), the children were born in Thailand in eight cases and in India in another five cases. In two cases (the two oldest cases), the children were born in the United States, and in one case, the child was born in South Africa.
- 13 The Indian Ministry of Home Affairs issued guidelines on 9 July 2012, which state that foreign commissioning parents can only enter India on a medical visa and that such a visa will only be granted to heterosexual couples who have been married for at least two years. Other criteria include requirements that the commissioning parents' home country must have certified that the home country recognises surrogacy, and must give an assurance that the child would be entitled to enter the home country as the biological child of the commissioning parents: Government of India, Ministry of Home Affairs, *Lok Sabha, Unstarred Question No 3491*, to be answered on 19 March 2013, at <<http://mha.nic.in/par2013/par2013-pdfs/ls-190313/3491.pdf>> (accessed 8 July 2013).
- 14 The Australian cases typically include very little information about the birth mother or the egg donor. Studies of surrogacy in India show that most birth mothers are very poor, particularly in comparison to the commissioning parents, and are often uneducated and illiterate. In *Mason & Mason*, Ryan J noted that the birth mother's consent to the surrogacy agreement and to the parenting orders was recorded by thumb print: [2013] FamCA 424; BC201350237 at [4], [5]. In Pande's study, 80.9% of the surrogate mothers 'reported family income below or around' the official poverty line in India: A Pande, 'Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker' (2010) 35 *Signs: Journal of Women in Culture and Society* 969 at 974. Donchin notes that women in transitional economies 'who provide reproductive assistance to those from abroad typically have very limited earning power, have little formal education, and have to provide for their own children': A Donchin, 'Reproductive Tourism and the Quest for Global Gender Justice' (2010) 24 *Bioethics* 323 at 326. Bailey notes that justifying surrogacy arrangements by reference to the surrogate's choice 'obscures the injustice behind these choices: the reality that, for many women, contract pregnancy is one of the few routes to attaining basic social goods such as housing, food, clean water, education and medical care': A Bailey, 'Reconceiving Surrogacy: Toward a Reproductive Justice Account of Indian Surrogacy' (2011) 26 *Hypatia* 715 at 722.
- 15 *Re Mark* (2003) 179 FLR 248; 31 Fam LR 162; FLC 93-173; [2003] FamCA 822 (Brown J); *Cadet & Scribe* [2007] FamCA 1498; BC200750642 (Brown J); *Wilkie & Mirkja* [2010] FamCA 6; BC20105000867 (Cronin J); *Collins & Tangtoi* [2010] FamCA 878; BC201050981 (Loughnan J); *O'Connor & Kasemsarn* [2010] FamCA 987; BC201051108 (Ainslie-Wallace J); *McGee & Duchampes* [2010] FamCA 1230; BC201051360; *Dennis &*

Not surprisingly, this controversial topic has been the subject of a number of recent publications in Australia as well as elsewhere.¹⁶ In this article we hope to contribute to the rapidly-evolving discussion about how Australia might achieve a coherent position on commercial surrogacy that reflects informed and deliberate decisions about some difficult policy issues.

The present discussion is limited to family law, and especially the issues that have surfaced in the reported cases. First, it addresses the apparently simple question: Who are the parents of surrogacy children? We review the legislation and case law and try to identify what points are clear and what issues still need to be resolved.

Second, we review discretionary decisions, such as making parenting orders and declarations of parentage. Should the court be making such orders if doing so gives effect to criminal arrangements? And when it appears that the commissioning parents or others have acted criminally in participating in the surrogacy agreement, should the court refer the papers to the appropriate authority to consider prosecution? We review the answers that first instance judges have given to these questions, and suggest that a satisfactory outcome will require the Full Court to address certain fundamental questions of principle. We conclude that achieving a principled and consistent Australian approach to commercial surrogacy will require a cooperative effort between the Commonwealth and the states and territories.

Part 1: Who are the parents of surrogacy children?

Introduction

It is surprisingly difficult to identify the legal ‘parents’ of children born as a result of international surrogacy arrangements. This section examines the rather technical law involved. It deals especially with the Act’s presumptions of parentage, ss 60H and 60HB, and the admissibility of DNA evidence based

Pradchaphet [2011] FamCA 123; BC201150171 (Stevenson J); *Ronalds & Victor* [2011] FamCA 389 (Dessau J); *Dudley & Chedi* [2011] FamCA 502; BC201150419 (Watts J); *Findlay & Panyawong* (2011) 266 FLR 236; 46 Fam LR 302; [2011] FamCA 503; BC201150422 (Watts J); *Hubert & Juntasa* [2011] FamCA 504; BC201150421 (Watts J); *Johnson & Chompunut* [2011] FamCA 505; BC201150420 (Watts J); *Edmore & Bala* [2011] FamCA 731; BC201150618 (Cronin J); *Gough & Kaur* [2012] FamCA 79; BC201250108 (McMillan J); *Ellison & Karnchanit* (2012) 48 Fam LR 33; [2012] FamCA 602; BC201250476 (Ryan J) (*Ellison*); *Mason & Mason* [2013] FamCA 424; BC201350237. See also *Schone & Schone* [2012] FMCAfam 1126; BC201210674. In *Rusken & Jenner* [2009] FamCA 282 (Bell J) the child was born to the parties in South Africa. In a commercial arrangement, a surrogate mother gave birth to the child, using donated sperm (and eggs of the intended mother had been inserted in the surrogate mother). The commissioning couple came to Australia and sought parenting orders. The surrogate mother intervened, seeking to have the child returned to her in South Africa. The case was determined according to factual matters relating to the child’s best interests, with minimal reference to the law. The child was ordered to live with the male applicant; the female applicant was granted contact; the surrogate mother (the intervener) was permitted telephone contact only.

¹⁶ Keyes, above n 8; Millbank, above n 5; J Millbank, ‘Resolving the Dilemma of Legal Parentage for Australians Engaged in International Surrogacy’ (2013) 27 *AJFL* 135; O Rundle, ‘Transnational Surrogacy: Mapping the Issues’, *Handbook of the 15th National Family Law Conference*, 2012, pp 59–81; A Harland, ‘International Surrogacy, Parentage Provisions and the Need for Australian Law Reform’ in the same volume, pp 83–100.

on samples illegally taken from children. It also raises a question yet to be the subject of judicial decision, namely, whether parentage is to be determined by Australian law, or the law of the country in which the child was born. We consider later whether the court should grant declarations of parenthood in surrogacy situations: that question involves policy issues to be reviewed in Part 2.

The international surrogacy arrangements that have appeared in the Australian case law generally follow a pattern. The commissioning couple make an arrangement whereby a woman, who is not related to the commissioning couple and is unknown to them before the arrangement, becomes pregnant with an embryo created from the sperm of one of the commissioning couple and an egg obtained from another woman who is also unrelated to and unknown to the commissioning couple.¹⁷ The intention is that the child will be handed to the commissioning couple at birth and brought up by them as their child, and in all the cases this is what has happened. By the time the case comes to court, the child has been in the care of the commissioning parents for some months, and has had no contact with the birth mother or egg donor.

We will need to consider certain provisions of the Family Law Act dealing with parentage in particular situations. But it is useful to put them in context by first considering what would *otherwise* be the position under the Family Law Act.¹⁸

There is no relevant generally applicable definition of ‘parent’ in the Act.¹⁹ It has been held that the word ‘parent’ when used in the Act means ‘a person who has begotten or borne a child’ — a biological mother or father of the child, as distinct from a person who is merely caring for a child as a parent would do.²⁰ It follows that for the purpose of the Family Law Act the identity of a child’s father, mother or parent is probably determined by reference to facts existing at the time of the birth. The subsequent care of the child would not seem relevant to determining who is the (biological) ‘father’, ‘mother’ or

17 The cases usually speak of the eggs being donated, but there is typically little or no evidence from which the courts could determine that the woman whose eggs were used had given free and informed consent. Indeed, there is generally little reference to the egg ‘donor’, although occasionally the courts note that she is unknown or that children will not have access to information about their genetic inheritance: eg, *Mason & Mason* [2013] FamCA 424; BC201350237 at [49].

18 The definition of ‘parent’ is not necessarily the same in different areas of law: *H v Minister for Immigration and Citizenship* (2010) 188 FCR 393; 272 ALR 605; [2010] FCAFC 119; BC201006880; *Mason & Mason* [2013] FamCA 424; BC201350237 at [12].

19 The term ‘parent’ includes an *adoptive parent* (s 4) but that is not relevant to identifying the parents in a surrogacy situation.

20 See *Tobin v Tobin* (1999) FLC 92-848; 150 FLR 185; 24 Fam LR 635; [1999] FamCA 446 (FC) at [42] (quoted in *Ellison* (2012) 48 Fam LR 33; [2012] FamCA 602; BC201250476 at [75]) (‘... in respect of the Family Law Act, in our view, the natural meaning of the word “parent” is the first definition given in both the *Oxford* and *Macquarie* dictionaries, and the definition “a person who has begotten or borne a child”, from the *Oxford English Dictionary* (2nd ed, vol 9), which was accepted by Gummow J (in a different context) in *Hunt and the Minister for Immigration and Ethnic Affairs* (1993) 41 FCR 380 at 386’) and [45] (‘Whilst the term may be capable of being used in different contexts to include broader categories than those of “father” or “mother”, in our view, the natural meaning of the word in the context in Pt VII Div 7 of a child is the biological mother or father of the child and not a person who stands *in locus parentis*.’)

'parent' (of course the court may make orders placing the child in the care of a non-parent if it considers that doing so will be in the child's best interests).

If it were not for the specific provisions of the Act that will be examined below, identifying the child's *father* in the typical commercial surrogacy situation would seem straightforward. If the sperm is that of the male commissioning parent (or one of them in the case of a same-sex male couple), in circumstances where everyone envisages that he will act as the father,²¹ he would naturally be seen as the biological father. If the sperm had come from some other man, the commissioning parent would not be the father.

