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SURROGACY – TEN LESSONS I HAVE LEARNT SINCE 1988

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BY STEPHEN PAGE[1]

INTRODUCTION

I am a dad through surrogacy. My daughter Elizabeth, born to my husband Mitchell and me, is almost 5 years old. She was born through surrogacy and egg donation in Brisbane with the court process in the Childrens Court in Brisbane. We are one of the lucky ones. Most intended parents from Queensland who undertake surrogacy do so overseas.

My first surrogacy case was in 1988. Since then, I have advised in over 1,900 surrogacy journeys for clients throughout Australia and 37 countries overseas.

In addition to my own journey in surrogacy, and acting for clients, I have been a member of a number of committees to do with surrogacy.[2] Between 2012 and 2016 I was the principal advocate for and co-author of a policy by the American Bar Association as to a proposed Hague Convention on international surrogacy arrangements.

For five years between 2017 and 2022 I lectured in Ethics and the Law in Reproductive Medicine, as part of the Masters of Reproductive Medicine at the University of New South Wales.

I have written numerous articles and given presentations around the world, three chapters[3] and a couple of books (one of which is awaiting publication[4]) about surrogacy. I have lived and breathed this subject for more years than I care to count. I have been interviewed in innumerable media interviews, for media organisations across Australia and overseas, including The New York Times and the Wall Street Journal.

I have also suffered from infertility. I want to share with you 10 things I have learnt about surrogacy.

LESSON 1 – PROHIBITION DOESN'T WORK

Between 1998 and 2010 all surrogacy in Queensland was prohibited. It didn't matter whether it was altruistic or not, traditional (where the surrogate is the genetic mother[5]) or gestational

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[2] For example, IAFL: Sexuality and Gender Identity Committee, Parentage Committee; AAAA: ART Resources Committee; director, Fertility Society of Australia and New Zealand Ltd (2021-); international representative on the ART Committee of the American Bar Association (2012-).

[3] One of which is yet to be published.

[4] *International Assisted Reproductive Treatment Law: A Guide for Lawyers* is in pre-production with the American Bar Association.

[5] I use gender to describe the surrogate. It is possible for a non-binary or transman to become a surrogate. I am not aware of any such case worldwide.

(where she is not). It didn't matter whether it occurred in Queensland or outside Queensland. Under the *Surrogate Parenthood Act 1988* (Qld) it was an offence to enter into or to offer to enter into a surrogacy arrangement anywhere in Queensland or indeed anywhere else in the world if it was done by someone who was ordinarily resident in Queensland.

Queensland led the way in the extra-territorial criminalisation of surrogacy, since copied in the ACT (2004)[6], Hong Kong (2007)[7], Queensland again (with the repeal of the *Surrogate Parenthood Act 1998* (Qld) and the enactment of the *Surrogacy Act 2010* (Qld)) and New South Wales (2011)[8].

Currently, there is a bill[9] which has passed the Italian House of Deputies (the Lower House) and is currently before its Senate, which seeks to criminalise Italian citizens engaging in surrogacy overseas.

Currently, there is a bill[10] in Ireland to criminalise Irish citizens in undertaking commercial surrogacy overseas.

I call the approach, pioneered in Queensland, as the *Queensland disease*. New Zealand researchers call it a *failed experiment*[11], which is apt.

Despite the Pope calling for a ban on surrogacy[12], surrogacy is here to stay, unless politicians are prepared to police the nation's bedrooms.[13] Surrogacy is part of the landscape and as such ought to be regulated. Much of the discussion about surrogacy is what *form* the regulation should take.

My first surrogacy case

My first surrogacy case was in 1988. My client was paid $10,000 to have a child. It was a traditional surrogacy i.e. an at-home insemination, therefore not involving an IVF clinic. Some key features about that surrogacy arrangement were:

- There had been no independent legal advice before entering into the arrangement.
- There had been no counselling before entering into the arrangement.

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[6] *Parentage Act 2004* (ACT).
[7] *Human Reproductive Technology Ordnance*.
[8] *Surrogacy Act 2010* (NSW).
[9] *Legislature 19a, bill no. 824.*
[10] *Health (Assisted Human Reproduction) Bill 2022*.
[11] New Zealand Law Commission, Review of Surrogacy, Issues Paper 47, citing: Debra Wilson and Julia Carrington "Commercialising Reproduction: In Search of a Logical Distinction between Commercial, Compensated, and Paid Surrogacy Arrangements" (2015) 21 NZBLQ 178 at 186. See also South Australian Law Reform Institute Surrogacy: A Legislative Framework – A Review of Part 2B of the Family Relationships Act 1975 (SA) (Report 12, 2018) at [12.3.1]; and House of Representatives Standing Committee on Social Policy and Legal Affairs Surrogacy Matters: Inquiry into the regulatory and legislative aspects of international and domestic surrogacy arrangements (Parliament of the Commonwealth of Australia, April 2016) at [1.70]–[1.71] and [1.112]–[1.113].
[12] https://press.vatican.va/content/salastampa/en/bollettino/pubblico/2024/04/08/240408c.html .
[13] Margaret Brazier, Alastair Campbell and Susan Golombok Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation – Report of the Review Team (Cmnd 4068, October 1998) at [4.38]: "[u]nless a state is prepared to police the bedrooms of the nation, surrogacy arrangements cannot effectively be outlawed, only driven underground".

- The surrogacy arrangement was oral.

My client decided to keep both the money and the child. I told her that she could.

It is clear, at least by the time that she came to me, that the surrogacy arrangement was illegal and void.[14]

The three parties involved (the intended parents – husband and wife, and my client, a single woman) were never prosecuted. I do not know whether the child was ever told about how he was created. What I do know is that the matter never went to court.

There were a small number of cases where surrogacy came up again for Queenslanders. Another case settled in about 1998 before Justice Jordan was in favour of the surrogate. In 1998 the case of *Re Evelyn* [1989] FamCA 55 came before Justice Jordan. In that case, a husband and wife in Queensland, dubbed Mr and Mrs Q, who could not have children had the assistance of their friends in South Australia, Dr and Mrs S, whereby Mrs S agreed to be the traditional surrogate for Mr and Mrs Q. Mrs S became pregnant, in part, due to the assistance of her husband. Mr Q was the genetic father.

Three weeks after the child was born and handed over, Mrs S held the child and took the child. Ultimately, custody was awarded in favour of Dr and Mrs S.

At the time that they entered into their informal surrogacy arrangement, the surrogacy arrangement was illegal, both under Queensland and South Australian law.

Why Queensland, South Australia and the other States sought to criminalise surrogacy was because of the shockwave of IVF, and related developments, transforming society. While traditional surrogacy had been around since ancient Indian text and the time of Genesis[15], IVF and egg donation transformed the world:

- 1978, Louise Brown was the first person in the world born via IVF, in the UK.

- 1980, Candice Reed was the third person born in the world via IVF, and the first in Australia.

- 1983, the first person in the world was born via egg donation- in Australia.

- March 1988, the first litigated surrogacy case in the world, in New Jersey[16], involving traditional surrogacy. The surrogate sought to keep the child. The Court declared the agreement void, but held that it was in the best interests of the child that the child live with the intended (genetic) father and the intended (non-genetic) mother.

- May 1988, the first IVF baby through surrogacy, Lousie Kirkman, was born in Australia. Louise was carried by her mother's sister, who was implanted with an embryo comprising an egg from her mother, implanted with donor sperm.

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[14] Due to the Surrogate Parenthood Act 1988 (Qld), s.3.

[15] Abraham, his wife Sarai, and maidservant Hagar (who was punished by Sarai and then banished, after delivering a child): Genesis 16: 1-4. Hagar was in a position of duress to become Abraham's surrogate. The child was conceived the old fashioned way. Artificial insemination was not invented until the 1770's.

[16] *In re Baby M*, 537 A.2d 1227, 109 N.J. 396 (N.J. 02/03/1988).

Between 1988 and 1998, there were five prosecutions for surrogacy related offences under the *Surrogate Parenthood Act 1988* (Qld)[17]. No one was imprisoned, although the maximum penalty was three years imprisonment. The typical penalty was a bond. The maximum penalty apparently received was a $200 fine. No one has ever been prosecuted in Queensland as far as I am aware for undertaking surrogacy overseas, even though that has been an offence since 1988.

Since then, there have been *three* referrals from the Family Court, two in 2011[18] and one in 2021 for engaging in commercial surrogacy[19] (the two in 2011 concerned Queensland couples who had undertaken surrogacy in Thailand). None of those were ever prosecuted. It remains an offence under the *Surrogacy Act 2010* (Qld) to enter into or to offer to enter into a commercial surrogacy arrangement, whether in Queensland or anywhere else in the world if undertaken by someone who is ordinarily resident in Queensland[20]. It is also an offence to give consideration under a commercial surrogacy arrangement, again, anywhere in the world if the person is ordinarily resident in Queensland[21].

In addition to the specific extra-territorial application, the *Criminal Code* also has a long arm law[22], which would apply to the offences.

Since those laws commenced in June 2010, not one person has been prosecuted.

Not one person has been prosecuted under similar laws in the ACT or New South Wales.

Not one person has been prosecuted under similar laws in Western Australia where there is a clearly longarm law that applies to those in Western Australia who enter into a surrogacy arrangement that is for reward overseas.

For what it is worth, since the criminalisation of commercial surrogacy extra-territorially has existed in Hong Kong, not one person has been prosecuted there for that offence either.

The message that I have received loud and clear from Hong Kong colleagues is that Hong Kong Police arrest (if they are not being nice) or politely request an interview (if they are being nice) the parents through overseas surrogacy – in order to have them attend at the police station for an interview. Shortly after the formalities of the interview have commenced, the parent concerned claims the right to silence, at which point the interview ceases. As a result of no admissions being made, no prosecution results.

The numbers make plain that the extra-territorial criminalisation of surrogacy has been a failure. It is not a deterrent. The actions by Australian intended parents epitomise what Sir David Attenborough said in *The Trials of Lif*e (1990):

> *"If you watch animals objectively for any length of time, you're driven to the conclusion that their main aim in life is to pass on their genes to the next generation. Most do so directly, by breeding. In the few examples that don't do so by design, they do it indirectly, by helping a relative with whom they share a great number of their genes. And in as much as the legacy that human beings pass on to the next generation is not*

[17] *Lavarch committee report.*
[18] *Dudley & Chedi* [2011] FamCA 502; *Findlay & Punyawong* [2011] FamCA 503.
[19] *Seto & Poon* [2021] Fam CA 288, discussed below.
[20] Ss. 54, 56.
[21] Ss. 54, 55.
[22] S.12.

only genetic but to a unique degree cultural, we do the same. So animals and ourselves, to continue the line, will endure all kinds of hardship, overcome all kinds of difficulties, and eventually the next generation appears."

In broad terms, for every child born in Queensland through surrogacy, two are born overseas. Australia wide, the figure is three to one. A comparison of the number of Australian children born internationally through surrogacy and those born domestically is shown in **Table 1** between 2009 and 2023. The international figures have been obtained by me under Freedom of Information from the Department of Home Affairs. The Department of Home Affairs collates data on the number of children who apply for Australian citizenship where they have been born overseas through surrogacy. That data is collated on a financial year basis i.e. 1 July to 30 June of the following year.

The domestic data is harder to come by. There is no universal method of reporting domestic surrogacy births. Statistics are provided by:

- Childrens Court of Queensland as to the number of parentage orders in its annual reports.
- County Court of Victoria as to the number of substitute parentage orders in its annual reports.
- Victorian Assisted Reproductive Treatment Authority as to the number of gestational surrogacy births through IVF clinics[23] in its annual reports.
- The Reproductive Technology Council of Western Australia in its annual reports as to the number of surrogacy births, typically, one a year, and the recent report by a ministerial expert panel in Western Australia.
- By the Australian and New Zealand Assisted Reproductive Database as to the number of children born through gestational surrogacy through Australian and New Zealand IVF clinics.

The limitation with the last source is that traditional surrogacy births (which I would estimate in Australia to be about 5% or possibly 10% of the total) are excluded. ANZARD (compiled by the University of New South Wales), reports on a calendar year basis and is typically two years behind. ANZARD does not give a breakdown between Australian and New Zealand IVF clinics. However, it has supplied data as to the number of gestational surrogacy births in New Zealand IVF clinics. By deducting that from the Australian and New Zealand total, it is possible to calculate the number of gestational surrogacy births in Australian clinics.

Table 1

Year	International Surrogacy Births	Australian Gestational Surrogacy Births
2009	10	14
2010	<10	11
2011	30	19
2012	266	17
2013	244	28
2014	263	29
2015	246	44
2016	207	38

[23] Traditional surrogacy is permissible at home in Victoria, but not through IVF clinics.

