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Précis Paper

Building Knowledge & Confidence in IVF matters

Louise Mathias, Barrister and Mediator, provides an insight to the importance of IVF, surrogacy and the law. It is a valuable contribution to our understanding of this modern and developing law.

Discussion Includes

- Common issues that arise in IVF cases
- The importance of IVF in family law
- Section 60H of the *Family Law Act 1975* (Cth)
- Steps to be taken by practitioners when faced with IVF cases
- Applications made to the Supreme Court in surrogacy cases
- Commercial surrogacy
- The future for IVF and surrogacy laws
- Surrogacy in family law

Précis Paper

Building Knowledge & Confidence in IVF matters

1. In this edition of BenchTV, Louise Mathias (Barrister and Mediator) and Jaimee Burke (Solicitor) discuss building confidence and knowledge in IVF (in vitro fertilisation) and surrogacy matters. The four main areas for discussion are typical and atypical scenarios in IVF cases, the *Family Law Act 1975* (Cth) and other provisions which relate to IVF, who are the legal parents in IVF cases and what, if any, are the provisions available for grandparents and known sperm donors if they want recognition or to have contact with the child.

2. Several family lawyers feel quite apprehensive when dealing with IVF and surrogacy matters as they are less common than other family law matters. While some lawyers are very confident when dealing with such matters, Ms Mathias believes every family lawyer would like to know more about the subject in order to enhance confidence and knowledge when presenting such cases.

What is IVF and What Does IVF Cover?

3. Section 4 of the *Family Law Act* provides a definition for "artificial conception procedure" which IVF comes under:

> **SECTION 4:**
> ***"artificial conception procedure"*** *includes:*
>
> *(a) artificial insemination; and*
> *(b) the implantation of an embryo in the body of a woman.*

4. IVF is an umbrella term which can refer to formal IVF, informal IVF and surrogacy. Formal IVF involves treatments at fertility clinics where patients go through medical procedures to conceive. According to studies by the University of New South Wales, the average cost for IVF for one cycle is around $8000, with a $4000 Medicare rebate. Thus, IVF is quite an expensive exercise, with costs increasing with medical issues of the mother or father. Informal IVF includes practices such as artificial insemination which can be carried out by individuals, or in a more sophisticated way in fertility clinics. Artificial insemination is often used in the gay and lesbian community, for example a man may provide a lesbian couple with a sperm sample. Surrogacy also comes under the umbrella of IVF and can be categorised as either altruistic, which is legal in NSW, or commercial, which is illegal across Australia.

The Importance of IVF and Surrogacy in Family Law

5. Australian family lawyers do not deal with IVF or surrogacy matters on a daily basis. However, according to the 2011 Census, there were 33,174 same sex couples in 2011, which is a 32% increase from the prior Census in 2006. Many of these same sex couples either have children or wish to have children. Additionally, there were 6,300 children living in same sex couple households in 2011, a doubling since the 2006 Census, and those numbers continue to increase. Moreover, over 100,000 babies have been born through IVF in the past 30 years and in 2013, 13,000 babies were born through assisted conception procedures throughout Australia and New Zealand. In the past four years, there has also been a 10% increase in the number of babies born using IVF. This is expected to grow as there is rising acceptance of same sex families and fertility clinics are becoming more common place and more accessible, with bulk billing IVF practices opening up in Sydney and some other suburbs. These statistics also do not capture informal IVF procedures like informal artificial insemination. Consequently, due to the growth in the use of IVF, it is likely that IVF will have a strong impact on family law as time progresses.

6. Ms Mathias believes the law needs to keep up and remain relevant as society changes. It is important for lawyers to not remain stagnant and diversify their practice areas in Family law, not only to keep up with demand from society and build confidence, but also to improve revenue.

Who Typically Engages in IVF and Surrogacy?

7. Heterosexual couples, homosexual couples, women who, for medical reasons, cannot carry a child or prefer not to carry a child, as well as single men and women engage in IVF and surrogacy. The list of people who engage in IVF is wide and really anyone who wants to have a child and is unable to have a child for varying reasons and have exhausted other avenues available to them (e.g. adoption) engage in IVF.