Identifying the *mother* in gestational surrogacy situations,²² however, would not be quite so simple. Given the authorities to the effect that the Act refers to biological parents, it seems clear that a commissioning woman who seeks to mother the child, but has no biological connection with the child, would not be seen as the child's mother under the Family Law Act. Is the 'mother', then, the woman who gives birth to the child? When a child is born to a woman from her own egg, she is obviously the biological mother. But in 'gestational' surrogacy situations such as those in the international cases, we might hesitate to say whether the 'mother' is the egg donor or the woman who gave birth to the child. Neither conforms entirely to the conventional meaning of mother — the egg donor provided half the child's genetic inheritance, but was not pregnant with the child; and the birth mother lacks a genetic link with the child. Under the surrogacy arrangement, neither woman is intended to have a role in the child's life, but if words like 'parent' in the Act refer to biological parents, this may not necessarily preclude either the birth mother or egg donor from the status of a parent. One might contemplate the possibility of some kind of recognition of both women,²³ but it has been pointed out that many provisions assume that a child will have one father and one mother,²⁴ so this does not seem an option under the Family Law Act as presently drafted. As we will see, there are now specific legislative provisions about parentage, but as far as we are aware there is no Australian court decision on whether, aside from such specific legislation, the 'mother' of a child born following egg donation would be seen as the birth mother or the egg donor, or whether the answer might turn on particular circumstances.

In short, 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

21 On this aspect, see in particular the illuminating discussion in *Baker & Landon* (2010) 238 FLR 210; 43 Fam LR 675; [2010] FMCAfam 280; BC201001961 at [29]–[46] per Reithmuller FM.

22 Gestational surrogacy refers to an arrangement where the egg is not that of the birth mother. In most of the published Australian cases, the egg comes from a third woman, not the commissioning parents. In some of the altruistic cases, the egg comes from the birth mother (this is referred to as genetic surrogacy). Where the egg comes from the birth mother, there is of course no difficulty.

23 The need to keep an open mind on such matters is underlined by the recent decision of the NSW Court of Appeal that there are circumstances in which it is not necessary to identify on the birth certificate whether a person is male or female: *Norrie v NSW Registrar of Births, Deaths and Marriages* [2013] NSWCA 145; BC201302946.

24 *Groth v Banks* [2013] FamCA 430; BC201350238 at [14]–[16] per Cronin J.

Law Act, but it would be uncertain whether the ‘mother’ would be the birth mother or the egg donor.

We now consider the impact of the specific provisions of the Act relating to parentage, starting with those that contain presumptions of parentage.

Presumptions of parentage under the Act

The Family Law Act contains a number of presumptions of parentage (we deal below with ss 60HB and 60H, which do not create presumptions but are relevant to determining parentage in some situations). In brief, the presumptions are as follows. A child born to a married woman during the marriage is presumed to be the child of the woman and her husband.²⁵ A child born to a woman in a de facto relationship (over a period assumed to be the window of conception) is presumed to be the child of the woman and her partner.²⁶ A child is presumed to be the child of a person named as a parent on the child’s birth certificate.²⁷ There is also a presumption arising from a person’s registered acknowledgment of parentage.²⁸ All these are rebuttable, and if they conflict, the one most likely to be correct prevails.²⁹ A different kind of presumption is the irrebuttable presumption that arises from a finding of parentage by a court (unless that finding is set aside).³⁰ The presumptions in the Act do not indicate their scope of application in international cases, although most of them are clearly expected to have some application in cases where the child is born outside Australia.³¹ The reported cases suggest that the presumptions are not often applicable in commercial surrogacy situations.³²

Section 60H

The determination of parentage in surrogacy situations is governed by specific provisions, notably ss 60H and 60HB, but interpreting them is complex, for a number of reasons. First, the older provisions in the Family Law Act about parentage read a little awkwardly with the newer sections dealing with artificial conception and surrogacy — for example the newer provisions speak of a child being or not being ‘the child of’ a person, but do not explicitly say who is a parent of the child. Second, there is an interplay between the Family Law Act’s provisions and certain state and territory laws dealing with parentage. Third, the provisions need to be applied in a wide range of factual situations, and it is not always clear whether the literal effect of the words reflects what the legislature might have intended. Fourth, different judicial views have been expressed about aspects of the provisions, notably whether some provisions implicitly exclude genetic donors from parental status, and to what extent the federal laws should be interpreted in a way that conforms with state laws.

25 Family Law Act s 69P.

26 Family Law Act s 69Q.

27 Family Law Act s 69R.

28 Family Law Act s 69T.

29 Family Law Act s 69U.

30 Family Law Act s 69S.

31 Sections 69R, 69S, 69T are all stated to apply to prescribed overseas jurisdictions. As at June 2013, no overseas jurisdiction had been prescribed.

32 See also the ‘provisional’ analysis in *Mason & Mason* [2013] FamCA 424; BC201350237, especially at [15], [33].

Section 60H deals with the status of children born as a result of fertility procedures. It was not designed for surrogacy situations, but it can affect them, because fertility procedures are often used in commercial surrogacy. Most of the subsections of s 60H incorporate reference to the state and territory legislation relevant to determining parental status. Together, these provisions form a national scheme (although there are some inconsistencies between the federal and state and territory provisions), the effect of which is to recognise the birth mother and her consenting spouse or partner as the parents of a child born as a result of a fertility procedure irrespective of their biological connection to the child. The scheme also denies parental status to gamete donors in such cases, although as we will see there are different views about whether it does so in all situations.

In all states and territories, the provisions applicable to determining parental status where a child is born after a fertility procedure have an extraterritorial effect,³³ which is significant because in international surrogacy cases the fertility procedures occur outside Australia. In some jurisdictions, the provisions apply irrespective of where the child was born,³⁴ and in some jurisdictions the legislation specifically states that the provisions apply to determine parental status ‘for the purposes of the law of the State’,³⁵ which might be taken to be a unilateral choice of law provision that is only intended to be applicable in litigation within that state. The Family Law Act does not explicitly stipulate the intended scope of application of the provisions relevant to determining parental status in the context of children conceived in fertility procedures, but Ryan J has expressed the view that ss 60H and 60HB have extra-territorial effect.³⁶

Subsection 60H(1) applies where a woman who gives birth to a child conceived artificially is married or in a de facto relationship at the time of the procedure. When it applies, s 60H(1) does two things. It provides that ‘the child is the child of the woman and of the other intended parent’, and, secondly, it *excludes* any other donors of genetic material: the child ‘is not the child of that person’. It applies if there is consent to the procedure by everyone involved — the woman and her partner, and any provider of genetic material.

33 In all jurisdictions except NSW, the legislation specifically gives extraterritorial effect to the provisions relating to the status of children born after fertility procedures, involving donated gametes: Parentage Act 2004 (ACT) s 11(7); Status of Children Act 1978 (NT) s 5B(1)(a); Status of Children Act 1978 (Qld) ss 14(1)(a), 14(3)(a); Family Relationships Act 1975 (SA) s 10B(1); Status of Children Act 1974 (Tas) s 10A(1)(a); Status of Children Act 1974 (Vic) s 10B(1)(a) (this only applies to Pt II — which relates to cases in which the birth mother has a male partner. Although the Victorian Act makes provision for parental status of children born to single women and to women in same sex relationships, the legislation does not expressly state the extraterritorial scope of those provisions); Artificial Conception Act 1985 (WA) s 4(1)(a). In NSW, the provisions relevant to the parental status of children born from fertility procedures are not separately given an extraterritorial effect; but they have this effect nonetheless because of general provisions which state that the Act applies whether or not the child was born in the state and whether or not the parents have ever been domiciled in the state: Status of Children Act 1996 (NSW) s 4(1)(a), (d).

34 Status of Children Act 1978 (NT) s 5B(1)(b); Status of Children Act 1974 (Tas) s 10A(1)(b); Artificial Conception Act 1985 (WA) s 4(1)(b).

35 Family Relationships Act 1975 (SA) s 10C(1), (2); Status of Children Act 1974 (Tas) ss 10C(1), (1A), (2), (3), (4); Artificial Conception Act 1985 (WA) ss 6(1), 6A(1), 7(1), 7(2).

36 *Ellison* (2012) 48 Fam LR 33; [2012] FamCA 602; BC201250476 at [49].

It also applies where certain state and territory laws provide that the child is the child of the woman and the other intended parent, and thus it gives federal effect to such provisions.

Subsections 60H(2) and (3) apply where a woman gives birth to a child conceived artificially, whether the woman is partnered or single. Thus they apply to all artificially conceived children (whereas s 60H(1) only applies to some). They give federal effect to certain state or territory laws which provide that the child ‘is the child of’ the woman (subs (2)) and/or a man (subs (3)).

Unlike subs 60H(1), 60H(2) and (3) do not expressly exclude any donor of genetic material from recognition as a parent. Judicial opinion is divided on whether they do so implicitly. On the ‘restrictive’ approach, these sections exclude any other donor of genetic material from parental status.³⁷ On this approach, where an unpartnered woman has a child by artificial conception, the sperm donor is not to be regarded as the child’s father. Further, where the woman gives birth using a donor egg — the case of gestational surrogacy — the egg donor is not to be regarded as a mother. Those favouring the restrictive approach may argue that it brings federal law into line with the effect of state laws.³⁸ The competing view, sometimes called the ‘enlarging approach’,³⁹ is that the legislation does not exclude an argument that the sperm donor might be the father.⁴⁰

Section 60H(1) in surrogacy situations

Surrogacy is very different from the situations that s 60H(1) was intended to cover. In surrogacy, the birth mother is not one of the intended parents. The intended parents are the commissioning couple. In most of the published commercial surrogacy cases, one of the commissioning parents has provided the sperm. So the child is intended to end up in the care of the man who provided the sperm, and the man’s partner (whether male or female), if he has one.⁴¹ Section 60H(1) says that if the birth mother has a spouse or partner, that person will be the father of the child rather than the sperm donor. That outcome is not intended by anybody, and does not appear to benefit the child or anyone else.⁴² It is apparent that the section was not drafted with the surrogacy situation in mind because the section refers to the birth mother’s partner as the ‘other intended parent’, whereas in surrogacy nobody intends

37 See especially *Patrick: An application concerning contact* (2002) FLC 93-096; 168 FLR 6; 28 Fam LR 579; [2002] FamCA 193; *Re Michael (Surrogacy Arrangements)* (2009) 41 Fam LR 694; [2009] FamCA 691.