Year	International Surrogacy Births	Australian Gestational Surrogacy Births
2017	164	51
2018	170	73
2019	232	55
2020	275	76
2021	223	82
2022	213	
2023	236	

A notable feature is the huge increase in overseas births between 2010 of <10 and 2012 of 266. This occurred as a direct result of NSW criminalising overseas commercial surrogacy, and the reaction to that. Contrary to MP's intentions, most of those 266 births, 227, occurred in India. The big jump immediately followed and was caused by the firestorm following the last-minute changes to the New South Wales *Surrogacy Bill* to criminalise New South Wales residents in undertaking surrogacy overseas. In ferocious reaction to that, surrogacy seminars commenced in Australia, giving intended parents information about how to undertake surrogacy overseas. One of those seminars was run by Victorian authorities.[24]

There was an immense amount of publicity about surrogacy, so that those who believed that they would forever remain childless suddenly realised that they could become parents through surrogacy. In recent years, hardly any children have been born to Australians through India. This has not been because of anything Australian authorities have done, but because of actions Indian authorities took to tighten availability of surrogacy to foreigners, starting in 2012, then 2014, 2016 and then in 2021.

In recent years, typically more Australian children are born via surrogacy in the United States than in Australia.

Table 2 – Comparison of International v Domestic Surrogacy in Queensland

Year	International Surrogacy Births Nationally[25]	Domestic Surrogacy Births Nationally[26]	Per Capita International Surrogacy Births – Queensland[27]	Domestic Surrogacy Births - Queensland[28]
2009	10	14	2	
2010	<10	11	<10	
2011	30	19	6	
2012	266	17	53	6
2013	244	28	49	10
2014	263	29	53	5
2015	246	44	49	9
2016	207	38	41	14

[24] Who says that life in Albury Wodonga is dull?
[25] Department of Home Affairs.
[26] ANZARD, when the NZ figures are deducted.
[27] Calculated by dividing the national figure by 5, as Queensland has 20% of the national population.
[28] Childrens Court of Queensland- the number of parentage orders made. This will slightly understate the number as one parentage order is made when multiple births have occurred. The writer has obtained parentage orders in two cases when twins were born.

Year	International Surrogacy Births Nationally[25]	Domestic Surrogacy Births Nationally[26]	Per Capita International Surrogacy Births – Queensland[27]	Domestic Surrogacy Births - Queensland[28]
2017	164	51	33	14
2018	170	73	34	12
2019	232	55	46	13
2020	275	76	55	11
2021	223	82	45	18
2022	213		43	18
2023	236		47	24

One can see from **Table 2** that in rough terms, for every child born in Queensland domestically, two are born overseas, which is a better outcome than the national figure, which is roughly for one child born in Australia via surrogacy, three are born overseas. Why Queensland is doing better than the national figure is unclear. Part of the explanation is that Western Australia, which has approximately half the population of Queensland, is doing considerably worse. Legislative restrictions in Western Australia with surrogacy have meant that in most years one child a year has been born there through surrogacy[29], while 20 or more children on a per capita basis have been born overseas via surrogacy to WA residents.

Whilst commercial surrogacy in Queensland is banned, it should not be assumed that the only form of commercial surrogacy involves the payment of money. As a New South Wales Supreme Court decision made plain, the promise of sperm to the partner of the would-be surrogate, in exchange for the woman being the surrogate, could amount to commercial surrogacy under the New South Wales *Surrogacy Act*[30] (which, in turn, is modeled on the Queensland *Surrogacy Act*).

Lesson 2 – Regulation is necessary, both of IVF clinics and of surrogacy.

Experience has taught us that when IVF clinics are not regulated and when surrogacy is not regulated, bad things can happen. That does not mean that they always happen, but that there is an increased risk that things can go wrong, and at times spectacularly wrong. We have seen that with surrogacy journeys that have gone wrong in India, Nepal, Thailand, Cambodia and Mexico, among other places.

There needs to be clarity about what IVF clinics can and cannot do.

We are blessed in Australia that we have extraordinarily high-quality IVF clinics. IVF started here early, with attempts from 1973. In at least one way, they are the highest quality IVF clinics in the world. Australia and New Zealand IVF clinics have pioneered using single embryo transfers as the norm. When more than one embryo is transferred, there is risk that twins or triplets may be conceived. Having a multiple pregnancy increases risk, both for the woman who is pregnant and for the children. Twins are typically born at 36 or 37 weeks and are typically developmentally delayed to some degree until they reach puberty.

[29] Although I am told by a WA colleague that between January and June 2023, three were born there (for the first time ever).
[30] *Application MJC & CSC; Re EMC* [2012] NSWSC 1626.

There is a higher risk that carrying twins will result in greater prematurity than that, with all the implications for the children involved.

In Queensland, IVF clinics are regulated in a variety of ways:

1. Every IVF clinic in Australia must, in order to operate, obtain accreditation from the Reproductive Technology Accreditation Committee of the Fertility Society of Australia and New Zealand. This is under a scheme of Commonwealth, State and ACT law[31]. Not having accreditation but operating as an IVF clinic is in effect an offence[32].

2. Various practices, including human cloning and commercial trading in eggs, sperm and embryos are rendered offences under a Commonwealth, State and ACT scheme[33].

3. In order to obtain accreditation, clinics must be accredited with a quality assurance scheme and then comply with a *Code of Practice* of the Fertility Society of Australia. Requirements of the *Code of Practice* include:

    a) Not exporting gametes or embryos for the purposes of commercial surrogacy.

    b) Compliance with the National Health and Medical Research Council, *Ethical Guidelines on the use of assisted reproductive technology in clinical practice and research* (2017, updated 2023). These are in effect imported into the *Code* as licensing conditions, subject to any statute to the contrary. Requirements include not to engage in commercial surrogacy or commercial egg donation.

    c) Compliance with the law. This includes:

        i) Ensuring that there is no purchase of tissue or advertising for donors, unless the requirements of the *Transplantation and Anatomy Act 1979* (Qld) are met.

        ii) Not supplying a service for commercial surrogacy[34], and not aiding and abetting, counselling or procuring a commercial surrogacy arrangement.[35]

        iii) Only claiming a clinically relevant service for the purposes of Medicare.[36]

    d) Providing data to the Fertility Society as to IVF cycles and related matters. That data in turn is collated by the University of New South Wales and then reported on an annual basis in the Australia and New Zealand Assisted Reproductive Database. That data shows, in essence, the quality or otherwise of IVF clinics in Australia and New Zealand. ANZARD is the oldest assisted reproductive database in the world. Ninety per cent of Queensland clinics also voluntarily supply their information to www.yourivfsuccess.com.au, which enables transparency of their data, in order to enable consumers to make a more informed choice.

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[31] For example, *Research Involving Human Embryos Act 2002* (Cth); *Research Involving Human Embryos and Prohibition of Human Cloning Act 2003* (Qld).
[32] *RIHE Act*, s.10; *Qld RIHE Act*, s.23.
[33] For example, *Prohibition of Human Cloning for Reproduction Act 2002* (Cth), s.21.
[34] *Surrogacy Act 2010* (Qld), s.58.
[35] *Criminal Code*, s.7; *Surrogacy Act*, s.56.
[36] *Health Insurance Act 1973* (Cth).

e) Compliance with regular audits by the Reproductive Technology Accreditation Committee of the Fertility Society of Australia and New Zealand.

In addition to all that maze of regulation, the Queensland Government has said that before the election due in October, there will also be an *Assisted Reproductive Treatment Act*, which has two prime purposes:

(a) To regulate Queensland IVF clinics, which must be registered with the Queensland Government, and

(b) To set up a central donor register so that donor-conceived adults can find out where they came from. Currently, there is a requirement by clinics to keep their own donor registers from donations commencing in 2004. From 2004, donor conceived adults can find out the identity of donors after they turn 18. The proposed central register will operate retrospectively to when donations commenced, which were sperm donations with Queensland Fertility Group in the late 1970's early 1980's. In doing so, Queensland will follow the worldwide lead of Victoria (which has since been followed in South Australia and the Australian Capital Territory).

Most of the recent bad publicity about IVF clinics in Queensland dates from pre-2004.

It is anticipated that that Bill will be debated in Parliament, most likely in August or September. The bill is likely to be introduced to Parliament about the time of this presentation.

You will be used to thinking that there is one law that deals with family law and that is the *Family Law Act 1975* (Cth). The landscape with surrogacy is quite different. Each of the States and Territories have their own laws. They are not consistent. It is assumed that because each State and Territory regulates altruistic surrogacy and criminalises commercial surrogacy that the laws are consistent. That is simply not the case.

Interstate surrogacy arrangements are common. You should be concerned about the surrogacy legislation in each State to ensure offences are not committed, and that the surrogacy journey can occur. The national legislative scheme, such as it is, is based on the law for the surrogacy arrangement being that of where the intended parents reside. However, if the surrogate resides in another State, then the criminal law there can also apply.

By way of legislative oversight, for example, every Queensland surrogacy arrangement in South Australia is unlawful. For a surrogacy arrangement in South Australia to be lawful, it must be a lawful surrogacy agreement. For an interstate arrangement, this must be entered into in accordance with a prescribed corresponding law of the Commonwealth or another State or Territory.[37] No such law has ever been prescribed. It is almost impossible for Queensland intended parents to comply with South Australian requirements otherwise, as at least one of them must be domiciled in South Australia.[38]

An example of the difficulty, as seen in Table 3, is the difference between Western Australia and Queensland for allowable expenses.

[37] Surrogacy Act 2019 (SA), s.4.
[38] S.10(4)(d).

Table 3: Differences between allowable surrogacy expenses: Western Australia and Queensland

Cost	WA[39]	Qld[40]
Travel	✗	✓
Accommodation	✗	✓
Parking to see doctor, lawyer, counsellor	✗	✓
Maternity clothes	✗	✓
Massages	✗	✓
Chiropractor	✗	✓
Acupuncture	✗	✓
Snow shovelling[41]	✗	✓
Employment of a locum	✗	✓

It is common for us living in Queensland to assume that it is easy to assume who are the parents of the child. I cover this further under lesson 10. However, there is simply not one rule currently about who is a parent. In everywhere but Western Australia, the *Family Law Act* reigns supreme. Western Australia is more complex because it is the only jurisdiction that has not referred its powers concerning ex nuptial children. Therefore, consideration must always take place when there is a surrogacy arrangement involving a surrogate in Western Australia as to all intended parents from Western Australia and whether the child might be considered an ex nuptial child, in which the interplay between the *Family Court Act 1992* (WA) and the *Artificial Conception Act 1985* (WA) are considered. It is not an easy answer.

If you have a surrogacy journey that happens only in Queensland, then the principal legislation that would concern you is the *Surrogacy Act 2010* (Qld). The difficulty if you have an interstate arrangement (which are common) is that you have to work out where the intended parents reside (or might need to reside due to restrictions in laws interstate) and whether any criminal offence might be committed in the other jurisdiction. Therefore, the surrogacy arrangement must not only comply with the law in the place in which the parentage order is to be obtained, but also where the surrogate and her partner live. As seen in Table 2, there is a difference between the allowed costs in Queensland and Western Australia. It is ironic that Western Australia, as the largest State does not appear in its legislation to allow any travel expenses or accommodation to be met.

Therefore, if a Queensland couple were to enter into a surrogacy arrangement with the surrogate and her partner in Western Australia, whereby out of necessity IVF would be occurring in Queensland (because of the extraordinary difficulties in undertaking surrogacy in Western Australia currently), then the surrogate will need to fly from Western Australia to Queensland and no doubt have overnight accommodation. In order to achieve that, those costs need to be met by the surrogate, not by the intended parents. While the intended parents can

[39] *Surrogacy Act 2008* (WA), s.6, 8.
[40] *Surrogacy Act 2010* (Qld), s.11.
[41] This might seem an odd one to include in the list. However, many Australians undertake surrogacy in Canada. Every Canadian surrogacy agreement refers to the cost of snow shovelling. In this aspect alone, the surrogacy agreement would be a surrogacy arrangement that is for reward, and therefore possibly criminal, in Western Australia, but lawful in Queensland.

lawfully meet those costs under the *Surrogacy Act 2010* (Qld), if they were to do so, then the surrogacy arrangement would be deemed to be a *surrogacy arrangement that is for reward,* and therefore an offence may be committed by the surrogate and her partner in Western Australia by entering into the surrogacy arrangement.

Table 4 shows the principal surrogacy laws in Australia.

Table 4: Australia's principal surrogacy laws

Jurisdiction	**Law**
Commonwealth	*Constitution*, s.118 (full faith and credit) *Evidence Act 1995*, s.185 (full faith and credit) *Family Law Act 1975*, s.60HB (recognition of parentage orders made under prescribed laws) *Australian Citizenship Act 2008*, s.8- recognition of parentage of those under s.60HB.
ACT	*Parentage Act 2004*
New South Wales	*Surrogacy Act 2010*
Northern Territory	*Surrogacy Act 2022*
Queensland	*Surrogacy Act 2010*
South Australia	*Surrogacy Act 2019*
Tasmania	*Surrogacy Act 2012*
Victoria	*Assisted Reproductive Treatment Act 2008, Status of Children Act 1974*
Western Australia	*Surrogacy Act 2008*

Lesson 3 - The human rights of all concerned are to be protected/there should be binding contracts.

Often, the discussion about whose human rights are to be protected is a discussion about the rights of the surrogate. She is characterised by some as being the mother, irrespective that most commonly her DNA is not that of the child, because she is carrying a child for someone else. The law certainly says that she is the mother, although following *Masson v Parsons* [2019] HCA 21 there is a lack of clarity about who is a parent.[42]

Less commonly, there is the discussion about the human rights of the child, the most vulnerable of them all. There is often a lack of discussion about the human rights of the donor[43], the donor's partner, the surrogate's partner, the children of the donor or the surrogate and that of the intended parents.