38 See, eg, *Patrick: An application concerning contact* (2002) FLC 93-096; 168 FLR 6; 28 Fam LR 579; [2002] FamCA 193; and the discussion in *Mason & Mason* [2013] FamCA 424; BC201350237 at [19]–[34].

39 See, eg, *B v J* (1996) FLC 92-716; 21 Fam LR 186; 135 FLR 472; *Re Mark: An application relating to parental responsibilities* (2004) 31 Fam LR 162 (Brown J); *Ellison* (2012) 48 Fam LR 33; [2012] FamCA 602; BC201250476 at [18]–[25]; *Groth v Banks* [2013] FamCA 430; BC201350238 (Cronin J).

40 Even applying the enlarging approach, however, a *mere* sperm donor, one who never intended to be a father, may not be recognised as a father: see the analysis in *Baker & Landon* (2010) 238 FLR 210; 43 Fam LR 675; [2010] FMCAfam 280; BC201001961 at [29]–[46] per Reithmuller FM.

41 In *O’Connor & Kasemsarn* [2010] FamCA 987; BC201051108 the commissioning father was a single parent.

42 For a striking example of the consequences of s 60H in an unusual circumstance involving

that person to act as the child's parent. There is a need to amend the section, although what form such an amendment would take will depend on the resolution of wider policy issues. It is arguable that there needs to be attention to a number of provisions to create clarity about the meaning of 'parent' and the relationship between the federal and state and territory provisions.⁴³

Section 60HB

Section 60HB relates to parentage in some surrogacy situations. It applies when a state or territory court has made an order under its state or territory surrogacy legislation⁴⁴ transferring parentage to the commissioning parents, whereupon the child 'becomes the child of' the commissioning parents. The effect of s 60HB is that such orders are also effective for the purpose of the Family Law Act.⁴⁵ The section is not currently relevant to commercial surrogacy cases because the state and territory laws allow such orders to be made only in *altruistic* surrogacy situations.

Evidence of parentage

The parentage of a child can be established by evidence in the ordinary way. Because establishing parenthood is often of great importance to determining what is best for a child, s 69V provides that if parentage of a child is a question in issue in proceedings under the Act, the court may 'make an order requiring any person to give such evidence as is material to the question'. But the best evidence is usually the results of properly conducted DNA tests of the relevant adults and children; and an unwilling person could prevent this by refusing to be tested, or refusing to consent to a child being tested. This problem is the subject of detailed provisions in the Act and the Regulations. By s 69W, the court can make a parentage testing order, requiring a 'parentage testing procedure' to be carried out on a child or other person.⁴⁶ If a person refuses to comply with such an order (or refuses to consent to a child having the test),⁴⁷ there is no penalty, but the court may draw such inferences as appear just.⁴⁸ The carrying out of such tests, and reports of the results, are governed by detailed regulations.⁴⁹

The application of these provisions to commercial surrogacy situations, however, can pose a problem, particularly in relation to children born outside

an altruistic surrogacy where the commissioning parents were also the genetic parents, see *Re Michael (Surrogacy Arrangements)* (2009) 41 Fam LR 694; [2009] FamCA 691.

43 An issue discussed most recently in *Mason & Mason* [2013] FamCA 424; BC201350237 and *Groth v Banks* [2013] FamCA 430; BC201350238.

44 The 'prescribed laws' to which s 60HB applies are Status of Children Act 1974 (Vic) s 22; Surrogacy Act 2010 (Qld) s 22; Surrogacy Act 2008 (WA) s 21; Parentage Act 2004 (ACT) s 26; Family Relationships Act 1975 (SA) s 10HB; Surrogacy Act 2010 (NSW) s 12: see Family Law Regulations 1984.

45 The section concludes: 'then, for the purposes of this Act, the child is the child of each of those persons'.

46 Family Law Act s 69W. It may be made on conditions, and the court can make associated orders, to enable it to be carried out and to make it more effective or reliable: s 69X.

47 Family Law Act s 69Z.

48 Family Law Act s 69Y.

49 Made under s 69ZC.

Australia. Who can authorise the taking of a sample from the child? Can the DNA evidence be admitted if tests are carried out on samples taken from a child without the necessary authorisation?

*Ellison*⁵⁰ appears to be the only decision to consider such problems in detail, and it requires careful examination. Mr E, the male applicant, filed an affidavit that annexed photocopies of DNA reports undertaken by a body identified as ‘the S Institute’. Those reports identified Mr E as the biological father of the twin children involved in that case. The DNA samples were taken from the children on the basis of Mr E’s consent. However, as the court pointed out, at the time ‘the birth mother was the only person who had authority to consent to a DNA sample being taken from the children’.⁵¹

Initially, the court ruled that the DNA evidence was inadmissible. One reason was the ‘manner in which it was presented’ — presumably as annexures to Mr E’s affidavit rather than as original evidence from the pathologist.⁵² The court also said the reports were inadmissible ‘as a consequence of’ a note by the pathologist which stated that ‘this testing report does not meet the requirements of the Family Law Act Regulations’.⁵³ Of course the note itself would not affect the admissibility of the reports, and the context indicates that the court was referring to the taking of the samples from the children without parental authorisation — which would indeed have been a reason that the report did not meet the requirements of the regulations. The judgment explained that under the Regulations, before a bodily sample is taken from a child, consent is required from ‘a person who is responsible for the long term care, welfare and development of the child’.⁵⁴ The court found that Mr E was not such a person under either Thai or Australian law (and did not find it necessary to consider which law was applicable).⁵⁵

It seems clear that the applicants and the pathologist treated the regulations as applicable. The applicants had claimed that the DNA evidence they relied on ‘complied with the Act and Regulations’,⁵⁶ and in a number of passages the court appeared to apply the Regulations in considering the admissibility of the DNA evidence.⁵⁷ However the Regulations did not apply. They apply only after a parentage testing order under s 69W has been made, as the court itself noted,⁵⁸ and in *Ellison* no s 69W order had been made before the DNA samples were taken.⁵⁹ Nevertheless, the court’s ruling on the admissibility of the DNA evidence appears to have been based in part on the Regulations.

50 *Ellison* (2012) 48 Fam LR 33; [2012] FamCA 602; BC201250476 (Ryan J). In a number of other cases the court has accepted DNA evidence without comment. If there were no parentage testing order and the birth mother consented to the samples being taken from the child and herself, there would seem to be no problem in admitting the evidence.

51 *Ellison* (2012) 48 Fam LR 33; [2012] FamCA 602; BC201250476 at [20].

52 *Ibid.*, at [19].

53 *Ibid.*

54 *Ibid.*, at [22], citing reg 21F(3)(a).

55 *Ibid.*, at [27].

56 *Ibid.*, at [19].

57 For example, *ibid.*, at [22] and [29].

58 *Ibid.*, at [22], second last sentence.

59 Advice received from the applicants’ solicitors. Indeed, no s 69W order could have been made: the section requires that a child’s parentage arises in proceedings under the Act, and on the facts the tests predated the commencement of the proceedings.

Because the test results were inadmissible, in November 2011 the court adjourned the hearing, and ‘ordered that Mr E and the children undergo a parentage test procedure conducted in accordance with the regulations’.⁶⁰ But this did not happen. The pathologist, Dr B, was wrongly advised that it would be enough to prepare a new report using the previously collected sample, and so, instead of having fresh tests in accordance with the order, the applicants led further evidence relating to the *original* tests. Dr B gave oral evidence, which apparently resolved other difficulties,⁶¹ but could not have cured the problem that Mr E lacked capacity to authorise the taking of samples.

We can now turn to the law, and the court’s ruling. Section 69ZC provides that ‘a report made in accordance with regulations covered by para 69ZB(b)’ may be received in evidence. But what is the status of a report made after a parentage testing order that does *not* comply with the regulations? In *Re C (No 1)* (1991),⁶² Fogarty J had held that such non-compliant reports were inadmissible, since ‘neither the Act nor the regulations seem to provide any discretion or capacity to admit the report notwithstanding non-compliance’. It was a report ‘made in accordance with the regulations’ that the court may receive into evidence under the section.⁶³ The current Regulations confirm this. Regulation 21M (5) provides that ‘[a] report completed otherwise than in accordance with this regulation is taken to be of no effect’. As Ryan J pointed out in *Ellison*, ‘strict compliance’ is required.⁶⁴ Accordingly, Ryan J, accepting the correctness of *Re C*, said that the initial reports were non-compliant with the regulations,⁶⁵ and thus inadmissible.⁶⁶ The later reports would also be non-compliant, and therefore equally inadmissible as the first report.⁶⁷

Nevertheless, Ryan J ultimately admitted the first reports into evidence. The reasoning is contained in the following paragraphs of the judgment:

Thus it is necessary to determine whether the first DNA reports might nonetheless be admissible under the Act and Evidence Act. In this regard it was fortunate for the applicants that these proceedings were conducted in accordance with Division 12A of the Act and that evidentiary rules, which would have made admission of aspects of the evidence on this topic problematic, did not apply (s 69ZT of the Act). In *Re C (No 1)* (1991) 15 Fam LR 350, Fogarty J said that compliance with the Regulations is mandatory and there is no capacity to admit a non compliant report into evidence. Mullane J in *McK v O* (2001) FLC 93 ruled inadmissible a DNA certificate where a parentage testing order was not made.

Sections 69W and 69ZB do no more than provide a mechanism which, following the making of a DNA parentage testing order, renders admissible a compliant DNA certificate which would otherwise be inadmissible. The sections are permissive and do not exclude the admission of other non-ordered forms of DNA evidence provided that material complies with the evidentiary requirements for admission. Clearly,

60 *Ellison* (2012) 48 Fam LR 33; [2012] FamCA 602; BC201250476 at [19].