It is often portrayed that the intended parents are, in effect, grasping individuals who put the surrogate at risk and from whom she must be protected. Sadly, there have been cases in

[42] See, for example, *Seto & Poon* [2021] discussed below.
[43] Most surrogacy journeys also involve egg donation.

Australia where it is clear that the surrogate has acted badly and other cases where the intended parents have acted badly.

It is essential in my view therefore that the human rights of all concerned should be involved and, as far as possible, protected.[44] The human rights of each person may conflict. Discussion of human rights in this area, at least internationally, is nascent.[45] In the words of Human Rights Watch and the International Women's Health Coalition:

> *"Children born of surrogacy are obviously crucial rights holders whose human rights must be considered in any discussion of surrogacy, and whose best interests are a primary consideration in all matters affecting them. Nevertheless, they are not the sole rights holders implicated in surrogacy arrangements. Additionally, it may not be in children's best interests to exclude consideration of the human rights of surrogates and intending parents and doing so is unlikely to lay the groundwork for effective policy. Along these lines, the development of guidance and policy on surrogacy should not move forward without full participation by representatives of the following groups, without discrimination including on the basis of race, ethnicity, age, disability, sexual orientation or identity, etc., and expert groups who represent the interests of these groups:*
>
> *a) Children born of surrogacy;*
>
> *b) Individuals who have acted or wish to act as surrogates, including through both commercial and non-commercial surrogacy;*
>
> *c) Individuals struggling with infertility;*
>
> *d) Individuals who have utilized (or seek to utilize) assisted reproduction, including surrogacy, to become parents; and*
>
> *e) Individuals who have participated or may wish to participate in assisted reproduction, including surrogacy, through contribution of genetic material including eggs and sperm.*
>
> *3) Key considerations and principles derived from human rights law and research that should frame the formulation of guidance, law and/or policy on issues of surrogacy*
>
> *As mentioned above, we fully agree with the importance of the primacy of protecting the rights of children born of surrogacy arrangements, and with the relevance of the core standards the Special Rapporteur has set forth in that regard. The following principles pertain more to other rights holders whose rights are implicated by surrogacy arrangements, as we are concerned that these rights have not yet been fully considered in this discussion:*
>
> *a) Everyone participating in a surrogacy arrangement in any capacity should have a full opportunity for informed consent, expert advice, accessible communication, and, as appropriate, supported decision making and legal counsel and representation.*

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[44] As for example is stated in the *Surrogacy Act 2019* (SA), s.7(a), authored by the writer: *"(a) the human rights of all parties to a lawful surrogacy agreement, including any child born as a result of the agreement, must be respected".*

[45] https://www.hrw.org/news/2019/06/03/submission-special-rapporteur-sale-and-sexual-exploitation-children?fbclid=IwAR1ij8PIVZ_3qbU1GlScsQIryEKdbIrUta5kkE5QHGMyWAGqGIUERGpiloc .

b) Every person has the right to make their own decisions about their reproductive life, including surrogates and potential surrogates, people who seek to become parents through surrogacy and other forms of assisted reproduction, and donors of genetic material.

c) People who are pregnant should not be deprived of the right to make decisions about abortion and other healthcare decisions by reason of a surrogacy agreement, and legal or policy frameworks for surrogacy should not facilitate such deprivation.

d) To the extent that new legal frameworks are developed for surrogacy, they should not rely on criminal sanctions. Criminalizing conduct related to consensual sexuality and reproduction (for example: sex work, sex outside of marriage, adolescent sexual behavior, same-sex intimacy, adolescent pregnancy and pregnancy outside of marriage, abortion, etc.) is generally harmful and leads to violations of human rights. In addition, it is unlikely that criminalizing surrogacy would end the practice. Rather, it is more likely that criminalization would drive surrogacy underground where unsafe conditions, discrimination and exploitation for all rights holders involved can flourish.

e) Fetal personhood has no basis in human rights law.

f) The right to found a family, to make decisions on the number and spacing of children and to benefit from scientific progress including through surrogacy and other forms of assisted reproduction, should not be denied on the basis of discriminatory criteria such as sexual orientation, gender identity, disability, marital or partnership status, etc.

g) The best interests of the child is a dynamic concept that should be applied appropriately in this specific context, including an examination of the likely consequences for children of surrogacy, if it is prohibited and pushed underground.

There are risks of abuse in surrogacy. The solution to this problem is not to ban surrogacy, but for surrogacy to be practiced under a framework based in international human rights law, incorporating the rights of the child, surrogates and potential surrogates, and people seeking to become parents through use of surrogacy and other forms of assisted reproduction."

It is pleasing that a Queensland legislative requirement, that the surrogate has autonomy over the pregnancy and birth[46], like any other woman, has been copied in Tasmania[47], Victoria[48], South Australia[49], the Northern Territory[50] and possibly soon in the Australian Capital Territory. [51]

Other legislative requirements include ensuring that:

- The paramount concern is the best interests and wellbeing of the child;

[46] *Surrogacy Act 2010* (Qld), s.10.
[47] *Surrogacy Act 2012* (Tas), s.11.
[48] *Assisted Reproductive Treatment Act 2008* (Vic), s.44A.
[49] *Surrogacy Act 2019* (SA), s.16.
[50] *Surrogacy Act 2022* (NT), s.10.
[51] *Parentage (Surrogacy) Amendment Bill 2023* (ACT), proposed s.28D.

- There is a post-birth transfer of parentage, with a long window of one to six months post-birth in which to apply for a parentage order (although as seen below this can be problematic);
- The surrogacy arrangement is altruistic;
- Overseas commercial surrogacy is banned (but as I said, this noble intent does not work);
- Both sides have independent legal advice and counselling before entering into the surrogacy arrangement;
- The surrogacy arrangement is in writing;
- The post-birth order can only be made with the consent of all;
- There is a floor of 25 for the ages of all concerned.
- There is a residence requirement of the intended parents.
- The intended parents must be single or a couple.
- When one or both of the intended parents is a woman, the surrogacy arrangement is medically necessary (so that another woman's life is not put unnecessarily at risk).

Uniquely, the Queensland Act, in s.6, sets out lengthy guiding principles:

> *"(1) This Act is to be administered according to the principle that the wellbeing and best interests of a child born as a result of a surrogacy arrangement, both through childhood and for the rest of his or her life, are paramount.*
>
> *(2) Subject to subsection (1) , this Act is to be administered according to the following principles—*
>
> *(a) a child born as a result of a surrogacy arrangement should be cared for in a way that—*
>
> *(i) ensures a safe, stable and nurturing family and home life; and*
>
> *(ii) promotes openness and honesty about the child's birth parentage; and*
>
> *(iii) promotes the development of the child's emotional, mental, physical and social wellbeing;*
>
> *(b) the same status, protection and support should be available to a child born as a result of a surrogacy arrangement regardless of—*
>
> *(i) how the child was conceived under the arrangement; or*
>
> *(ii) whether there is a genetic relationship between the child and any of the parties to the arrangement; or*

(iii) the relationship status of the persons who become the child's parents as a result of a transfer of parentage;

(c) the long-term health and wellbeing of parties to a surrogacy arrangement and their families should be promoted;

(d) the autonomy of consenting adults in their private lives should be respected."

A failure of all of our surrogacy legislation is to clearly recognise the parentage of children born overseas. We now have almost 3,000 of them nationwide, some of whom have reached adulthood. The best that can be said is that some parentage is recognised because:

- As a matter of fact, the intended parents would be considered to be parents, as per *Masson v Parsons* [2019] HCA 21.

- Some intended parents are recognised as they were living overseas when they underwent their surrogacy journey, and therefore should be recognised, based on comity: *Carlton & Bissett* [2013] FamCA 143.

- A very few have been recognised because their overseas surrogacy order has been registered here, although there has been a difference of views whether that is possible when there has been a commercial surrogacy arrangement.[52]

- Some are recognised because the form of surrogacy overseas was by adoption.[53]

In most cases, intended parents don't go to the Court seeking that their parentage be recognised. They get on with parenting, having often spent $100-300,000 on their overseas surrogacy journey over 18 months to 4 years. The last thing they want to do is to spend more money on lawyers for a less than tangible outcome.

Difficulties arise if only one of them is on the birth certificate, as seen:

- When gay men undertook surrogacy in India. Only one of them would be on the birth certificate. The other would be a non-person. This could only be cured by a step-parent adoption[54], which in Queensland at least requires leave to adopt from the FCFCOA to be obtained[55] before the application to adopt is made.

- When surrogacy was undertaken in Thailand, and some journeys in Mexico and Colombia. The biological father and the surrogate would be shown on the birth certificate. The limping parentage of the surrogate would continue, unless a step-parent adoption order were made.

[52] *Re Halvard* [2016] FamCA 1051; *Re Grosvenor* [2017] FamCA 366; *Sigley & Sigley* [2018] FamCA 3; *Rose* [2018] FamCA 978; *Allan & Peters* [2018] FamCA 1063.
[53] *Family Law Act 1975* (Cth), s.4.
[54] *Blake & Anor* [2013] FCWA 1.
[55] *Adoption Act 2009* (Qld), s.92(1)(d).

There seem to be moves to cure this, at least interstate:

- **NSW**, to allow the Supreme Court to make parentage orders for children born via overseas surrogacy[56];

- **ACT**, to the same effect[57], but only if there is a *pressing disadvantage facing the child that would be alleviated by making a parentage order*. In overcoming that hurdle, intended parents would still need to run the gauntlet that there is no time limit for prosecution of the extra-territorial surrogacy offence in the ACT.

- **WA**, by the ministerial expert panel recommending the ability of intended parents to ensure the other is added through an administrative process with the Registrar of Births, Deaths and Marriages. The Government has accepted that recommendation in principle, but the resultant bill has not yet been tabled.

However, protecting the human rights of the surrogate, recognising her as the mother, does not usually (if she decides to not relinquish the child), protect the human rights of the child and the rights of the intended parents who, after all, are driving the journey.

Four recent cases illustrate this point.

***Seto & Poon* [2021] FamCA 288**

This was an informal surrogacy arrangement between two heterosexual couples who appeared not to live in New South Wales. One of the wives who could have children easily, proposed to the other that she be the surrogate for the other and her husband.

Significantly, there was none of the usual protections seen under the *Surrogacy Act 2010* (NSW) – as twins were ultimately born in New South Wales:

- There was no formal written agreement signed by the parties. Instead, there were some notes written in Cantonese and some exchanges on WeChat.

- There was no independent legal advice given to each of the parties.

- There was no pre-signing counselling.

These features of a written surrogacy arrangement, independent legal advice and counselling features required under our *Surrogacy Act* and those across Australia, although currently in both Victoria and the ACT the surrogacy arrangement can be an oral one. I say currently because there is a Bill before the ACT Parliament that proposes that, among other changes, surrogacy arrangements in the ACT be written.

The intended father, Mr Seto was born in country G. He had migrated to Australia and became a citizen in 2011. His wife, Ms Yue was born in China and had an adopted child with her first husband in China. That child lived with his biological mother, Ms Yue's sister. That adoption was put in place apparently due to China's one-child policy.

[56] *Equality Legislation Amendment (LGBTIQA+) Bill 2023* (NSW), schedule 19.
[57] Parentage (Surrogacy) Amendment Bill 2023 (ACT), proposed sections 28F and 55

Ms Poon, the surrogate, was born in Hong Kong. She married Mr Zhu who was born in country G. Ms Poon and Mr Zhu came to Australia in 2014 on a student visa granted to Ms Poon. They had a son born in 2018.

Between 2017 and 2019, Ms Yue and Mr Seto underwent five unsuccessful IVF cycles in Australia and country H.

After the last of those were unsuccessful, Ms Yue and Ms Poon agreed that Ms Poon would be the surrogate in exchange for financial assistance in Ms Yue obtaining Australian residence.

Between July and November 2019 Mr Seto then had sex four times with Ms Poon in an attempt for her to become pregnant. These were unsuccessful.

By February 2020 Ms Poon and Mr Seto attended an IVF specialist. It is unclear where that specialist operated, whether in Australia or overseas. Mr Seto and Ms Poon said that they were a couple. They used the same address. Ms Yue attended the appointments as a supportive friend of Ms Poon. Mr Zhu attended none of the appointments at the IVF clinic or at the hospital. He signed no documents in relation to the IVF procedure.

In May 2020, following the creation of embryos comprised of Mr Seto's sperm and Ms Poon's eggs, an embryo transfer occurred whereby two embryos were implanted into Ms Poon. Ms Yue was present. Because two embryos were transferred, it is likely that this implantation occurred overseas.

Two weeks later, Ms Poon and Mr Zhu moved into the home of Mr Seto and Ms Yue. They remained there for two months before then moving out to their own accommodation.

Six weeks after the implantation, the parties executed a document *"Agreement on renunciation of guardianship"*. This agreement, written in Cantonese and drafted by Ms Poon, said that she would *"voluntarily give up custody of the children"* provided Mr Seto pays:

- IVF and medical costs.
- $50,000 to assist with her immigration application, and half of that in costs over $100,000 and acts as a financial guarantor of the application.
- A $7,000 deposit, and
- $4,000 towards Ms Poon's tuition fees.