61 See *ibid.*, at [31] of the judgment, quoted below.

62 (1991) 15 Fam LR 350; 104 FLR 436; FLC 92-283.

63 Then s 66W(10), identical in relevant ways to the present legislation.

64 *Ellison* (2012) 48 Fam LR 33; [2012] FamCA 602; BC201250476 at [29].

65 The first report had actually included a note to the effect that it was non-compliant because Mr Ellison did not have the legal capacity to authorise the taking of samples.

66 *Ellison* (2012) 48 Fam LR 33; [2012] FamCA 602; BC201250476 at [29].

67 *Ibid.*: ‘The applicants’ decision to simply have the first samples and data reviewed and a second report issue does not result in a report which complies with the Regulations.’

when a parentage testing order has not been made more than mere production of the DNA certificate will be required so as to admit this DNA evidence.

As was mentioned earlier, subject to an issue about capacity to consent to the procedure, Dr B's oral evidence and documents produced under subpoena from the testing laboratory resolved other matters which would have rendered those first reports inadmissible. Importantly, the chain of custody was sufficiently reliable to establish that the samples tested were taken from Mr Ellison and the children. The effect of this was that the first DNA reports were admitted and the totality of the admitted evidence on this point established to a degree of medical certainty that Mr Ellison is the children's biological father.⁶⁸

With respect, this reasoning is problematical. It is true, as pointed out in para 31, that the requirements relating to reports following a parentage order do not apply to *other* evidence that might be tendered. That other evidence will be admitted if it passes the ordinary tests of evidence law; and because of s 69ZT those tests are in some ways more relaxed in children's cases than they used to be.⁶⁹ This principle seems to have been the reason that other parentage evidence was admitted.⁷⁰ But it does not justify admitting the first reports. On the assumption that the Regulations were relevant, for the reasons given above, doing so was inconsistent with *Re C* and her Honour's own analysis. If a court-ordered parentage report does not comply with the Regulations, it cannot be admitted under s 69ZC, and, on the authority of *Re C*, it cannot be admitted at all. Nothing in the pathologist's oral evidence remedied the defect, namely the lack of authority to take the samples from the children.

As noted earlier, this reasoning seems to treat the Regulations as applicable. But we submit that where no s 69W order has been made, s 69ZC and the Regulations would simply not apply⁷¹ and the admissibility of the DNA evidence is governed by the general law of evidence.

The problem was that under Thai and Australian law only the birth mother had parental responsibility, and she had not consented to the samples being taken. The samples were therefore obtained improperly. Admitting any evidence based on these samples would require consideration of s 138 of the Evidence Act 1995 (Cth), which makes material that has been obtained 'improperly or in contravention of an Australian law' inadmissible unless certain things are established (see below). It does not appear that the court was referred to this section, which is in Pt 3.11 of the Evidence Act and is therefore not excluded by s 69ZT. In order to admit evidence so obtained, the court would have had to find that 'the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained'.⁷²

Section 138 required the court to consider the following matters:

- (3) Without limiting the matters that the court may take into account under subsection (1), it is to take into account:

⁶⁸ *Ellison* (2012) 48 Fam LR 33; [2012] FamCA 602; BC201250476 at [30]–[32].

⁶⁹ Compare *McK v O* (2001) 28 Fam LR 243; FLC 93-090; [2001] FamCA 1338; BC200108628, also mentioned at [29].

⁷⁰ Her Honour treated the oral evidence of the pathologist, and the second report, as 'non-ordered forms of DNA evidence': *ibid*, at [30].

⁷¹ Section 69ZB provides that regulations can be made relating to 'the carrying out of parentage testing procedures under parentage testing orders ...'.

⁷² Evidence Act 1995 (Cth) s 138(1).

- (a) the probative value of the evidence; and
- (b) the importance of the evidence in the proceeding; and
- (c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding; and
- (d) the gravity of the impropriety or contravention; and
- (e) whether the impropriety or contravention was deliberate or reckless; and
- (f) whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights; and
- (g) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention; and
- (h) the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law.⁷³

Because the court's attention was not drawn to s 138, we have no judicial guidance about how it should be applied in situations like *Ellison*. Its application would depend on the facts of each case, and on the judge's evaluation of the various matters. There may of course be factors supporting the admission of the evidence. But the reference to the International Covenant on Civil and Political Rights is interesting, and shows how the application of human rights might be more complex and nuanced than indicated in the submissions made in *Ellison* (discussed below, Part 2). Arguably, taking DNA samples from a child without authority violates Art 9.1 ('Everyone has the right to . . . security of person'). More specifically, Art 24 provides that:

Every child shall have, without any discrimination [. . .], the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

The protection of children against assaults and interference such as the unauthorised taking of DNA samples is surely a measure of protection required by the child's status as a minor, and is thus protected by Art 24. More generally, a court applying s 138 would need to consider not only the impact on the particular children before the court, but the effect of the decision on the human rights of children in general, and their parents,⁷⁴ and their rights would arguably be diminished by admitting into evidence DNA samples taken from children without the consent of a person having parental responsibility.

For these reasons, in our view the position relating to the admission of DNA evidence based on samples taken from children without proper authorisation may be summarised as follows:

- If a parentage testing order has been made, the non-compliant DNA reports must be excluded because of the Regulations and *Re C*. If this is incorrect, the reports cannot be admitted unless s 138 of the Evidence Act is applied, because they were taken 'in contravention

⁷³ Ibid.

⁷⁴ And compare the United Nations Convention on the Rights of the Child 1989, eg, Art 3.2 ('ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her . . .') and Art 5 ('States Parties shall respect the responsibilities, rights and duties of parents . . .').

of Australian law': under the Regulations, a sampler 'may not take' a sample from a child unless consent has been given by 'a person who is responsible for the long-term care, welfare and development of the child'.⁷⁵

- If no such parentage testing order had been made, the Regulations are irrelevant, and the admissibility of the report should be determined under ordinary principles. Those principles include s 138 of the Evidence Act 1995 (Cth). Samples taken from a child without parental authority are surely obtained 'improperly' and therefore the court cannot admit the evidence unless it finds, having regard to the specified matters, that the desirability of admitting the evidence outweighs the undesirability of admitting it.⁷⁶

The applicable law in international family cases

For most issues in international family law, the applicable law is the law of the forum per se, without reference to choice of law questions. Historically, this could be explained on the basis that the courts only exercised jurisdiction when the parties were domiciled in the forum.⁷⁷ The application of forum law could then be justified on the basis that forum law was by virtue of the jurisdictional rules the law of the domicile.⁷⁸ Although the common law jurisdictional rules were expanded very substantially in the Family Law Act,⁷⁹ there has been no corresponding change to the choice of law rules.

Subsection 42(1) of the Family Law Act states that when the court exercises jurisdiction under the Act, it must apply the Act.⁸⁰ This provision is sometimes treated as a choice of law rule, justifying the Australian courts' application of the Act in international cases. It has been interpreted to have that effect in a case about parental status.⁸¹ No doubt, if an Australian court is asked to make a parenting order or a declaration of parentage, it would have to do so under

⁷⁵ Family Law Regulations 1984 regs 21F(1) and (3)(a).

⁷⁶ Evidence Act 1995 (Cth) s 138(1).

⁷⁷ *Le Mesurier v Le Mesurier* [1895] AC 517 at 540; [1895-9] All ER Rep 836. At common law, married women lacked capacity to acquire a domicile independently of their husbands, and so there was only one forum in which proceedings could be brought.

⁷⁸ As it happens, the law of the domicile is the law most often applied when a choice of law analysis is used in family law. For example, the law of the matrimonial domicile is presumed to be the law that the parties intended to govern their entitlement to property: *Murakami v Wiriyadi* (2010) 268 ALR 377; [2010] NSWCA 7; BC201000540 at [98], [121], [126].

⁷⁹ In all applications other than applications for divorce orders, the mere presence of either party at the time that initiating process is filed is sufficient: Family Law Act 1975 (Cth) s 39(4) (matrimonial causes other than divorce orders), s 69E(1) (applications involving children). In matters in which the best interests of the child are relevant, including parenting orders, the normal rule of *forum non conveniens* does not apply and proceedings cannot be stayed on the basis that the court is a clearly inappropriate forum: *Pascarl & Oxley* [2013] FamCAFC 47.

⁸⁰ This is subject to s 42(2), which requires the court to apply common law choice of law rules, subject to the Marriage Act 1961 (Cth). There are very few common law choice of law rules applicable in family litigation, as explained above.

⁸¹ *Brianna v Brianna* (2010) 43 Fam LR 309; FLC 93-437; [2010] FamCAFC 97; BC201050480 at [65].

the Family Law Act, even if there were an international element to the case.⁸² It is much less clear that the law of the forum should be applied to determine other issues, such as who is a child's parent, when the child is born outside Australia and the birth and genetic mothers are not Australian.

In international surrogacy cases, including *Ellison*, the courts assume that Australian law is applicable to determining parental status without justifying that assumption.⁸³ In several cases, the courts have referred also to the law of the place where the child was born, also without any explanation.⁸⁴ Determining the applicable law for identifying parental status is a novel issue in private international law.⁸⁵ It should not simply be assumed that forum law is applicable to this question if the legislation is silent as to its intended scope of application. Further attention needs to be given to what law should be applied in international cases. It is not appropriate simply to dismiss the relevance of the law of the place where the fertility procedure occurred, where the child was born, and where the mother is domiciled and resident, without clear legislative instruction to do so.

Parentage in commercial surrogacy situations: summary

To conclude, in commercial surrogacy arrangements where the child is born through donated eggs and the sperm of one of the commissioning parents, the position relating to parentage under Family Law Act appears to be as follows:

- The child's legal mother will be the birth mother if the circumstances fall within s 60H(1)(where the birth mother is married or partnered)⁸⁶ or within s 60H(2) (if a state or territory law says the child is her child). If the birth mother is single and no such state or territory law applies, the position is uncertain.
- If a commissioning intended father provided the sperm, no provision of the Family Law Act explicitly prevents the court from finding him to be the father if at the time of the procedure the birth mother had no consenting husband or de facto partner. However under state and territory laws such sperm donors are irrebuttably presumed not to be

82 *Re Mark: an application relating to parental responsibilities* (2003) 179 FLR 248; 31 Fam LR 162; FLC 93-173; [2003] FamCA 822 at [94].