The $50,000 was to be paid in instalments of $10,000 at 12 weeks' gestation, $20,000 following the birth of the children and the last $20,000 when the children attain the age of 6 months.

The first $30,000 was paid. After the payment, Ms Poon said that she no longer required Australian residence:

> *"I am very grateful … now I don't need to worry about my residency. Since the national security law passed the bill last month through Australia, Hong Kong residents are now eligible for a 5 year temporary visa with pathways to permanent residency. There are more benefits offered by another two countries, in Canada and Britain…"*

By November 2020 Ms Poon demanded that there be further payments of $50,000 for one baby but if two babies were born, $100,000 and:

> *"If you do not pay the $100,000, you will never see the children once they are born many people happy to pay for twins."*

A week later, Ms Poon said to Mr Seto and Ms Yue:

> *"I want 70% before I do anything more."*

Ms Yue understood that that meant a further $70,000 to be paid. The following day, Ms Poon said to Ms Yue on WeChat:

> *"Is there something wrong with your memory or ears? I made it clear yesterday though you might have missed it as I was weak when I talked. If you would like to pay 70% then that needs to be paid prior to seeing the doctor."*

The following day, there was fallout between Ms Yue and Ms Poon which ended with Ms Yue saying:

> *"We haven't achieved any agreement. Why should I pay you? Who knows how many arguments we are going not have?"*

Just before Christmas, Ms Poon said:

> *"From the beginning, I've not been after money. I didn't do it for money. If it was for money, I wouldn't have asked for this little money. My relatives have said a lot to me. I listened to them but you also think about what they say myself and try not being affected by them. As for this, it's between you and me. I trust you. You trust me. That's how we got to where we are right now."*

Not surprisingly, Ms Yue said:

> *"I actually know you well. I don't believe you will blackmail me with the babies. All I worry about is you seeing how cute the babies are and the fact that you gave birth to them. That's why I'm so concerned about it. You know I spent all my fortune to have them. They are all I have and support me living my life."*

The children were born by caesarean section in 2020. Ms Poon and Mr Zhu then withheld the children. By January they said to Mr Seto and Ms Yue:

> Ms Poon: *"You need to pay a further $30,000 before I proceed with the paperwork."*
>
> Mr Zhu: *"If you don't pay up, I will gift the 2 babies away. A boy and a girl twins are very sought after. A lot of people will pay for them."*

Over the next two days, $30,000 was transferred by Mr Seto and Ms Yue to Ms Poon.

Two days later, there was an incident between the parties. Ms Yue picked up a kitchen knife and made threats that she would harm herself. Mr Seto then calmed her and took away the knife.[58] From that point, Ms Poon and Mr Zhu would not permit Ms Yue to come to their home. Mr Seto, his parents and sister continued to visit the babies every day for 1-2 hours.

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[58] Surrogacy arrangements that go awry are the most volatile family law cases I have seen, worse than when a parent accuses the other of seeking to kill them or of having sexually abused their child.

Six days later, a letter was written by a solicitor for Ms Poon, Ms D, to the solicitors for Mr Seto and Ms Yue. During the course of this letter, this was said:

> *"**Moving Forward***
>
> *Our client draws your attention that section 6 of Surrogacy Act 2010 … entitles our client to have the expenses and costs incurred before, during and after the surrogacy to be reimbursed in accordance with the reached pre-conception surrogacy arrangement between you and our client, and the arrangement is enforceable under the Act. The costs and expenses in relation to the surrogacy incurred by our client, which is yet paid by you, that our client is entitled to claim from you, under section 7 of the Act, in appliance to the dispute between you and our client, as per following:-*
>
> 1. *Our client proposes to have her expenses of nutrition fees in an estimated amount of $100,000 to be reimbursed and such fee incurred from pre-conception until the expected date in the future that she could be fully recovered from the caesarean birth delivery.*
>
> 2. *Our client proposes to have the anticipated cosmetic/medical expenses in an estimated range of $40,000-$50,000 to be reimbursed and such expenses will be aiming to recover our client's physically disgraceful changes.*
>
> 3. *Our client proposes to have our anticipated legal expenses in an estimated amount of $50,000 to be reimbursed, including but not limited to legal advice, current non-litigious stage of the subjected surrogacy matter and any potential litigious stage of the disputes as well as the parentage rights transfers in future.*
>
> 4. *Our client proposes to have her anticipated costs for maternity matron an estimated amount $24,000 to be reimbursed from which the maternity matron started to take care of the twins from 5 January 2021, who was employed for at least two months.*
>
> 5. *Our client proposes to have her anticipated reimbursement for the loss of earnings of her husband and herself, in an estimated range $120,000-$150,000. Total proposed reimbursements: $334,000-$374,000.*
>
> *Our client instructs that you and your husband have proceeded the payments in various occasions as to the partial reimbursements from the above, as follows:*
>
> 1. *You and your husband paid $20,000 to our client in October 2020.*
>
> 2. *You and your husband paid $30,000 to our client in November 2020.*
>
> 3. *You and your husband paid $30,000 to our client in January 2021.*
>
> *Total paid amount $80,000.*
>
> *In light of the above the outstanding amount is between $254,000 and $294,000 that, as per our client's instruction, she is entitled to claim from you under the Act. Our client would like to provide you with some leniency that our client proposes to have $290,000 to settle the matter as to save any further unnecessary inconvenience potential costs between the parties.*

> *We are instructed to receive the outstanding payments in sum of $290,000 to our firm's trust account on behalf of our client within seven days from the date of this letter, due by 4 p.m. on 22 January 2021 …"*

By 1 February 2021 there was a discussion at the home of Ms Poon and Mr Zhu with Mr Seto and his mother and sister. They had settlement negotiations. The comments made included:

- *"How do you get it legal in Australia".*
- *"We are doing illegal surrogacy".*
- *"How do we settle, making this thing from illegal to legal?".*
- *"The main concern is that there was actually money but we will not present that to the court".*
- *"If you guys do not agree, you most likely won't get the kids and she won't get anything".*
- *"She can do whatever she wants if you don't settle with her".*

It is no surprise that four days later, the matter was filed urgently. Within the month, interim orders were made for the children to be placed on the watch list and for the children to spend time with Mr Seto and Ms Yue from 6 p.m. to 8 p.m. daily. The matter was listed for final hearing three weeks later. An ICL was appointed. By consent, a single expert was appointed to conduct a psychological assessment of Ms Yue.

The children ended up in the care of Mr Seto and Ms Yue.

Stevenson J referred the proceedings to the New South Wales Commissioner of Police for investigation as to commercial surrogacy and any additional offences committed by the respondents and/or their lawyer in the demands for payments of money in exchange for the children.

Her Honour also concluded that the conduct of the solicitor should be drawn to the attention of the Legal Services Commissioner for investigation as to whether she is a fit and proper person to hold a practicing certificate.

Privilege was determined to be waived by Ms Poon. Her Honour was satisfied that the dominant purpose of the advice provided by Ms D was to maximise the amount of money which Ms Poon and Mr Zhu could obtain from Mr Seto and Ms Yue in order to secure a handover of the children. Ms D did not file a notice of address for service. She indicated by email to the court that Ms Poon and Mr Zhu had failed to place her firm in funds and thus they would be unrepresented the following day. When Ms D was called upon to make written submissions as to a potential referral to a New South Wales Police and/or the Office of the Legal Services Commissioner, Ms D suddenly left her employment with the firm that she was working with and took with her their file. She gave no notice to her employers of her intended departure or of her intention to remove the respondent's file.

The case is also significant about who is a parent, which I discuss under Lesson 10 below.

***Tickner & Rodda* [2021] FedCFamC1F 279**

This was an altruistic gestational surrogacy arrangement in New South Wales between a single surrogate and a gay couple.

The usual procedures under the *Surrogacy Act 2010* (NSW), which is largely modelled on the *Surrogacy Act 2010* (Qld), had been followed. There was a written surrogacy arrangement. Each of the parties had independent legal advice. The parties had pre-signing counselling undertaken which recommended that the surrogacy arrangement proceed. Pregnancy was achieved via IVF at a large IVF clinic, IVF Australia.

IVF Australia has a procedure through its surrogacy committee whereby it reviews whether the surrogate is a suitable woman to carry and also that the other requirements have been met, namely, that legal clearance has been given and that the pre-signing counselling report recommends that the surrogacy arrangement proceed. All those steps were met and the parties went ahead. The surrogate then became pregnant. The intended parents lived in Sydney. The surrogate lived in a regional town. Shortly after the implantation, the intended parents moved from Sydney to that regional town with a view to residing there for the duration of the pregnancy and for a short time after the birth. Difficulties arose between the surrogate and them. A month later, the surrogate began to consider the possibility of terminating the pregnancy. The difficulties between them continued.

Two months after the intended parents had moved to that town, the surrogate notified the joint counsellor that she had terminated both the pregnancy and the surrogacy arrangement. This was subsequently confirmed by her solicitors. Three weeks later, the intended parents returned to Sydney to live.

The surrogate had not terminated the pregnancy. The child was born later in 2021. After the birth, the intended parents were informed of the birth. Very soon after the child was born, the intended parents brought proceedings in the Family Court for the child to live with them.

Again, it is not surprising that the court ordered that the child live with the intended parents when Aldridge J said[59]:

> *"The evidence does not suggest any reason why the applicants would not be appropriate, loving and caring parents of the child. The evidence discloses some difficulties with the mother's mental health, including instances of suicide attempts and drug overdoses but she retains the care of her other five children."*

The child ended up living with the intended parents. The case is also significant as to who is a parent, also dealt with under Lesson 10.

A & C (2019) unreported

In 2018 I was appointed by Demack J as independent children's lawyer concerning a baby, who was 18 months old at trial. The *"surrogate"*, Ms A, was a single woman who had four other children. She was the best friend of the sister of a man, Mr B, who had a male partner.

[59] At [21].

The men were keen to be parents. Ms A offered to be their traditional surrogate, i.e. there would be an at-home insemination resulting in her pregnancy.

The three parties did not enter into a written agreement. They did not obtain any counselling. They did not obtain any legal advice. The surrogacy arrangement was altruistic. There were several attempts on the one day at Ms A's home with at-home insemination, using Mr B's sperm. Two weeks later, Ms A underwent a test. It was unclear until the trial as to when the attempts at artificial insemination had occurred. The date of the test was obtained from a subpoenaed document. The test was a nuchal test, commonly taken at 12 weeks. My chronology, once I had the information from Mr B at trial as to the date of the artificial insemination, made plain that Ms A had engaged in fraud. A nuchal test is undertaken at 12 weeks, and yet, the test in this case, according to the timeline, was taken at two weeks.

It is no surprise then that when the nuchal test was undertaken, Ms A learnt that she was 12 weeks pregnant. She then went to the intended parents and told them that she must have been pregnant from the one night stand that she had previously had, which she had told Mr B about. The question that she then posed to them was, what was to happen with the child?

Having been emotionally committed to this process and with the dream that they could become parents, the intended parents felt compelled that they be the parents of this child, albeit knowing that neither of them were the genetic parents.

What was able to be established at trial, from the timeline and documentary trail was that Ms A knew that she was already pregnant when she attempted the at-home inseminations. She had misled the intended parents, with the intention of ensuring that they took her unwanted pregnancy from the one night stand.

Two weeks before the child was due, Ms A then demanded of Mr B that his sister have no role to play at all in the child's life. He responded to the effect that he and his partner would be the parents and that his sister would be the child's aunt, but that his sister would not be a parent. This enraged Ms A, who was determined to cut off the relationship between the intended parents and the child, and called the whole deal off. She succeeded.

Ms A then went online to an online bulletin board to find would-be parents. She was assured by a woman on this online bulletin board that the woman was a solicitor (she was not) and that the proposed intended parents, Mr and Mrs C were suitable and had been screened (they had not). The intention was for Mr and Mrs C to be the adoptive parents.

Ms A gave birth in a north Queensland hospital. She told the hospital that there was a surrogacy arrangement and that the intended mother (whom she had just met that day) was Mrs C. Upon the child being discharged from hospital, the child came into the care of Mrs C. She then travelled with the baby interstate to be with her husband.

In order to enable both Mr and Mrs C to be recognised as the parents, it was agreed that Ms A and Mr C would be named on the birth certificate as the parents. The point of naming Mr C on the birth certificate was so that there could subsequently be a step-parent adoption in favour of Mrs C, so that both Mr and Mrs C would be recognised on the birth certificate as the parents.

A few months later, Mrs C, her other children and the baby moved to Queensland to where Ms A lived. They moved into Ms A's home initially. Mr C did not move, as he had work commitments.

Mrs C had borderline personality disorder. She was the victim of childhood sexual abuse at the hands of her grandfather. She had, as a child, been in care as a result.

At one stage, State authorities had removed her children from her care due to violence and drug issues by Mr C.

Ordinarily one would say that Mr and Mrs C were not viable candidates to care for the child.

Nevertheless, they had had infertility and were desperate to have another child, hence their actions in taking up the extraordinary offer by Ms A two weeks before she was due to give birth.

By the time the child was a year old, Mrs C and her children were still living with Ms A and her children. Mr C remained interstate.

In these circumstances where the mother was bereft of social support, she had a breakdown. She was admitted to hospital. She placed her three children (including this child) in the care of Ms A.