83 *Re Mark: an application relating to parental responsibilities* (2003) 179 FLR 248; 31 Fam LR 162; FLC 93-173; [2003] FamCA 822.

84 *Dudley & Chedi* [2011] FamCA 502; BC201150419 at [25]; *Dennis & Pradchaphet* [2011] FamCA 123; BC201150171 at [20].

85 The leading treatise states that similar provisions in English legislation, dealing with parental status for children born after assisted reproduction, 'are rules of English domestic law and do not amount to general rules of the conflict of laws', but does not suggest when those rules ought to be applied: Lord Collins of Mapesbury (Gen ed), *Dicey, Morris & Collins on the Conflict of Laws*, 14th ed, Sweet and Maxwell, 2012, p 1216. The characterisation of the rules as domestic suggests that they should not be applied without a choice of law analysis.

86 This is also the case in all state and territory jurisdictions, if the mother is married or in a heterosexual relationship. In most Australian jurisdictions, this is also the case for single birth mothers and birth mothers in same sex relationships. In Tasmania, the legislation does not specifically state that single birth mothers will be legally recognised as the mother. In Victoria, the legislation relevant to single mothers and birth mothers in same sex relationships is in the only part of the legislation relevant to parental status that is not expressly given an extraterritorial application. See references above n 33.

the father,⁸⁷ and as noted elsewhere in this article, Ryan J has expressed a provisional view to the effect that the Family Law Act in effect incorporates the parenthood provisions of state and territory law.⁸⁸ On that view, state and territory provisions might prevent the sperm-providing commissioning parent from being recognised as the father. However this is not the only possible interpretation of the relevant provisions. Under subss 60H(2) and (3), the provisions of state and territory legislation relating to parental status are picked up only to identify which persons *are* the parents of a child for the purposes of the Act. Subsections 60H(2) and (3) do not explicitly pick up any state or territory provisions stating who is *not* the father. And although both Watts J and Ryan J have said that s 60HB provides that state law ‘will govern the determination of parentage’ of children born under surrogacy arrangements,⁸⁹ in its terms s 60HB deals only with situations where a court has made an order under a prescribed law of a state or territory.

- If at the time of the procedure the birth mother had a husband or de facto partner who consented to the procedure, unless contrary to existing authorities it is held not to apply to surrogacy situations, s 60H(1) might lead to the bizarre result that the legal father will be the *birth mother’s husband or partner*, and not the biological father who seeks to act as such.
- Where a parentage testing order has been made, DNA evidence is inadmissible in family law proceedings if the Regulations have not been complied with, for example if samples were taken from a child without proper authorisation. And whether or not there has been a parentage testing order, such samples, and any other evidence improperly obtained, can be admitted only if the court applies s 138 of the Evidence Act 1995 and finds that the desirability of admitting the evidence outweighs the undesirability of admitting the evidence, having regard to the matters listed in that section.

In this area, therefore, several issues need attention. First, the Full Court could usefully clarify the law in some respects, including the question whether parentage is to be determined by Australian law or the law of the country in which the children are born. Second, there is a need for legislative reform. In our view s 60H needs to be amended because it has been interpreted in a way that can produce absurd results in some surrogacy situations. What that amendment should be, and whether the other parentage provisions of the Act are satisfactory, are questions of policy. No doubt their resolution will be aided

87 The parental status presumptions of the ACT, NSW, South Australian and Victorian legislation all provide in such circumstances that the sperm donor is irrebuttably presumed not to be the father: Parentage Act 2004 (ACT) ss 11(5), 12; Status of Children Act 1996 (NSW) ss 14(2), (4); Family Relationships Act 1975 (SA) s 10C(4); Status of Children Act 1974 (Vic) ss 13(1)(c), (2), 15(1)(b), (2). The ACT, NSW and SA provisions are stated to apply whether or not the fertility procedure occurred in the jurisdiction, and whether or not the child was born in the jurisdiction, but the relevant Victorian provisions are not.

88 *Mason & Mason* [2013] FamCA 424; BC201350237.

89 *Ibid*, at [34], agreeing provisionally with *Dudley* [2011] FamCA 502; BC201150419 at [29].

by the report of the Family Law Council when it has finished its work on this topic.⁹⁰

Part 2: The relevance of criminality to the making of parenting and related orders

Introduction

Unlike most of the laws discussed above, the laws discussed in this section require the court to make what can loosely be called discretionary judgments — to weigh things up, to balance some things against others. We need to examine what those things are, and how they are to be balanced. We will look at making parenting orders, granting declarations of parenthood and referring papers to the prosecuting authorities.

In the international commercial surrogacy cases we are examining, there is no difficulty about jurisdiction, or about the applicants' standing to seek parenting and related orders.⁹¹ The children are present in Australia, and regardless of parentage the applicants, the commissioning parents, already have the care of the children and are entitled to apply for parenting orders as 'persons concerned with the children's care, welfare and development'.⁹² The application is for orders that remove the parental rights of the surrogate mother, and she, therefore, is a necessary party to the proceedings.⁹³ The provider of the egg, it seems, has no such rights and is not a necessary party. Perhaps for this reason, in these cases the position of the egg donors is ignored, and the courts generally make no reference to any interest or right of the children to know their maternal genetic heritage.⁹⁴

Parenting orders

The Act contains detailed provisions relating to the making of parenting orders, ie, orders dealing with parental responsibility and the care of the child. As we have seen, the birth mother is a 'parent' and starts with parental responsibility, the other parent normally⁹⁵ being the commissioning parent who is the biological father. In substance, the application seeks parenting orders that give parental responsibility to the commissioning parents and remove it from the birth mother. The court must regard the child's best interests as the paramount consideration when making parenting orders.⁹⁶ In all the reported cases, given uncontested evidence that the applicants are suitable, that the child has been living with them since birth, and that there are no competing claims by the birth mother or the egg donor, the courts have had no difficulty in making parenting orders in favour of the applicants.

⁹⁰ The terms of reference for the Council's parentage review were issued by the Attorney-General in June 2012 and updated in September 2012.

⁹¹ See, eg, *Ellison* (2012) 48 Fam LR 33; [2012] FamCA 602; BC201250476 at [9]–[16].

⁹² Family Law Act 1975 s 65C(c).

⁹³ Family Law Rules 2004 r 6.02.

⁹⁴ In *Mason & Mason*, Ryan J noted that the egg donor was 'unknown and will remain so unless in India there is a significant change in the law': [2013] FamCA 424; BC201350237 at [49].

⁹⁵ Unless s 60H applies, as explained above.

⁹⁶ Family Law Act 1975 s 60CA.

Declarations and findings of parentage

Principles applicable in issuing declarations or making findings of parentage

Sometimes the applicants seek a declaration that one of them is a father of the children. Section 69VA provides:

As well as deciding, after receiving evidence, the issue of the parentage of a child for the purposes of proceedings, the court may also issue a declaration of parentage that is conclusive evidence of parentage for the purposes of all laws of the Commonwealth.

Such a declaration has continuing effect, whereas the parenting orders cease to have effect when the child turns 18. The declaration means that the relationship between child and father will be acknowledged for the purposes of Commonwealth law. The Human Rights Commission (HRC) was therefore inaccurate when it submitted in *Ellison* that if a declaration were made, rights would accrue to the children 'relating to citizenship, migration, medical treatment, intestacy and child support'. Under s 69VA the declaration is conclusive evidence of parentage only 'for the purposes of all laws of the Commonwealth', and thus rights would accrue in relation to medical treatment and intestacy, and any other matters governed by state or territory laws, only if those state or territory laws expressly picked up s 69VA declarations. The Queensland Succession Act 1981, for example, has no such provision.

When it finds that a person is a parent,⁹⁷ the court 'may' issue the declaration.⁹⁸ What principles govern this decision? There are no specific legislative guidelines about issuing such a declaration. The paramount consideration principle does not apply, because, as the court held in *Ellison*, a parentage declaration is not a parenting order under s 64B.⁹⁹ Thus the discretion is at large, although, as her Honour rightly indicated, the children's interests will be a relevant and often a very important consideration.¹⁰⁰

In the result, because the 'paramount consideration' principle does not

97 In s 69VA, 'parentage' refers to biological parentage: see *Tobin v Tobin* (1999) FLC 92-848; 150 FLR 185; 24 Fam LR 635; [1999] FamCA 446 and the discussion in *Groth v Banks* [2013] FamCA 430; BC201350238.

98 Although her Honour had made a declaration of parentage in *Ellison*, in *Mason* Ryan J expressed the 'provisional' view that unless an order had been made in favour of the applicant pursuant to the Surrogacy Act 2010 (NSW), the provisions of the Family Law Act did not permit the court to make a declaration of parentage in favour of the applicant: [2013] FamCA 424; BC201350237 at [15]–[37]. The amendments of 2008 (inserting ss 60H and 60HB) showed an intention to adopt the scheme that applied in the states and territories, namely, a scheme for the transfer of parentage in accordance with an order made by the Supreme Court (of NSW in that case). Her Honour said that this interpretation would achieve, on a state by state (and territory) basis, a uniform system for the determination of parentage.

99 (2012) 48 Fam LR 33; [2012] FamCA 602; BC201250476 at [80]. Ryan J also referred to the emerging view that a parentage testing order under s 69W is likewise not a parenting order, citing *Brianna v Brianna* (2009) 43 Fam LR 309.