Mr C moved interstate to live with Mrs C. Ms A agreed, with the consent of the Department, to the release of the two eldest children to Mr and Mrs C. Ms A however did not agree to the release of the baby.

Ms A maintained that the baby should remain living with her.

Mr and Mrs C then commenced proceedings for the child to live with them. During the course of those proceedings, the *"surrogate"* said that she was of Aboriginal descent and that it was important to her that the child be in her care and therefore be connected with its nation and cultural traditions.

During the course of the proceedings, Ms A (not disclosing this to the court at the time) sought to place the child with her GP, with the intention that the child would live permanently with the GP. The GP declined to take the child.

The family report writer was of the view that because of genetics between Ms A andthe child, that the child had four siblings, and because of the child being Aboriginal, that therefore given the clear problems in the household of the woman and her husband, that the child should remain with Ms A.

After a three day trial, I formed the view that the best interests of the child were that the child be with the two people, no matter how flawed they were, who were not going to give away the child and who loved that child for whom the child was, namely, Mr and Mrs C. They agreed to support the child concerning its Aboriginal culture and connections.

Demack J agreed with that approach and ordered that in the best interests of the child, the child live with the woman and her husband and have no time with Ms A.

By the time of trial, the matter had become an either/or proposition – either the child was going to live with one party and have no contact with the other – whichever party that was.

The Canadian Case

This case has echoes of *Tickner*.

In 2021, an Australian couple underwent surrogacy with a surrogate for a second time. Canada is an altruistic surrogacy regime. Intended parents from Queensland need to take care with Canada because even though Canada is altruistic, due to the nature of the extra-territorial offences in Queensland, one still must take care that no offence is committed under the *Surrogacy Act 2010* (Qld).

The intended parents were a gay couple. A child was conceived the first time via IVF in Canada using an embryo comprised of the sperm of one of the men and fertilised with an egg from a donor. That surrogacy journey had gone well, albeit the surrogate had some post-natal depression.

The parties then discussed undertaking surrogacy again. Agreement was reached that they do so. Each side had independent legal advice and entered into a contract under Canadian law as to surrogacy.

The surrogate attended the Canadian IVF clinic. An embryo was implanted.

From that point on, there were evident difficulties in the eyes of the Australian couple as to the approach taken by the Canadian surrogate. She did not answer them straight about whether or not she was pregnant. It was clear that she by now was depressed, which they saw as being consistent with her behaviour earlier from the first birth when she had post-natal depression. They put down her difficulty in communicating with them to post-natal depression.

Due to her failure to tell them that she was pregnant, they assumed that the implantation had not been successful. They therefore thought that their role was best in providing her with emotional support.

There was then an exchange of photographs of the surrogate, showing her doing various activities, but typically showing from the chest up. Although they had become friends, the surrogate had settings on her Facebook account which only enabled the Australian couple to see the front page of her Facebook account and not see the posts inside.

Over a period of some months, there was then some odd behaviour on the part of the surrogate. On her Facebook profile, open to any Facebook member, there were three numbers set out. These numbers appeared to be the day and month of birth of each of her two children and the day and month when this child might be born (if the pregnancy had continued). They thought that they were probably getting it wrong and didn't take it any further – but they had some suspicions, given that the surrogate had not answered them clearly about whether or not she had become pregnant.

And then one day, the surrogate made a mistake. She dropped her security settings on Facebook. This resulted in the intended parents, my clients, being able to look inside her Facebook account. This showed pictures of her being evidently pregnant (which she had never disclosed since the attempted implantation), pictures which she had never shared with them, and a photograph showing three pairs of shoes. One pair of shoes clearly belonged to her elder child, one pair of shoes clearly belonged to her kindergarten aged child. The third pair of shoes was a pair of baby shoes.

Suspicious, the intended parents through their Canadian lawyer wrote to the surrogate through her lawyer demanding to know whether the surrogate was pregnant. The surrogate denied that she was pregnant.

Not being satisfied with this response, the intended parents then engaged a private investigator. A report was provided which showed that the surrogate was clearly pregnant and that she had a baby seat installed in her car. Neither of her children needed a baby seat. They were too old.

By this stage, the game was up. The demand was made of the surrogate that it was known that she was pregnant and that when the child was born to hand the child over.

At this point, the surrogate denied that she was pregnant through IVF. She said that she had had a third child to be a sibling to her children. She did not say how she became pregnant. The obvious retort to that was that a DNA test be undertaken.

The child was born. A DNA test was undertaken. Not surprisingly, it showed that the Australian intended parent was the father of the child.

The child was handed over. Orders were made in Canada for the child to live with the intended parents.

Subsequently, the surrogate was uncooperative with the process in obtaining Australian citizenship and Australian passport. Both were able to be obtained.

The surrogate maintained that she had been a victim of the intended parents and that she had never engaged in fraud.

Lesson 4 – Judicial Oversight

While auto recognition of the intended parents at the time of birth is desirable, as happens in many overseas jurisdictions[60], but not in Australia, in my view, it is essential that there will always need to be the backup of having judicial oversight, in case things go wrong.

A fundamental failure with compliant surrogacy arrangements in Australia is that if the surrogate decides not to relinquish, then there is no binding contract.

An American colleague[61] has described that the role of a lawyer with surrogacy is that of:

1. Architect.

2. Pilot.

3. Janitor.

The role of architect is basically planning the whole surrogacy arrangement and putting it together. This is always the preferred role.

The role of pilot is where the intended parents know where they want to go and get there as quickly as they can.

[60] For example, by operation of law in British Columbia, Manitoba, Ontario, Illinois, Ukraine, Kazakhstan, Buenos Aires; and as recommended by Law Commissions in New Zealand and the United Kingdom; pre-conception orders recognising the intended parents as the parents in South Africa, Greece and Israel; and pre-birth orders in many US states and in some Mexican states.

[61] Richard Vaughn, former chair of the ART Committee of the American Bar Association.

The least desired role is that of janitor or cleaner where it is the most complex cleaning up other peoples' messes and typically involves highly volatile matters. It is an awful position to be in.

Nevertheless, when things go wrong, it is essential to have a judge able to make a determination. Having judicial oversight, even if only in cases of last resort, gives a clear message to the parties, their lawyers and IVF clinics about what is, and what is not, acceptable.

Lesson 5 – Anonymity is dead

A surrogacy journey, in Australia at least, involves one where the intended parents are the surrogate and partner all know each other at least at some stage during the course of the journey prior to the surrogate becoming pregnant.

That is not always the case in some countries overseas. For example, in China it is an offence for doctors, but not the surrogate or intended parents, to engage in surrogacy.[62] Surrogacy still happens there, but doctors keep a lid on matters so that the intended parents never find out the identity of the surrogate or vice versa.

Since 1988, as I said, I have advised in over 1,900 surrogacy journeys for clients. My client group (and I have not kept precise statistics) has comprised of two large groups, each equaling about 50%: gay couples and heterosexual couples. There are others who undertake surrogacy that I have acted for – single men, single women, transgender people and a couple of lesbian couples. But the two big groups are those of gay couples and straight couples.

When one thinks of surrogacy one does not think of egg donation. However, the reality is, at least for the client group that I have seen, about three-quarters of them at least, not only need a surrogate, but also an egg donor. Clearly, all the gay couples need an egg donor, as do all the single men. Experience has taught me that most of the single women also need an egg donor, as have the lesbian couples. At least half of the straight couples also need an egg donor.

In Australia, egg donation since 2004 has been, what the Americans would call, open identity, namely, that the child, upon turning 18, can find out the identity of the donor.

That is not the case in many overseas surrogacy journeys. Donors in South Africa, for example, have to be anonymous (although the agencies there have required their donors to be able to consent to identification later on, as the South African Law Reform Commission has proposed a change to donation laws there to bring them more into line with Australia). Donors in countries such as Colombia and Ukraine, for example, are anonymous. The default model in an emerging surrogacy destination, Argentina, donors fit all three types, namely, anonymous, known and open identity.[63]

The default model in the United States has been anonymous donors. However, in recent years, there has been a great shift of many of these donors to open identity. The reason that that change has occurred is not out of some new-found respect for the donor-conceived person,, so that they know where they came from, but because of technology. There are two developments with technology that mean that anonymity is dead. The first is the one that we should all be familiar with. Databases like Ancestry.com and 23andme.com mean that today very often donors are able to be identified. For example, prior to 2004 sperm donation in Queensland was anonymous. Recently, I have acted for a number of men who many years ago (in one case 40

[62] Procedures on the Administration of Human Assisted Reproductive technology 2001, art. 22.
[63] The default model in both Greece and Mexico was anonymous. The law has changed in Greece to allow open identity donation. Practices have changed in Mexico so that open identity donation is now available.

years ago) were sperm donors. They have been found because the child or the child's parents have undertaken a DNA test such as through Ancestry.com. A member of the donor's family, for example, his mother, his brother or his brother's son has also taken a test and the connection has been made.

The other source is also from technology. Gone are the days where we led anonymous lives. Much of what we say and do we put on social media, such as Facebook and Instagram. Most of us do it. A tool from Google and other apps, reverse-image search, is able to identify the person.

I have had clients who have been able to identify their donor from reverse-image searches. I did not recommend that they do so. They had done these searches before the topic arose with me. I would be careful about undertaking searches of this kind, as in my view that is an issue within the autonomy of the resultant child, not the parent.

As an exercise, I thought I'd take a picture of myself to try and do a Google reverse-image search. The first one was a failure. I was unable to identify anyone. The second one I tried I instantly recognised a similar photograph on my Instagram account. It also identified:

- Facebook account for Victory Life Church
- a YouTube Maps Geography and Cartography
- 20 years of Mitch Cowger
- Father Tony Churchill from St Michaels Catholic Church
- Daniel Schipper Sermons
- the 2023 Mississippi Baptist State Evangelism Conference and
- Community of Grace Sunday Worship from YouTube, among others.

Only one of these is the right answer. Nevertheless, I was able to be found.

Just for fun, I did a third search and discovered that it took me to Stephen Page, the famous Aboriginal ballet choreographer – no relation. The point is it's not a perfect tool but used carefully, is able to identify the person concerned. As I said, these two tools, the DNA data bases and photoscraping mean that today anonymity of donation is dead.

Lesson 6 – Surrogates (and Donors) are extraordinary people

A sperm donor gives the gift of life. The American Society for Reproductive Medicine in 2011 estimated that the amount of time involved by a sperm donor in providing the donation – including counselling – was one hour. Men are quick. By comparison, it estimated that the amount of time involved by an egg donor was greater than 50 hours. The ASRM later walked away from its estimate, but it's probably right.

The role of an egg donor is much more complicated than the role of a sperm donor. An egg donor must have daily stomach injections, typically for 14 days and sometimes more than one a day – self-administered. The egg donor ultimately engages in a minor operation for the egg pickup. This happens for any woman undertaking IVF. Any egg pickup has the risk of the woman having ovarian hyperstimulation syndrome – where she produces too many eggs. Some

of the symptoms of OHSS include a racing heart, a sudden drop in blood pressure and at worst, death.

Therefore, any woman who is contemplating being an egg donor has to contemplate the possibility at least that they will die from being a donor. Sperm donors don't have the same risk.

Embryo donors are not common, but they are typically couples who have already become parents and decided to provide their embryos to enable others to become parents. Any of these donors give the gift of life and therefore are extraordinary. Nothing compels them to do so but their generosity is lifegiving.

Surrogates similarly give the gift of life.Whilst the genetic material is a start, if a child needs to be conceived through surrogacy, then the child will not be born without a surrogate.

I use the word *conceive* advisably. Under section 22(2)(e) of the *Surrogacy Act 2010* (Qld), the surrogacy arrangement in Queensland must be entered into *before the child was conceived*. *Conceived* is not defined. What concerned me following commencement of the Act was if a judge took the view that conception was the act of fertilisation and not of the act of pregnancy. If that had been true, then many people who create embryos today and enter into surrogacy arrangements later, could never obtain a parentage order in their favour.

I was delighted when I appeared before Judge Clare SC in *LWV v LMH* [2012] QChC26 when her Honour accepted my submissions that conception was the act of pregnancy, not that of fertilisation. That case was particularly telling. The intended couple were a husband and wife. The wife had undertaken an emergency hysterectomy because she had been diagnosed with cancer. In order to enable fertility preservation, her eggs were immediately removed prior to the hysterectomy and fertilised with her husband's sperm. This all occurred in 2008 when all surrogacy was illegal in Queensland under the *Surrogate Parenthood Act 1988* (Qld).

Following the enactment of the *Surrogacy Act* in 2010, the intended mother's sister (my client) offered and became their surrogate.

The issue before the court was what *conceived* meant. Her Honour said[64]:

> *"The Act offers no definition. This appears to be the first time a court has been asked to interpret section 22(2)(E)(iv). Nonetheless, the answer seems straightforward. Whatever approach the statutory interpretation is applied, whether it is to view 'conceived' as a technical term, or in its everyday meaning, or the meaning that best advances the purposes of the act, the result is the same. The point of conceiving a child is the commencement of the pregnancy, which involves an acted process within a woman's body."*

What surprised me about that case was that it was the first in the world to decide the point.

By giving the gift of life – and receiving so little in return, surrogates and donors are just extraordinary.

[64] At [7].

The risk that the surrogate has in carrying a child is, aside from any fallout of the relationship with the intended parents, a risk of dying from being pregnant and giving birth, or some long-term injury.

In common with similar legislation interstate as I said earlier, the *Surrogacy Act* requires that if a woman is to be an intended parent, then there must be a medical need for surrogacy and she must be an eligible woman. The requirement in section 14(2) is that she is a woman who:

> *"(a) is unable to conceive; or*
>
> *(b) if able to conceive –*
>
> *(i) is unlikely to be able, on medical grounds, either to carry a pregnancy or to give birth; or*
>
> *(ii) either –*
>
> *(A) is unlikely to survive a pregnancy or birth; or*
>
> *(B) is likely to have her health significantly affected by a pregnancy or birth; or*
>
> *(iii) is likely to conceive –*
>
> *(A) a child affected by a genetic condition or disorder, the cause of which is attributable to the woman; or*
>
> *(B) a child who is unlikely to survive a pregnancy or birth; or*
>
> *(C) a child whose health is likely to be significantly affected by a pregnancy or birth."*

Likely is a term that has long been considered by the courts where it is considered that there is a significant risk, albeit does not need to be on the balance of probabilities.[65] The whole point of that section, however, although unstated, is to ensure that surrogates do not unnecessarily die.

There is a belief in Australia that women don't die from pregnancy and childbirth. That view is false. Women still die in Australia from both, although the rate is low. Whilst we are very lucky in Australia as to our maternal mortality rate, nevertheless the maternal mortality rate exists. Anyone who considers undertaking surrogacy overseas, aside from the financial and legal risks, should always consider the risk as to the woman who is going to be carrying the child. Is there a significant risk that she might die from this process?

UNICEF and the WHO, among other organisations, have created Trends in Maternal Mortality 2000-2020, which give estimates for each country.[66] Every day in 2020 approximately 800 women worldwide died from preventable causes related to pregnancy and childbirth meaning that a woman dies around every two minutes. The lifetime risk of maternal death in Australia for any woman is one in 19,000. In 2020 there were nine maternal deaths in Australia.

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[65] See, for example, *Tillmanns Butcheries Pty Ltd v AMIEU* [1979] FCA 85; (1979) 42 FLR 331.
[66] https://www.who.int/publications/i/item/9789240068759.

In 2021, a mother died in Brisbane three days after giving birth to twins, in what became a reported case.[67] I acted for the late mother's sister and sister-in-law.

We aren't the least risky country. To give an example from Europe – the lifetime risk of maternal death in Norway is one in 43,000.

The lifetime risk in the United States is one in 2,700. In 2020, it was estimated that there were 770 maternal deaths there. They appear to occur mainly with women of colour and in remote rural areas.

Australians have been all over the world in undertaking surrogacy. In Iran, where Queenslanders have undertaken surrogacy, the maternal mortality rate lifetime risk is one in 2,600. In 2020, 270 women died. Australians have also undertaken surrogacy in Nigeria and Kenya.The lifetime mortality risk in Nigeria is one in 19. In 2020, 82,000 women died from maternal mortality rate. In Kenya, the lifetime risk is one in 52 with 7,700 dying in 2020. The risk is not equal worldwide and nor should it be assumed to be.

Because surrogates and donors are extraordinary people, they should be protected at every opportunity. This does not mean that they should be allowed to act in a capricious manner. Nevertheless, they should not be worse off from being surrogates or donors. They should have adequate life insurance, private health cover (if they want a private birth), quick access to the local maternity hospital, wills for both them and their partner, and where they are working, income protection insurance. All of this should be funded by the intended parents.

Lesson 7 - When, not if, the intended parents become parents

When one combines a healthy egg, healthy sperm and implants them into a healthy uterus, it seems as though it is like an algebraic equation that the birth of a child will result. The reality about surrogacy is that it is absolutely certain that a child will result at the other end.[68]

There are, however, four exceptions:

1. **The intended parents die.** It is essential therefore:

    a) That the intended parents have wills, including the appointment of a testamentary guardian (which did not occur on the part of the mother who died from childbirth complications in *Wickham & Toledano*).

    b) That they have adequate life insurance and that the beneficiaries of their life insurance have been properly identified.

    c) That they have properly identified the beneficiaries for their superannuation.

    What they do not want to do is to unexpectedly die and therefore leave a child who has been born either locally, interstate or overseas and left as a penniless orphan. their families will have to clean up the mess. It is much better that in the very unusual event that they might die during the course of the journey that the child is protected so that

[67] *Wickham & Toledano* [2022] FedCFamC1F 32.
[68] Hence, why I called my book, *When Not If: Surrogacy for Australians*. The intended parents are not limited to using their DNA, or using that surrogate.

there is someone, as testamentary guardian, who can control their affairs and there are means to raise the child.

Of the hundreds of children that I've helped be born into the world, not one of their parents died during the journey. However, one mother has died two years after the child was born and one father died seven years after the child was born. It could happen.

2. **They don't have enough money.** A ballpark figure for undertaking surrogacy in Queensland (including the IVF costs) is about $70,000. It might cost them as little as $50,000 or as much as $100,000. A ballpark figure, if they were to do surrogacy in Canada for example, is $140,000 and $300,000 in the United States.

3. **They need a donor, and they are not prepared to use a donor.** The vast majority of the clients I have seen who undertake surrogacy have recognised that they need or may need a donor and they just want to become parents. Occasionally, however, clients specify that they only want a child if it is their genetic child, and that no donor is used. Sometimes they are not successful.

4. **Something goes wrong and they give up.** For most intended parents, surrogacy is a hard journey with many moving parts. If you've ever built a house, you will know how frustrating it is that nothing happens at the right time and the cost goes up. Imagine the emotions of trying to make a baby.

   Things go wrong. They may have a fallout with the surrogate or the surrogate walks away. The surrogate may not get pregnant or the surrogate might have a miscarriage. The worst I've seen is that the surrogate gave birth to a child prematurely who died three weeks later.

   There should be no criticism of those who give up – each of us have life choices to make. If one wants to eat lots of Italian food and get fat, drink lots of wine, travel around the world and take up photography – each of these things is a life choice, which is also cheaper than raising a child.

   However, if the point of the exercise is to raise a child, then the two messages I give my clients are:

   1. Be kind to yourselves.

   2. Subject to 1., be resilient.

My surrogacy journey was particularly difficult and lasted over four years. At one stage I felt like giving up, even though I knew the outcome was certain. We didn't. My daughter is now almost 5 years old.

Lesson 8 – Collaboration works best

A good surrogacy journey is really a story of love where, interwoven into this transaction, there are people coming together who have one aim in life concerning this transaction, which is to enable this person or people to become parents and be blessed with a child. It is a different approach to that taken by a typical family lawyer. Rather than the, he said she said type approach, it is truly a collaborate approach involving both lawyers plus, where necessary, counsellors and doctors. The procedures under the *Surrogacy Act* are designed to ensure that

those who wish to be parents are suitable to be parents and that those who wish to be surrogates are also suitable to be surrogates.

They are also designed, even though they don't say it specifically, that by the time the surrogacy arrangement is entered into, all the parties should be in the same canoe paddling in the same direction. If they aren't, they should get out. There is nothing worse than intended parents and the surrogate going into a surrogacy journey where they are not of the one mind and, therefore, have different expectations. That is a recipe for disaster, which has played out a number of times in cases in Australia.

I cannot emphasise the need *at the beginning of the journey* to ensure that there is absolute thoroughness about:

1. The process of counselling that is undertaken, preferably by an experienced fertility counsellor who has done surrogacy before.

2. The careful drafting of the surrogacy arrangement to cover all likely eventualities. The fact that the surrogacy arrangement may not be legally binding is beside the point. By reducing the agreement to writing and having the parties sign it, in itself greatly reduces risk. It sets expectations. It is important to manage those expectations.

3. Where there is potential conflict or concerns, that there is open communication between the various parties, their lawyers and other helping professionals – the doctors and counsellors, for example.

Everything must be done that can be done to ensure that in a transparent manner, the surrogate and partner and intended parents know where they are heading and are aware of the potential pitfalls along the way.

This does not mean that as lawyers we should shirk from our professional responsibilities. Quite the contrary. We should uphold our professional responsibilities. But it is important to talk to others to make sure that everyone is on the same page or, to use the metaphor, that they are all in the same canoe paddling in the same direction.

Lesson 9 – No one likes the cleaner

A surrogacy arrangement that has gone wrong involves more volatile emotions than a case involving child sexual abuse. I've run both. The intended parents who have not been given the child into their care or facing resistance from the surrogate as to the making of the parentage order feel that they have been cheated. The surrogate who feels as though she has not been respected by the intended parents – because, for example, it is seen as a transaction, also feels as though she has been cheated. She wants to be heard and to express her pain.

It is often better with these cases, where possible, to allow the dust to settle so that all can reflect about what has just happened and then hopefully, enable peace to arrive and a parentage order to be made.

In some cases, such as the Canadian case, that option is not available. Urgent action is needed to ensure that the child's best interests are protected.

An example of what not to do

I was asked to fix up a surrogacy arrangement in South Australia that had broken. The child had been born. The surrogate had a husband and children. The surrogate had wanted to be a surrogate for some time and had gone online to seek out intended parents.

By sheer chance, she had come across a woman that she had gone to school with, who was now a lawyer. The surrogate offered to be the surrogate for the lawyer and her husband.

The intended parents went through the motions of getting independent legal advice, but in reality, the lawyer drafted the surrogacy arrangement herself and controlled its terms. It was handled in a very business-like manner.

The requirement under the law at that time in South Australia was that there would be three counsellors:

- One to see whether the would-be surrogate was suitable.
- One to deal with surrogacy implications with the surrogate and partner.
- One to deal with the intended parents as to surrogacy implications.

There was no requirement under South Australian law that the three collaborate. It is no surprise, then,that the three counsellors did not talk with each other.

The birth was particularly traumatic. The placenta only gave way 1½ hours after the birth.

The child was handed over immediately after birth.

In the weeks following the birth, the surrogate kept having medical episodes, associated with having given birth. These culminated on one occasion when she went out to the front gate to get mail out of the letterbox and collapsed. She was bleeding profusely. The surrogate was then hospitalised and endured a long operation.

Whilst she was in hospital, she got a phone call from the intended mother. The phone call was to the effect that the paperwork had been lodged with the court and could the surrogate please collect it from the court.

At no time during the phone call was there any discussion, according to the surrogate, of:

"How are you?"

It was treated very much as a business transaction.

Given that the surrogate was concerned that she may well have lost her life, this did not make her feel kindly towards the intended parents. The surrogate sought that there be counselling. The intended parents then insisted that the surrogate attend upon a particular counsellor, that they were paying for. The surrogate felt very much pressured at that point in that counselling to agree to the making of the parentage order.

When I appeared in the Youth Court of South Australia, my instructions were to tell the court that my clients were not agreeable – at that stage – to consent to the making of the parentage order but wanted two things to occur:

(a) That there be some counselling of the surrogate so that she could reflect on what had happened, with the counsellor chosen by the surrogate, paid for by the intended parents.

(b) That my costs relating to the application be met.

Not surprisingly, there was resistance from the intended parents. They wished to press ahead with the application on the basis that there had previously been consent by the surrogate to the application.

Again, not surprisingly, the court declined to do so. The matter was stood down to enable the parties to talk. The judge indicated that he wanted to adjourn the matter to enable enough time for water to pass under the bridge or dust to settle – along those lines.

Negotiations were then had so that there was some small amount for my fees and my client could choose a counsellor.

After the surrogate had had counselling, then when the matter reconvened several months later, my clients consented to the making of the parentage order.

Following that case and representations that I made on behalf of my clients, amendments were made to South Australian law, namely, *one* counsellor was to provide the counselling and if the surrogate sought counselling after the child was born, that would be paid for by the intended parents.

Lesson 10 – Who is a parent is often not straightforward

Currently, one in 18 children born in Australia are born through assisted reproductive treatment of some kind – or one in every classroom. ART is common.

It used to be the case that it was certain who were the parents:

1. The woman who gave birth was the mother.

2. The man who was the genetic father was the father.

With the rise in Australia of sperm donation, starting in Queensland in the late 70's, that equation has changed.

Under the *Family Law Act* there are general parentage presumptions and specific parentage presumptions. Under the *Status of Children Act 1978* (Qld) there are general parentage presumptions and specific parentage presumptions.

For a child conceived naturally, it was always assumed that the man was the father.[69] However, as seen in cases overseas, intention may determine who is a parent even in those cases.

[69] *B and J (Artificial insemination)* [1996] FamCA 124. .

Services Australia have taken the view that they will not accept that a man is a parent of a child for the purposes of child support, just because of DNA, unless there is a court finding to that effect.

The effect of the High Court decision in *Masson v Parsons* [2019] HCA 21 is that for family law purposes, there are five separate tests that need to be undertaken to determine whether someone is a parent. That court held that where there was any conflict between the *Family Law Act* and the State and Territory legislation, the former prevailed. Nevertheless, for the sake of being careful, one must go through all of the checks just in case. It is important to be meticulous, as it is easy to make a mistake. The tests therefore are:

1. Is the person a parent under the general (rebuttable) parentage presumptions under the *Family Law Act 1975* (Cth)?

2. Is the person a parent under the specific parentage presumptions under the *Family Law Act 1975* (Cth), such as section 60H(1)?