100 *Ibid*, at [90]. Under the convention they are 'a primary consideration'. And in other areas of discretion relating to children, the courts have consistently stressed the importance of children's interests, even where the paramount consideration principle does not apply: eg, *CDJ v VAJ (No 1)* (1998) 197 CLR 172; 23 Fam LR 755; *EJK v TSL* (2006) 35 Fam LR 559; [2006] FamCA 730.

apply to making parentage declarations, it is an open question whether the interests of the children in the case should prevail over any competing interests or public policies. Only two cases — *Dudley* and *Ellison* — have really explored this question, and they took contrasting approaches.

Different approaches to illegality in *Dudley* and *Ellison*

In *Dudley and Chedi*¹⁰¹ the applicants were surely committing a crime under Queensland law when they made a commercial surrogacy arrangement in Thailand. The Queensland legislation provided that '[a] person must not enter into or offer to enter into a commercial surrogacy arrangement', and imposed a penalty of 100 penalty points or 3 years imprisonment. The Queensland provisions expressly applied extra-territorially.¹⁰² Watts J made the parenting orders, applying the 'paramount consideration' principle. There was no application for a parentage declaration, but his Honour rightly saw a policy issue as to whether he should make a *finding* that the male applicant was the father:

There is a general policy question as to whether or not I should make the requested orders, which could be perceived in some sense to sanction acts which were illegal in Queensland at the relevant time and which were against public policy (such public policy now being recognised by way of legislation through virtually the whole of Australia in making those acts illegal, with possible severe penalties).

Declining to make the finding, his Honour said:

Notwithstanding the possible advantages to [the children] in making a finding that Mr Dudley is a parent . . . , I decline to make that finding for the following reasons:

- (1) Applicable state law made what he did illegal;
- (2) There was at that time no provision in state law that would allow the recognition of any relationship between the twins and Mr Dudley;
- (3) Had the surrogacy arrangement been altruistic, there is now such a provision that would allow such recognition;
- (4) Mr Dudley may seek a remedy through adoption legislation; and
- (5) The orders that are sought in this case can be made without recognising Mr Dudley as the father of the twins.¹⁰³

Ellison was decided soon after *Dudley*. The basic facts were similar, but the court took a very different approach. After a detailed discussion, and a consideration of *Dudley*, Ryan J made a parentage declaration in favour of Mr Ellison (as well as making parenting orders).

Her Honour held that the policy argument in the first three points made by Watts J should not stand in the way of making a declaration that Mr Ellison was the father of the children. The court accepted without reservation the following submission by the HRC:

¹⁰¹ [2011] FamCA 502; BC201150419.

¹⁰² As Ryan J pointed out in *Ellison*, where the facts were similar, although commercial surrogacy was not illegal in Thailand, 'the Surrogate Parenthood Act 1988 (Qld) in which State the applicants and children live, asserts extraterritorial effect and renders the applicants liable to prosecution and potentially imprisonment for up to three years.'

¹⁰³ There was no formal application for a parentage declaration, or indeed for a finding of parenthood, in *Dudley & Chedi* [2011] FamCA 502; BC201150419 at [32].

the court is faced with having children in front of it and needs to make orders that are in the best interests of those children, and at that stage it's probably too late to ask whether — or to inquire into the legality of the arrangements that had been made. The court really needs to take children as it finds them.¹⁰⁴

Ryan J criticised the fourth and fifth points made by Watts J, again accepting submissions by the Commission. On the fourth point, the HRC had suggested that there was some doubt about whether the applicant would have a remedy through the Queensland adoption legislation without a finding or declaration of parenthood, and Ryan J, going further, held that he would not.¹⁰⁵ On the face of it this seems correct. If granted parental responsibility under the Family Law Act the applicants would have fallen within the definition of 'parent' under the Queensland adoption legislation;¹⁰⁶ but there is an additional requirement: the applicants could apply for adoption only if leave had been granted under s 60G of the Family Law Act.¹⁰⁷ Such leave could be given only if at least one of them was a 'parent'.¹⁰⁸ Thus the Family Court would need to find that the applicant was a 'parent' (under the Family Law Act) in order to grant leave to apply for adoption under s 60G. It might be arguable, however, that in the context of s 60G the word 'parent' should be interpreted consistently with the extended definition in the Queensland adoption legislation; if so, the applicants would be eligible to obtain leave under s 60G and thus to apply for adoption, as Watts J had held in *Dudley*. As to the fifth point, Watts J was of course correct to say that the parenting orders *could* be made without recognising the male applicant as the father, as has been done in some of the other cases. The comments by the HRC, accepted by the court in *Ellison*, simply emphasised the value to the children of recognising his parenthood.

In *Ellison*, the court's reasoning on making the parentage declaration adopted the Commission's written submissions.¹⁰⁹ Those submissions cited a number of provisions of the Convention on the Rights of the Child relating to parents and legal guardians and treated them as supporting the application. In particular the Commission submitted that children born of surrogacy arrangements 'should not be subjected to a disadvantage or detriment as a result of any difference in legal status conferred on their parents or guardians'.¹¹⁰ The court followed *Re X and Y (Foreign Surrogacy)*¹¹¹ and *Re D and E*¹¹² (where the issue arose in connection with adoption and where the court was required to treat the children's best interests as paramount) and concluded that the children's interests outweighed any competing policy considerations:

104 *Ellison* (2012) 48 Fam LR 33; [2012] FamCA 602; BC201250476 at [87].

105 *Ibid*, at [99].

106 Adoption Act 2009 (Qld), Dictionary, para (b) of the definition of 'parent'.

107 Adoption Act 2009 (Qld) s 92(1)(d).

108 See the definition of 'prescribed adopting parent' under s 60G; *Ellison* (2012) 48 Fam LR 33; [2012] FamCA 602; BC201250476 at [99].

109 Set out in *Ellison* (2012) 48 Fam LR 33; [2012] FamCA 602; BC201250476 at [85].

110 *Ibid*, at [85].

111 [2009] 1 FLR 733.

112 (2000) 26 Fam LR 310; [2000] NSWSC 646; BC200003802.

In relation to this issue, even if these children's best interests are not the paramount consideration, the approach adopted by Bryson J [in *Re D and E*] is no less applicable as to how public policy and these children's interests should be balanced.

. . . Although the children have been granted Australian citizenship, a declaration of parentage has a wider reach than parenting orders. Considered from the perspective of the children, it is difficult to discern how it could be in their interests to permit public policy considerations to stand in the way of a declaration of parentage in relation to the person who is their biological father. As was said in *G v H* such a finding may well be of the greatest significance to the child in establishing his or her lifetime identity (per Brennan and McHugh JJ). In this case, to the children, a declaration of parentage has the significance there stated. In the exercise of my discretion, I am unable to give greater weight to public policy considerations of the type discussed in *Dudley & Chedi* in priority to the children's interests.

Lest it be overlooked, irrespective of how State law views the applicant's actions, the children have done nothing wrong.¹¹³

The approaches in *Dudley* and *Ellison* are incompatible. *Dudley* held that a finding of parenthood should not be made because of the criminality of the arrangement, and it is clear from the reasoning that Watts J would have refused to grant a declaration of parentage had such an application been made. *Ellison* held, in substance, that a declaration of parenthood would benefit the children and that this factor outweighed any concerns about the criminality of the arrangement. Although the HRC submitted in *Ellison* that it had been 'open' to Watts J in *Dudley* to adopt the course he did,¹¹⁴ there is no denying the inconsistency between the two approaches. Ryan J was right, therefore, to spell out her reasons for not following *Dudley*: it is well established that a judge at first instance should generally depart from a precedent set by another only if convinced that the earlier decision was wrong.¹¹⁵ The wider issues are considered further below.

A further complication arises from a recent decision in which Ryan J expressed the provisional view that state law governs the determination of parentage of children born under surrogacy arrangements and the state law will be recognised by federal law, and concluded (subject to possible further submission) that unless an order were made in favour of the applicant in that case under the relevant state legislation — the Surrogacy Act 2010 (NSW) — the provisions of the Family Law Act did not permit the court to make a declaration of parentage in the applicant biological father's favour (as it had done in *Ellison*).¹¹⁶

¹¹³ *Ellison* (2012) 48 Fam LR 33; [2012] FamCA 602; BC201250476 at [90]–[92].

¹¹⁴ *Ibid*, at [87].

¹¹⁵ See, eg, *Hamilton Island Enterprises Pty Ltd v FCT* [1982] 1 NSWLR 113 at 119; 60 FLR 285; 82 ATC 4088; 12 ATR 790 (Rogers J: 'Unless I were of the view that the decision of another judge of coordinate authority was clearly wrong I would follow his decision'); *La Macchia v Minister For Primary Industries And Energy* (1992) 110 ALR 201 (Burchett J, quoting *Halsbury*, 'a judge of first instance will as a matter of judicial comity usually follow the decision of another judge of first instance [scil of coordinate jurisdiction] unless he is convinced that the judgment was wrong').

¹¹⁶ *Mason & Mason* [2013] FamCA 424; BC201350237 at [33]–[34].

Referral of papers for possible prosecution

There is clear line of authority that the court has a duty in some circumstances to refer papers to the appropriate authority so that prosecution may be considered.¹¹⁷ Most of the decisions involve possible offences against Commonwealth laws — notably the revenue laws, but also perjury¹¹⁸ and bigamy.¹¹⁹ There seems no obvious reason to limit the duty to breaches of *Commonwealth* laws as distinct from state or territory laws, and a number of the statements of principle do not suggest any such limitation. Consistent with those authorities, in *Dudley* and another case¹²⁰ Watts J referred the papers to the Office of the Director of Public Prosecutions, Queensland. In no other commercial surrogacy case, however, either before or after *Dudley*, has the court referred the papers or mentioned the possibility of doing so.

It is not an easy question. It has been argued, for example, that fear of such referrals will deter intending parents from seeking parenting orders;¹²¹ but a somewhat similar policy argument was rejected in relation to revenue matters.¹²² Again, prosecution of the intended parents would be likely to disadvantage the children, as pointed out in *Ellison* in the context of a certificate under s 128 of the Evidence Act 1995 (Cth),¹²³ but the prosecution of parents for other crimes, too, would equally disadvantage their children, and is generally seen as a matter relevant to sentence rather than a reason for exempting parents from criminal liability. There are difficult and competing factors to be weighed up in this matter, and the question deserves more sustained judicial attention than it has yet received.