3. As a matter of fact, is the person otherwise a parent under the *Family Law Act 1975* (Cth)? This may be seen as an esoteric question, arising from *Masson v Parsons* but often intention will determine whether or not someone is a parent.

4. Is the person a parent under the general (rebuttable) parentage presumptions under the *Status of Children Act 1978* (Qld)? These general parentage presumptions are identical under both the *Family Law Act* and the *Status of Children Act*.

5. Is the person a parent under the specific parentage presumptions under the *Status of Children Act 1978* (Qld)?

As seen in *Masson*, whether or not Mr Masson was a parent depended on biology, intention, and parenting the child following the birth of the child.

In cases such as *Clarence & Crisp* [2016] FamCAFC 157, intention would now be relevant, but the issue in that case was whether the woman who provided the embryo, comprising of her egg, fertilised with donor sperm, was a donor or parent. The woman who provided the embryo was in a de facto relationship with the recipient woman on the date of the artificial conception procedure.

There is a lack of clarity under section 60H(1) as to whether the date for consent is the date of birth of the child or the date of the artificial conception procedure. However, it appears, such as in *Wickham & Toledano* that the relevant date is the date of the artificial conception procedure, not of the date of the birth. There is no Full Court authority on point.

There is no authority whatsoever as to the provisions of the *Status of Children Act 1978* (Qld) as to what is the relevant date, namely, that of the fertilisation procedure or the birth of the child.

The requirement under section 60H is that there is the right type of relationship on the relevant date but also that there has been consent.A recent decision of the Court of Appeal in considering similar legislation to section 60H in the UK, *S (Children: Parentage & Jurisdiction)* [2023] EWCA Civ 897 had to consider whether the non-biological mother in a lesbian relationship was a parent. The woman concerned asserted that she was a parent. However, she had never gone to the IVF clinic and had never executed any of the consent forms required by the clinic.

Peter Jackson LJ said[70]:

> *"This question [on the balance of probabilities did the person consent] is the only one that must be answered in order to determine whether an individual is to be treated as the child's legal parent. A closer examination of the legislation and the case law enables the following further observations to be made, but they are not a substitute for the statutory question:*
>
> *1. Whether person did not consent is a matter of fact, taking into account all the circumstances. Assisted reproduction takes place in a wide variety of circumstances and the evaluation of whether consent has not been given must be made in the context of the actual circumstances of the individual case.*
>
> *2. The relevant time is the time when the procedure was undertaken. There will be a natural focus on evidence about that moment in time, but evidence about earlier or later periods may contribute to the assessment of whether consent was given or not.*
>
> *3. The Act does not prescribe the form in which consent can be given. It may be in writing or oral or unarticulated. It may be express or implied from all the circumstances. Formal written consent is not a requirement of the parenthood provisions of the Act, though licensed clinics in England and Wales would not offer treatment without it. In other circumstances the absence of written or express consent may not be a strong indicator that a person did not consent. The assessment will by definition be taking place in the presence of a marriage or civil partnership and will inevitably take account of the nature of the adults' relationship.*
>
> *4. The Act does not require the consent or lack of consent is communicated by lack of communication may be a relevant fact in determining whether consent exists.*
>
> *5. The Act does not equate a lack of consent with an objection or a stated withholding of consent.*
>
> *6. The Act does not require that the consent is limited to a specific form of assisted reproduction or to a specific time or place. If the nature of the consent is broad enough, it may encompass a variety of procedures in a range of circumstances.*
>
> *7. Awareness that a procedure is being undertaken is not the same thing as consent, though it is clearly a precondition of the possibility of consent having been given.*
>
> *8. Acquiescence in a procedure being undertaken is not the same thing as consent, but the court will be careful to distinguish acquiescence from consent that has not been expressly stated.*
>
> *9. The assessment of a lack of consent is an objective exercise, but as it concerns the state of mind that the spouse or civil partner, that person's own account of their stated mind is of great importance and the court will need to have clear*

[70] At [45].

reasons for objecting it. Such reasons may be found in the evidence of the gestational mother or elsewhere in the evidence.

10. Finally, the Act does not limit the ways in which a state of mind can be formed. Whether a spouse or civil partner has or has not consented may be the result of a deliberate exercise of choice, but the law does not require consent to be given or not given in a decisive manner or on a single occasion: in some cases its presence or absence may be inferred from the circumstances."

It appears clear that section 60H(1) is intended to apply only to standard ART, and not to surrogacy.[71]

The *Family Law Act* under section 60HB and regulation 12CAA of the *Family Law Regulations 1984* (Cth) and section 8 of the *Australian Citizenship Act 2007* (Cth) in effect recognise the making of State and Territory parentage orders. One would have expected in any event that those orders would have been recognised under the full faith and credit provision of the *Constitution* and the *Evidence Act*:

- Section 118 of the *Constitution*:

  "Full faith and credit shall be given, throughout the Commonwealth, to the laws, the public Acts and records, and the judicial proceedings of every State."

- *Evidence Act 1995* (Cth) section 185:

  "All public acts, records and judicial proceedings of a State or Territory that are proved or authenticated in accordance with this Act are to be given in every court, and in every public office in Australia, such faith and credit as they have by law or usage in the courts and public offices of that State or Territory.

It seems clear, as the Full Court said in *Bernieres & Dhopal* [2018] FamCAFC 180, that the Commonwealth intended to leave it to the States and Territories to determine laws as to surrogacy.

If the Commonwealth Parliament recognises State and Territory parentage orders,then one would think that the judicial processes that are required in order to enable such parentage orders to be made are the State and Territory judicial processes.

Section 17 of the *Surrogacy Act 2010* (Qld) provides:

> "To remove any doubt, it is declared that, unless and until a parentage order is made under chapter 3 transferring the parentage of a child born as a result of a surrogacy arrangement, the parentage presumptions under the Status of Children Act 1978 apply to the child."

Lamb & Shaw [2018] FamCA 629 was a surrogacy arrangement in North Queensland that went awry.A parentage order was never made. Tree J considered section 23 (which is a single woman who has an embryo implanted which is not her genetic material). Section 23 provides, relevantly in (4),

[71] *Bernieres & Dhopal* [2018] FamCA 180 at [55]- [58].

> *"also, the man who produced the semen has no rights or liabilities in relation to any child born as a result of the pregnancy happening because of the use of the semen unless, at any time, he becomes the husband of the child's mother."*

His Honour noted that the *Surrogacy Act* and *Status of Children Act* were different pieces of legislation and said that[72]:

> *"I am satisfied that the purpose of the deployment of that language in section 23(4) was indeed to protect semen donors from the rights and liabilities of parenthood, so as, amongst other things, not to discourage donors of semen for single women. Even if I am wrong as to that, and the purpose was that identified by the parliamentary committee later reporting on surrogacy, then it seems to me that the words of the provision simply do not permit the achievement of that intention …*
>
> *I am satisfied that in Queensland the genetic father is the father of the child, both as a matter of fact and as a matter of law.*
>
> *At the sake of completeness I should say that, as I observed in the first judgment, section 23(4) or more particularly the way in which Parliament dealt with semen donors under that provision, is different to how the State Parliaments of Victoria and New South Wales have dealt with the situation, in that both of those States have utilised the device of an irrebuttable presumption, as was deployed by the Queensland Parliament in section 19(2) of the Status of Children Act. Whilst it may be unfortunate fathers in different States have different rights in the Family Court, that is the product of two things. Firstly the Full Court decision of Bernieres & Dhopal … which construed section 60HB of the Family Law Act as leaving it to each of the States and Territories to regulate the status of children born under surrogacy arrangements, which status will be recognised for the purpose of the Family Law Act. Secondly, the fragmentation of powers in relation to children and parenthood which presently exist under the constitutional arrangements of the Federation of States which is Australia."*

That approach taken by his Honour, is not the approach by the Childrens Court. Childrens Court judges do not accept his Honour's approach. An example is *RBK v MMJ* [2019] QChC 42. *Lamb & Shaw* was decided pre-*Masson*, whereas *RBK v MMJ* was reported post-*Masson*. Prior to the High Court clarifying who was a parent under the *Family Law Act*, there were two schools of thought which were that one looks at the *Family Law Act* first to identify whether someone was a parent and if unable to find them as a parent there, then goes to the relevant State and Territory *Status of Children Act*. The other school of thought was that, as a matter of fact, if one is a parent under the *Family Law Act*, and that is in conflict with the *Status of Children Act*, then the *Family Law Act* prevails.

As of 2018, the Full Court had just delivered its judgment in *Bernieres & Dhopal*, in effect, taking the former approach, which therefore bound his Honour.Judge Richards held[73]:

> *"14. It follows from this that the interpretation of the Surrogacy Act by Tree J was unnecessary given that the Family Law Act provides a complete answer to the issue of who is a parent for the purposes of that jurisdiction.*
>
> *15. Tree J's interpretation of the Status of Children Act and the Surrogacy Act in my view cannot be correct if it means that a sperm donor who wishes to be an*

[72] 2018 FamCA 629 at [27] & [29]-[30].
[73] At [14]-[17].

intended parent is instead a birth parent because of the different terms used in section 21 of the Act. This is because the reference to the man who produced the semen having no rights or liabilities in respect of a child to be born as a result of pregnancy is also used in section 19C(2) [of the Status of Children Act] in a situation where there has been artificial insemination and the female bearing the child has a female de facto partner or a female registered partner.

16. *If it is correct that a child who was born as a result of donor semen by a man intending to become the fulltime parent of the child with his male partner becomes for the purposes of the [Surrogacy] Act a birth parent; then, on that basis, there will be different meanings assigned to the same phrase in ss19C and 21 of the Act. This is because of the interplay between those sections and section 10A of the Births, Deaths and Marriages Registration Act which allows for only two people to be registered as parents on the birth certificate. In the case of section 19C of the Act that would be the mother of the child and her female partner.*

17. *The better view then is that it cannot be that a semen donor in a case such as this is a birth parent within the meaning of the Surrogacy Act. The interpretation that fits both the Status of Children Act and the Births, Deaths and Marriages Registration Act is that a birth parent by definition is a person other than an intended parent. This means that once a person has entered into a surrogacy agreement as an intended parent they are excluded by the definition in section 8(3) of the Surrogacy Act from being a birth parent. This does not take away from the fact that they are a biological parent but accords with the provision that they have no rights or liabilities as a result of the donation of the sperm."*

Masson has been applied in three surrogacy cases under the *Family Law Act*:

Case 1: *W and T* (2019)

About one month after *Masson,* a client of mine sought to register a US surrogacy order. The effect of the order was that both my client and the other father were recognised by the US court as the parents. Registration under s.70G would have had the effect of recognising both of them as parents under the *FLA*. My client was the non-biological parent. His ex- partner opposed my client being recognised as a parent.

Given that *Masson* had just been decided, my client's case pivoted to an alternative approach- either register the US surrogacy order, or, following Masson, find that both men were the parents.

On entering the courtroom, the presiding judge wondered why the application had been brought, *"because both men are the parents"*. My client then discontinued his application for registration, as the point had been made.

A concern my client had (and the point the other side was going to take) was that the surrogacy arrangement was commercial. There was the possibility at least that the Court may decline to

register the order, given the public policy against commercial surrogacy[74]. Following *Masson* made the process of establishing parenthood considerably easier.

The Federal Court in *H v Minister* [2010] FCAFC 119, when it decided that the test for parentage under the *Australian Citizenship Act 2007* (Cth) was as to a question of fact (the test later used by the High Court in *Masson*), determined that a person does not need to be the genetic parent to be a parent for the purposes of that Act.

Case 2: *Seto & Poon* [2021]

The Court found that Mr Zhu (Ms Poon's husband) was not a parent under s.60H(1) (as he had not consented under s.60H(1), but if he did it was to further commercial surrogacy, it not being his intention to be a parent), and found that Mr Seto was a parent. The Court was silent whether Ms Yue or Ms Poon or both of them were parents.

The Court applied *Masson* to determine that Mr Seto was a parent.

Although the Court considered s.60H(1), it ought not to have done so. The Full Court in *Bernieres* and Thackray CJ in *Farnell & Chanbua* [2016] FCWA 17 (the Baby Gammy case) had made plain that s.60H is not intended to apply to standard IVF.

Case 3: *Tickner & Rodda* [2021]

The Court, applying *Masson*, found that the biological intended father was a parent. The Court was silent about whether the non-biological intended father or the surrogate, or both of them, was a parent. The Court then adjourned to consider whether or not it had jurisdiction to make a parentage order under the *Surrogacy Act 2010* (NSW), and whether it was desirable to do so.

If the Court did not have jurisdiction in *Tickner* to make a parentage order, then the failure to find both intended parents as the parents in that case, and in *Seto*, meant that the only apparent road open to establish parentage of both parents would be to bring a step-parent adoption application. Such an application would:

1. Ordinarily necessitate a two step approach, the first step being to obtain leave to adopt under s.60G, the second step being the adoption application. If the child is in Queensland, leave to adopt is required[75]. In NSW, leave to adopt would not be required[76] as the children in *Seto* and *Tickner* were not children of the marriage: s.60F or of de facto partners: s.60HA, and adoption would not change parental responsibility, as both the intended parents in each case already had that: cf. s.61E(2).

2. Be slow. In Queensland[77] and NSW[78], the child must be 5 years old before the adoption application can be made.

[74] *Re Halvard* [2016] FamCA 1051; *Re Grosvenor* [2017] FamCA 366; *Sigley & Sigley* [2018] FamCA 3; *Rose* [2018] FamCA 978; *Allan & Peters* [2018] FamCA 1063. The author appeared for the applicants in *Halvard*, *Grosvenor*, *Sigley*, *Rose* and *Allan*.
[75] *Adoption Act 2009* (Qld), s.92(1)(d).
[76] There is not a similar provision to the Queensland provision in the *Adoption Act 2000* (NSW), though there is a requirement for evidence of leave to adopt being granted: *UCPR*, r. 56.8(t).
[77] *Adoption Act 2009* (Qld), s.92(1)(h).
[78] *Adoption Act 2000* (NSW), s.30(1)(a).

Ownership of Embryos

This is not surrogacy but a recent decision by Riethmuller J needs to be read by every family lawyer.

As I said, one in 18 children currently born are born through ART in Australia. The freezing of eggs, sperm and embryos is widespread. It has been clear since 2017 that it is possible to obtain an injunction under section 114 as to the use of embryos between parties., at least for married couples[79] and de facto couples in Western Australia.

The consensus by the lawyers in that case was that embryos were not property. That approach, in my view, was always wrong because it did not meet the plain wording of the definition of *property*, namely, it could be something *in possession* – in section 4, and was not consistent with a series of cases involving the ownership of sperm where the High Court[80] and Supreme Courts[81] have held that sperm is capable of being owned and therefore attracts a bundle of rights that are known as property. In December, I managed to persuade Judge Demack that an embryo was property. Her Honour made appropriate orders enabling my client to be able to use the embryo. However, her Honour declined to give reasons.

Riethmuller J in *Leena & Leena* [2024] FedCFamC 1F 135, was in no doubt that embryos are property.

The issue before the court was what was to happen with embryos that had succumbed.The wife sought orders permitting her to take possession of them (they were contained in sealed plastic tubes known as a straw) in order to be able to deal with them by placing them in an urn with the ashes of another relative or a flowerpot, appropriately marked, as a form of memorial. Whilst there was an issue as to whether the wife sought to bury them at her home or with her deceased mother, she gave an undertaking not to do so if she obtained possession. The husband sought destruction. The embryos were held by an IVF clinic in Sydney.

The first issue of concern in the case is that his Honour had to consider the *Assisted Reproductive Technology Act 2007* (NSW). Currently, there are similar laws in four States and soon in the ACT, as seen in Table 5.

Table 5 – ART Acts

Jurisdiction	**Law**
Commonwealth	NA
ACT	*Assisted Reproductive Technology Act 2024* (partly commenced)
New South Wales	*Assisted Reproductive Technology Act 2007*
Northern Territory	NA
Queensland	NA – however, it is expected that an Assisted Reproductive Technology Act will be enacted before the election.
South Australia	*Assisted Reproductive Treatment Act 1988*

[79] *Piccolo & Piccolo* [2017] FCWA ….167.
[80] *Clark v Macourt* [2013] HCA 56.
[81] For example, *Re Cresswell* [2018] QSC 142.

Jurisdiction	**Law**
Tasmania	NA
Victoria	*Assisted Reproductive Treatment Act 2008*
Western Australia	*Human Reproductive Technology Act 1992* (it is anticipated that there will be replacement law enacted in Western Australia this year)

What was also significant to his Honour was that the embryos were comprised of the husband's and wife's genetic material. It may be that a different approach might be taken with donor embryos. However, in my view, that is unlikely to be the case given case authority dealing with widows' use of their late husband's sperm retrieved posthumously.

His Honour said[82]:

> *"35. While those storing embryos have their rights limited, the parties still enjoy a 'bundle" or "collection" of rights. The fact that the succumbed embryos are stored with a third party and that the provision of such storage services are limited to ART providers (which must be registered according to s 4 of the ART Act), does not deny the progenitors of property rights over the embryos. It is necessary that registered providers are involved in the process and this reliance on third parties does not dispel the rights afforded to gamete providers.*
>
> *36. The rights afforded to the parties include the parties' entitlement to give consent to storage, to request directions be made with the stored embryos and dictate the period to which the embryos are stored. They also enjoy negative rights, such as forbidding their embryos being used in certain ways without their direction, such as implanting them, donating the embryos to other persons, or donating them to research. Under the ART Act, s 17 allows gamete providers to give, modify, or revoke their consent in relation to embryos. Section 25 provides that ART providers cannot store the embryos without the gamete provider's consent. While the ART providers have "obligations" under the ART Act, the gamete providers are the only ones with "rights" in relation to the embryos: the embryos are comprised of their genetic material, were produced and stored for their benefit, and the embryos cannot be used for implanting, donation, research, or otherwise, without their explicit consent. The "bundle of rights" that the parties can exercise indicate that the stored embryos are appropriately the subject of property rights.*
>
> *38. However, the depth of emotions concerning gametes and embryos is significant, as exemplified by the comment of Professor Forman that:*
>
> > *Rather than see the embryos as a "back-up" plan, patients' now see them as "virtual children" and as potential siblings of the children they had through IVF.*
> >
> > *(Deborah L. Forman, "Embryo Disposition and Divorce: Why Clinic Consent Forms Are Not the Answer Cutting Edge Issues in Family Law"*

[82] At [35]-[36], [38]-[41].

(2011) 24(1) Journal of the American Academy of Matrimonial Lawyers 57, p.18)

39. Researchers have pointed out that people engaging in ART often do not reflect deeply upon what is to occur in the event of a separation. However, I note that in the present case, the particular clinic had counselling in place to support the parties and there was no claim that either party in this case had not reflected fully on the effect of the consent forms that they had signed.

40. Tissue and body parts are not consistently treated as being outside the ambit of property rights. Hair is property once cut from the person (hence wigs made with human hair can be bought and sold). However, dead bodies were not generally considered the subject of property rights unless a person has lawfully exercised work or skill when dealing with a body or a body part after which it can be the subject of property rights: Doodeward v Spence [1908] HCA 45; (1908) 6 CLR 406 ("Doodeward"). However, the approach in Doodeward has been criticised for not providing a suitably nuanced test for contemporary application: see, for example, the discussion in Roger S. Magnusson, "The Recognition of Proprietary Rights in Human Tissue in Common Law Jurisdictions" [1992] MelbULawRw 5; (1992) 18 Melbourne University Law Review 601.

41. Advances in medical science in the last 50 years have resulted in millions of human tissue items being held or stored both for research and treatment, necessitating the resolution of many disputes. Thus, many cases have concluded that sperm samples are subject to property rights for various purposes. For example, in Edwards; Re Estate of Edwards [2011] NSWSC 478; (2011) 81 NSWLR 198, the Court applied the principle in Doodeward, finding that the applicant's deceased husband's sperm was "property"."

His Honour went on to say[83]:

"It is clear that, at least beyond the limits of "family law" the rules of contract and property have been adapted to the artificial reproduction sphere and will continue to apply (with appropriate attenuations based upon public policy). Even if the legislature attempts to provide a framework specifically for embryos, such a framework will inevitably rely upon contractual or property law principles as these are the relevant frameworks available in the legal system."

His Honour said further[84]:

"The legal rules for property rights are a system of legal regulation that provide for rights by a person against the world with respect to the subject matter of the property right. As property rights are a legal construct, it is the legal system that determines what can be the subject of property rights, and over the centuries this has altered. Property rights are not limited to items that are tradable or have a market value: for example, they are frequently relied upon to determine rights to items of significant emotional value with no resale worth such as wedding albums, a baby's sonogram, a child's first tooth, a keepsake from a trip, or a great grandmother's letters. By allowing

[83] At [47].
[84] At [50].

a person property rights over an embryo, the law does not convert an embryo into something equivalent to a chattel but provides a suite of rights to those who have created the embryo. As with many property rights the law imposes considerable restrictions on the extent of those rights and how they may be exercised. Many restrictions appear in the ART legislation of the various states."

Further[85]:

"If the agreements with the ART provider are considered as no more than mere consents, then it would not appear that there is a valid contract in place. Whilst the avoidance of legal language is attractive in this sphere, in the absence of contractual rights or property rights, it is difficult to see what rights, powers or remedies the providers of genetic material would hold. Clearly the law must provide some rights to those who have caused embryos to be created. Generally, those rights flow from the law concerning contract and property. Whilst most would consider that embryos are not to be treated like typical forms of property, recognition of property rights on the part of those causing embryos to be created provides a suite of important legal remedies, beyond contractual rights against those they have dealt with directly. At common law it is well recognised that some property rights can be restricted on the basis of public policy, which can easily be done to ensure that embryos are dealt with appropriately.

Many of the overseas cases have simply enforced the contracts entered into by the parties. However, this apparently simple approach is also fraught for the same reasons that contracts are not enforceable with respect to children's issues, nor property cases (save in cases where the provisions relating to binding financial agreements have been complied with): such agreements can easily become inappropriate when events occur that were not contemplated at the time, largely because of the optimistic beliefs that most couples hold to the effect that they are not likely to separate. The issues are particularly difficult in the context of gametes and embryos: see, for example, Anita Stuhmcke et al, "Use of Stored Embryos in IVF Following Separation or Death of a Partner" (2013) 20 Journal of Law and Medicine 773, and the facts in Evans. If the nature of an embryo is considered inappropriate to be the subject of property rights, as an embryo lies somewhere between a chattel and a human being, then leaving an embryo to a fate determined by contracts concerning its creation appears more objectionable than considering it the subject of property rights that are appropriately attenuated to recognise the unique nature of an embryo. Pursuant to the Act, a recognition of property rights would enable the Court to determine what orders are "just and equitable" with respect to an embryo, even if that differed from the contracts or consents of the parties, both for married and de facto couples.

Although s 79 of the Act was drafted for the purpose of dealing with the more traditional subject matter of property rights, it is worded sufficiently broadly to enable appropriate regard to be paid to the special nature of embryos. The requirement that any order be "just and equitable" provides a suitable basis to attenuate property rights as may be appropriate in cases concerning embryos.

[85] At [56]-[63].

The embryos in this case were stored in 'straws'. The plastic straws are clearly "property". This aspect of cases concerning minute tissue samples led Master Sanderson in Roche, to say at [24]:

> *To deny that the tissue samples are property, in contrast to the paraffin in which the samples are kept or the jar in which both the paraffin and the samples are stored, would be in my view to create a legal fiction. There is no rational or logical justification for such a result.*

I approach the case on the basis that the plastic straws are of no market value, nor emotional value to any party. The straws only have value as the container for the embryo, and as such, the focus must be on the embryo and not the straw.

The law as set out in Doodeward, which appears to remain the binding authority, at least with respect to the succumbed embryos, results in the embryos being "property" due to the work and skill utilised to extract and store them, placing them into straws. However, recognising the parties "collection of rights" over the embryos, it is appropriate to consider them the subject of property rights at common law. When categorising embryos for the purpose of the provisions of the Act which provides for children and property, the succumbed embryos are clearly not the former, and should not be excluded from the latter. In my view, the parties' rights with respect to embryos are property rights within the meaning of the term as it is used in s 79 and s 90SM of the Act. If I am wrong in concluding that viable embryos are the subject of property rights, I am nonetheless persuaded that the viable embryos can be the subject of an injunctive order relying upon s 114 of the Act as the parties in this case were married.

Both parties contributed their genetic material, the wife her ova and the husband his sperm. It is invasive and more emotionally exhausting to extract ova than it is to collect sperm. The wife made a larger contribution in this respect. The wife paid the fees to keep the embryos stored, therefore contributing financially, however this cost can be reflected in the final property proceedings which are pending. The embryos are the product of the bodies of each party and give rise to significant emotional issues for the parties, neither of which can continue to conceive naturally. The outcome (destruction or delivering the embryos to the wife) will have an emotional impact upon each of the parties. A relevant, but not decisive consideration, is the agreement of the parties reached at the time they caused the embryos to be created.

Considering the matter as a whole, I am satisfied that partial property orders are appropriate to deal with this issue. I am not persuaded to make orders that the succumbed embryos be delivered up to the wife, nor would I have ordered that they be delivered up to the husband. I am satisfied that it is just and equitable that orders be made for the succumbed embryos to be destroyed, and I make orders accordingly."

The significance of the case is that every family lawyer in their initial consult with clients should **ALWAYS** have as part of their intake procedure to ask their clients when the client is considering property settlement, to find out if there are any eggs, sperm or embryos in storage. If they fail to do so, and the client is then prevented from using them due to the negligence of the lawyer in raising it in the first place, sooner or later a disgruntled client will sue the negligent lawyer in question. Therefore, keeping an intake process where this question is actively asked will minimise potential claims.

I have acted in a number of cases where a previous property settlement had been done and the family lawyer who had been handling the matter had not asked about the embryos. They had been left out of any consideration of resolution in the property settlement. Now, following *Leena*, there is no excuse. Luckily, in those cases, I was able to obtain resolution of the ownership of the embryos so that my client could use them. Those who are prevented from doing so may instead seek damages against their lawyers.

The ruling means that there should be the ability to have ownership of embryos as part of consent orders made by Registrars, and for embryos to be part of financial agreements.

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