Discretion and criminality: towards a principled approach

Dudley and *Ellison* give different answers to an issue that underlies many of these cases: what is the right approach to making orders that will benefit the applicants and the particular children before the court, but may also give effect

117 See, eg, *T and T* (1984) FLC 91-588 (Full Court); *In the Marriage of P and P* (1985) FLC 91-605; *Malpass and Mayson* (2000) FLC 93-061; *Georginas v Kostrati* (1988) 49 SASR 371; (1989) Aust Torts Reports 80-233 (SC SA, Full Court, Von Doussa J saying at SASR 376: ‘Where a tax fraud or evasion is disclosed in evidence it is the court’s duty to draw the evidence to the attention of the executive branch of government for such action as may be appropriate’); *Hiu & Ling* [2010] FamCA 743; BC201050836; *Vasilias v Vasilias* (2008) 217 FLR 134; [2008] FamCA 34.

118 *Simpson v Hodges* [2007] NSWSC 1230; BC200709480.

119 *Hiu & Ling* [2010] FamCA 743; BC201050836.

120 *Dudley & Chedi* [2011] FamCA 502; BC201150419; *Findlay & Punyawong* (2011) 266 FLR 236; 46 Fam LR 302; [2011] FamCA 503; BC201150422.

121 Millbank, above n 5, at 206 anticipated that:

These decisions will seriously deter parents from NSW, Queensland and the ACT who have engaged in paid surrogacy overseas from seeking parenting orders in the future. Such families are effectively left with no means of regularising the legal status of their child. This may also impact upon citizenship, as the above discussion has explained. This recent development may also deter parents from other states from revealing information about the circumstances of the child’s birth.

122 *In the Marriage of P and P* (1985) FLC 91-605; 9 Fam LR 1100.

123 *Ellison* (2012) 48 Fam LR 33; [2012] FamCA 602; BC201250476 at [3].

to criminal actions, and by rewarding criminal arrangements may put at risk the human rights of other children, as well as birth mothers and egg donors in Third World countries?

The courts must assess these matters in the light of the available evidence in each case. What do they have? The cases show that there is always some evidence of the surrogacy arrangement and of the suitability of the applicants to have parental responsibility for the child. In some cases the birth mother is a party and has filed a document consenting to the orders, and an affidavit to the effect that she intends to relinquish all her rights and obligations in relation to the children and that she consents to the proposed orders.

The amount of information, especially about the surrogacy arrangements and the position of the birth mother, varies from case to case. At one extreme is *Ellison*, where as a result of Justice Ryan's initiative in appointing an independent children's lawyer and seeking the intervention of the Australian Human Rights Commission, the court obtained a family report and fairly detailed information. As a result, there was evidence that identified the children and their paternity, and thus excluded the possibility that it was a case of child trafficking.¹²⁴ There was evidence from the birth mother, who consented to the orders. And there was evidence that the applicants were unable to have children of their own,¹²⁵ and had given considerable thought to issues relating to the children's identity and culture.¹²⁶ Indeed, they had obtained the mother's agreement to receive photographs of the children and to meet with them and the children when they visited Thailand (despite which, however, the court found that it was 'almost certain' that the children 'will never know their biological or birth mother').¹²⁷

In some other cases, the evidence does not go much further than establishing the surrogacy arrangements, the mother's consent to the proposed orders and the suitability of the applicants.¹²⁸ There is rarely evidence about the circumstances leading up to the surrogacy arrangements, or such matters as the mother's ability to give informed consent, or the availability of counselling, although in some cases there was evidence that someone had explained the legal issues to her and had translated the court documents. In *Findlay & Punyawong*, for example, the mother's evidence was only that she had spoken to the applicants through an interpreter about the surrogacy agreement; that a Thai lawyer had explained the content of Thai law about surrogacy; that 'an interpreter' had explained the content of Australian law; and that the parenting plan and the Australian court documents had been read to her in her own language before she signed them.¹²⁹ The court had 'no evidence as to what, if any, safeguards were in place to protect the surrogate

¹²⁴ Ibid, at [4].

¹²⁵ As there was in some other cases, eg, *Dudley & Chedi* [2011] FamCA 502; BC201150419 at [9].

¹²⁶ *Ellison* (2012) 48 Fam LR 33; [2012] FamCA 602; BC201250476 at [122].

¹²⁷ Ibid, at [129].

¹²⁸ Eg, *Gough & Kaur* [2012] FamCA 79; BC201250108.

¹²⁹ *Findlay & Punyawong* (2011) 266 FLR 236; 46 Fam LR 302; [2011] FamCA 503; BC201150422 at [16]. The situation was the same in *Dudley & Chedi* [2011] FamCA 502; BC201150419.

mother from emotional or financial harm'. The age of the birth mother is usually not specified.

In some cases the mother is not a consenting party at all, and the application proceeds on an undefended basis. In *Ronalds & Victor* there was substituted service on the agency in India; the mother did not file any documents or participate in any way in the proceedings.

Even more worrying is *Wilkie & Mirkja*,¹³⁰ in which the court dispensed with service on the mother altogether. There was evidence that the solicitor in Mumbai who had organised the surrogacy found that the mother's address 'did not exist'. The applicants had never met her. The court said that attempts to serve her with the documents would be futile, since there were 'no indications as to her status or intellectual capacity' that would enable it to find that a newspaper advertisement would bring the application to her attention.¹³¹ The court concluded that the mother was 'not interested in the proceedings and would not attend even if she was properly served',¹³² and had excluded herself from the children's lives.¹³³ But the court could not have been sure that she had not been, for example, drugged or coerced, or told that the children were dead. Indeed, it could not be sure that the children were in fact the children of a surrogate mother, as distinct from trafficked children. Since the applicants had not met the mother, they too might have been unaware of the children's true history. All they knew, it seems, was that a Mumbai solicitor claimed to have organised the surrogacy and later discovered that the address given for the surrogate mother did not exist. The court went on to make the parenting orders sought, finding, on the applicants' uncontradicted evidence, that the parenting orders they sought would be in the best interests of the children.

In these cases there is generally no evidence about the woman who provided the eggs or the circumstances in which the eggs were obtained. The usual situation seems to be that the applicants engage an organisation in the other country to obtain an egg from an anonymous donor. The court is told nothing about how the eggs were obtained, although in no case has the court indicated any concern to exclude the possibility of coercion or other improper behaviour in relation to the egg donor. Generally, the court says nothing about the implications of the child's biological relationship to the egg donor. In *Ellison*, unusually, the issue was briefly mentioned:

Although it is almost certain that the children will never know their biological or birth mother, it is not within the court or the applicants' power to coerce those women to establish or maintain a relationship with the children. I agree with the ICL that this may raise issues for the children as they mature.¹³⁴

It is obvious from many of the cases that the practice in international surrogacy fails to protect the human rights of surrogate mothers and egg donors. It falls far short of international human rights standards relating to

130 [2010] FamCA 6; BC20105000867.

131 *Ibid*, at [2].

132 *Ibid*, at [3].

133 *Ibid*, at [16].

134 *Ellison* (2012) 48 Fam LR 33; [2012] FamCA 602; BC201250476 at [129].

intercountry adoption,¹³⁵ and, even more, of the rigorous requirements for adoption, and for altruistic surrogacy, that apply under Australian laws.

To sum up, in these cases there is always evidence that persuades the court that it is in the child's interests to make the parenting orders sought. This is hardly surprising, given that the applicants' evidence is uncontradicted, that no-one else is claiming the role of parent or offering to care for the children, and that the applicants have had the care of the children for some months before the matter comes to court. As we have seen, in some cases it is unclear whether the mother had given an informed consent, and even, in at least one case, whether the child was indeed the child of the alleged surrogacy arrangement. Yet in all the cases, even where the evidence did not exclude improper pressure on the mother and/or egg donor, the court made the requested parenting orders.

Was it wrong to do so?

Answering this question takes us back to legal principle. The court can either make or refuse to make the parenting orders. Refusing to make the parenting orders would deny legal support to the only people in a position to care for these children. Even if the courts suspected or believed that the mother's consent had been coerced, or, perhaps, even if it suspected that the children had been trafficked, refusing to make the parenting orders would presumably leave the applicants looking after the children without legal authority, or have the children taken from the only people they knew as parents, and placed with the state child protection authorities, perhaps then becoming state wards, going into foster care, or being adopted by somebody else.

The children's best interests must be the paramount consideration. In *Ellison*, the court accepted as 'demonstrably correct' the following submission by the HRC:

the court is faced with having children in front of it and needs to make orders that are in the best interests of those children, and at that stage it's probably too late to ask whether — or to inquire into the legality of the arrangements that had been made . . .¹³⁶

This submission is misleading, however, if it implies that the circumstances of the surrogacy arrangement are irrelevant to the assessment of what will be in the child's best interests. The way they behave in relation to the arrangement may be relevant in the assessment of commissioning parents' capacity to meet the child's needs. The court might need to know, for example, if the commissioning parents proceeded with the arrangement without any assurance that the child would be able to enter and live in Australia, or showed little or no compassion for the surrogate mother or the egg donor, or were insensitive to the child's identity rights and cultural identity needs. Again, these fertility arrangements often involve multiple births, and a court would be

¹³⁵ The Intercountry Adoption Convention requires that the mother's consent be given only after the birth of the child, and after she has received counselling, and that her consent 'has not been induced by payment or compensation of any kind': *Convention on Protection of Children and Co-operation In Respect of Intercountry Adoption*, Art 4.

¹³⁶ (2012) 48 Fam LR 33; [2012] FamCA 602; BC201250476 at [87].

concerned about the suitability of the commissioning parents if they left one or more unwanted siblings behind in India or Thailand with no arrangements being made for their welfare.

How should we understand the court's acceptance of the submission that it was 'too late' to inquire into the legality of the arrangements? If it is 'too late' to inquire into the legality of the arrangements, and if the proposed orders would benefit the children, must the court make the orders regardless of the circumstances of the surrogacy? If so, it would seem that much of the evidence so carefully obtained in *Ellison*, and much of the sort of material required to be provided under the Commission's proposed guidelines, might be legally irrelevant. The logic of the submission seems to be that if the proposed orders will benefit the children before the court, the orders must be made regardless of the criminality of the arrangement, and regardless of whether the mother and egg donor were subjected to duress or fraud. Indeed, if in fact the children were not surrogate children at all, but victims of child trafficking, the court would still be 'faced with having the children in front of it'. Even then, on the basis of the Commission's successful submission, would it not still be 'too late' to do anything other than make the orders that would benefit the children?

In our view answering these questions requires a more rigorous analysis of legal principle than can be found in the existing authorities. It would be appropriate for the Full Court to examine this issue when the occasion arises. When it does, it may need to tackle a fundamental and unresolved issue about the meaning of the paramountcy principle. The *Ellison* approach seems to mean simply that the court must make whatever order it considers best for the child. This has been called the 'strong' view of the paramountcy principle. The alternative position — the 'weak' view — is that there can be circumstances that permit or require the court to make different orders. In the leading High Court case of *AMS v AIF* (1999)¹³⁷ three of the seven justices indicated, in separate judgments and in somewhat different terms,¹³⁸ that making the child's best interests the paramount consideration does not make it the sole, or only, consideration.¹³⁹ The proposition that the child's best interests are the 'paramount' but not the 'sole' consideration¹⁴⁰ has since been dutifully recited in many subsequent family law cases.¹⁴¹

But what does it mean? If it means only that the court should ensure that all relevant matters are considered when the court assesses what orders would be

137 *AMS v AIF and AIF v AMS* (1999) 199 CLR 160; 163 ALR 501; [1999] HCA 26; BC9903190.

138 *Ibid.*, at [95] per Gaudron J; [143]–[144] and [193] per Kirby J; [212] per Hayne J. The other Justices, Gleeson CJ, McHugh, Gummow and Callinan JJ, did not comment on the issue.

139 Earlier statements can be found to the same effect, notably *Storie v Storie* [1945] HCA 56; (1945) 80 CLR 597 (cited by Gaudron J in *AMS*).

140 This is the much-quoted statement in *A & A: Relocation Approach* (2000) FLC 93-035; 26 Fam LR 382; [2000] FamCA 751 at [64]. Although later Full Court cases have departed from some aspects of the reasoning (partly because of the later amendments of 2006), so far as we are aware this formulation has not been questioned.

141 Examples include *A & A: Relocation Approach* (2000) FLC 93-035; 26 Fam LR 382; [2000] FamCA 751 at [64]; *KB & TC* [2005] FamCA 458; (2005) FLC 93-224; *Morgan and Miles* (2007) FLC 93-343; 38 Fam LR 275; [2007] FamCA 1230 at [80]; *Ahcrafft & Haber* [2010] FamCA 6; BC201050008 at [54].

best for the child, it would be a commonplace, consistent with the strong view. This appears to have been the interpretation by the Family Law Council in 2006: after referring to the High Court's statement about the child's best interests not being the sole consideration, it added '[f]or example, the interests of the parents can be considered if they are relevant to the best interests of the child'.¹⁴² A different reading, picking up the force of the word 'but', is that the High Court was implying that in principle there could be circumstances in which the court could make orders that did not achieve the best available outcome for the children. The language of the relevant judgments in *AMS* is open to more than one interpretation. Kirby J, and some academic commentators, have embraced this 'weak' position.¹⁴³

So far as we are aware, the Family Court has not indicated whether the strong or the weak version represents the law, and it can only be a matter of speculation whether other considerations have played any part in decisions expressly based on what is best for the children. But a commercial surrogacy case might be an occasion where the question can no longer be avoided. If there is a situation in which it might be arguable that some competing interest or policy can be taken into account, it is hard to imagine a stronger candidate than a case where the parties seek orders that will give effect to a criminal transaction, especially, where (as in cases like *Wilkie*) the evidence does not exclude the possibility of fraud, improper pressure on the birth mother, or even child trafficking.

In relation to matters that are *not* governed by the paramountcy principle, such as whether to admit evidence improperly obtained, or whether to refer the papers for prosecution, the problem is how, in the absence of legislative guidance, the court is to weigh up competing interests and policies. This problem is acute in relation to making declarations or findings about paternity, as shown in the contrasting approaches in *Dudley* and *Ellison*. A refusal to make the declaration or finding of parentage would disadvantage the children (although of course much less so than a refusal to make parenting orders). What would it achieve? At a symbolic level, making the parenting orders but refusing the declaration or finding of paternity might send a mixed message. At a practical level, a number of questions arise. Would refusing the parentage declaration reduce criminality by discouraging commercial surrogacy? Or would it only drive commercial surrogacy underground? Further, if there are net benefits to the public in refusing the declaration or finding, do those net benefits outweigh the detriment to the children before the court? The court would normally have no evidentiary basis to make an informed assessment of these competing factors. In the absence of any guidance from the legislature, it is perhaps unreasonable to expect the court to make guesses about these matters, and if so, there is merit in the view that the decisive factor should be the impact on the children before the court: the approach in *Ellison*, rather than the approach in *Dudley*.

142 See the Family Law Council report *Relocation*, (May 2006), cited in *M & K* [2007] FMCAfam 26; BC200701779 (Altobelli FM) and *Marston & Marston* [2007] FamCA 1362; BC200750101 (Dawe J).

143 M Kirby, 'Family Law and Human Rights' (2003) 17 *AJFL* 6; J Crowe and L Toohey, 'From Good Intentions to Ethical Outcomes: The Paramountcy of Children's Interests in the Family Law Act' (2009) 33 *MULR* 391 at 391-414.

In short, we suggest that the international surrogacy cases indicate a need for the Full Court to provide guidance on a number of matters of principle, including:

- Whether the ‘paramount consideration’ principle permits the court to give any weight to any interest or policy competing with the best interests of the children before the court.
- If it does, what the competing interests are, and how they are to be assessed, in international surrogacy cases. In particular, are there any circumstances in which wrongdoing relating to the birth mother could lead the court to make orders other than those that would be best for the children?
- On matters where the paramountcy principle does not apply, such as parentage declarations, evidence improperly obtained, and the referral of papers to prosecutors, how should the court identify and assess any interests or policies other than the interests of the children before the court?

Part 3: Conclusion

As we have suggested in this article, the Australian law relevant to surrogacy is incoherent and ineffective. In the context of international commercial surrogacy, this is most evident in the lack of coordination between relevant federal legislation, especially the Family Law Act, and the state and territory surrogacy legislation. We have not referred in detail to the relevant law on immigration and citizenship, but these cases come before the Family Court only after a determination has been made by immigration officials that the child is the child of an Australian for immigration purposes. Once that decision is taken and the child is in Australia and has been brought before the court, it seems inevitable that parenting orders will have to be made, as we have explained above. This shows that reform to other areas of law will continue to be futile without reform to immigration law and practice. The lack of effective or direct coordination between these various areas of law leads, intentionally or not, to the subversion of state and territory policies on surrogacy.

This lack of coordination is consistent with a more widespread ambivalence towards the enforcement of the surrogacy legislation. In applications for parenting orders and adoption involving surrogacy, there seems little willingness to identify or take into account criminal behaviour,¹⁴⁴ or to prosecute offenders.¹⁴⁵ In the case of altruistic surrogacy, the courts have

¹⁴⁴ In most international commercial surrogacy cases in the Family Court, the court either does not comment on the possible criminality of the arrangements, or states that it is not relevant to their decision. See, eg, *Re Mark (an application relating to parental responsibilities)* (2003) 31 Fam LR 162; FLC 93-173; 179 FLR 248; [2003] FamCA 822 at [94]. It is likewise in adoption cases: eg, *Blake* [2013] FCWA 1; *McQuinn & Shure* [2011] FamCA 139. *McQuinn* was an international altruistic case; but at the time the agreement was entered into all forms of surrogacy were criminalised under Queensland legislation, and that offence applied to ordinary residents of Queensland acting outside Queensland: Surrogate Parenthood Act 1988 (Qld) ss 3 and 2 (definition of ‘prescribed contract’).

¹⁴⁵ There are very few reported instances of prosecutions under the surrogacy legislation. The Investigation into Altruistic Surrogacy Committee of the Queensland Parliament identified

already shown themselves likely to relax the legislative prerequisites to granting a parentage order, in the state or territory jurisdictions in which this is permitted.¹⁴⁶ As we have already noted, once the child is in the care of the commissioning parents, and assuming that the birth mother has consented to relinquish the child, the strong view of the paramountcy principle appears to require this.

The legal response to surrogacy requires closer and more careful consideration. It is highly undesirable that the law is so complex and inconsistent; greater cooperation between the Commonwealth, the states and territories is necessary. There are good reasons for the control of commercial surrogacy, which become more important when the birth mother is from a developing country and likely to be highly vulnerable, where the egg donor is unknown, and when the children are likely to be unable to identify their genetic heritage or to identify or know their birth mothers.

only five prosecutions under the Surrogate Parenthood Act 1988 (Qld). The committee noted that none of the individuals who had been charged under that legislation had received a severe penalty, and that '[i]n most cases, the charges were dismissed and no conviction was recorded': Queensland Parliament, Investigation into Altruistic Surrogacy Committee, *Report*, 2008, p 9.

¹⁴⁶ In several of the very few published cases of applications for parentage orders in altruistic surrogacy cases, the courts have relaxed the requirements for granting a parentage order: eg, *BLH v MW* [2010] QDC 439 and *C v B* [2013] NSWSC 254; BC201301472. This is permitted under the Queensland and NSW legislation that was in issue in these cases, as well as in the Tasmanian legislation. For the same reasons as we have identified above in Part 2, it seems likely, if not inevitable, that the courts will exercise their discretion to make parentage orders even if the requirements of the legislation are not fulfilled, because to do otherwise would not be consistent with the child's best interests.