Typical and Atypical Scenarios in IVF and Surrogacy Cases

8. The following are five common scenarios in IVF and surrogacy cases:
    a. Lesbian couples with known sperm donor
    b. Lesbian couple with one or more children and the relationship breaks down
    c. Known sperm or egg donors who want contact or parenting orders to be made
    d. Mother with a putative father seeking child support
    e. Both birth mothers, with two children, in same sex relationship which breaks down

9. The following are more uncommon scenarios which may arise in IVF and surrogacy cases:
    a. One birth mother, and after the child is born or after conception, she forms a new relationship with a person that forms a bond with the child
    b. Grandparents who want orders made on their behalf
    c. Single heterosexual woman who seeks the help of a known sperm donor

Common Issues in IVF Cases

10. Defining the issues in a case is very important from the outset and that continues as the case progresses. Common issues are: Who is a legal parent? Did all the parties (intended parent(s) and donor of sperm/egg) consent to the procedure? Was there a de facto relationship at the time of the conception? And what are proper appropriate parenting orders for others such as biological parents or grandparents who want contact orders with the child made?

Legislation

11. Lawyers need to look at relevant provisions in the *Family Law Act 1975* (Cth), *Family Law Regulations 1984* (Cth), *Status of Children Act 1996* (NSW) and the *Child Support Assessment Act 1989* (Cth), to find direction when faced with an IVF case.

12. Section 60H of the *Family Law Act* is the main provision for IVF and surrogacy cases. The section is a deeming provision which deems children who are born as a result of artificial conception procedures to be the child of the man or woman for the purposes of the act. The man or woman does not necessarily need to be biologically related to the child. The donor of genetic material can be pushed to one side and legal parentage is given to the intended parents.

SECTION 60H:

Children born as a result of artificial conception procedures

(1) If:

(a) a child is born to a woman as a result of the carrying out of an artificial conception procedure while the woman was married to, or a de facto partner of, another person (the other intended parent); and

(b) either:

(i) the woman and the other intended parent consented to the carrying out of the procedure, and any other person who provided genetic material used in the procedure consented to the use of the material in an artificial conception procedure; or

(ii) under a prescribed law of the Commonwealth or of a State or Territory, the child is a child of the woman and of the other intended parent;

then, whether or not the child is biologically a child of the woman and of the other intended parent, for the purposes of this Act:

(c) the child is the child of the woman and of the other intended parent; and

(d) if a person other than the woman and the other intended parent provided genetic material--the child is not the child of that person.

(2) If:

(a) a child is born to a woman as a result of the carrying out of an artificial conception procedure; and

(b) under a prescribed law of the Commonwealth or of a State or Territory, the child is a child of the woman;

then, whether or not the child is biologically a child of the woman, the child is her child for the purposes of this Act.

(3) If:

(a) a child is born to a woman as a result of the carrying out of an artificial conception procedure; and

(b) under a prescribed law of the Commonwealth or of a State or Territory, the child is a child of a man;

then, whether or not the child is biologically a child of the man, the child is his child for the purposes of this Act.

(5) For the purposes of subsection (1), a person is to be presumed to have consented to an artificial conception procedure being carried out unless it is proved, on the balance of probabilities, that the person did not consent.

13. Section 60H(1) provides two ways that a mother and her spouse/defacto partner can become legal parents of the child born to the mother arising out of an artificial conception procedure, either by consent of all the parties or under a prescribed law.

14. The "prescribed law of the Commonwealth or of a State or Territory" referred to in ss 60H(1)(ii) and 60H(2)(b) includes the *Status of Children Act 1996* (NSW). Section 14 of the *Status of Children Act* provides for parenting presumptions. If someone makes an application in the State court under the *Status of Children Act* and an order is made there, then by virtue of that order, that order can be used in a Federal setting, giving Federal effect to the State law. However, there is no prescribed law for ss 60H(3)(b) that a child is the child of a man after an artificial conception procedure.

15. In summary, if there are facts where the woman is married or in a de facto relationship at the time of conception of the child through IVF and there was consent by all parties (the woman,

her partner and the donor of genetic material) then the child will be a child of the woman and the other intended parent (whether married or de facto, male or female).

16. Section 60H has been really welcomed by lesbian couples, because it displaces the donor of genetic material and it gives the woman, who is not the birth mother but a partner in that same sex relationship, status as a parent of the child that was born.

17. However, section 60H does not refer to the partner as a parent for the purposes of the other sections of the *Family Law Act*. When the section was placed into the *Family Law Act*, the definition section was not amended to include "other intended parent", so the "other intended parent" is not by definition a parent as per the *Family Law Act*. Thus, a partner may be referred to as the "other intended parent", as per s 60H, but they may not be a parent for the purposes of the other sections of the *Family Law Act*, which can create some difficulty.

18. In addition, it also seems that s 60H is not variable enough to meet all of the different family situations seen today. For example, a sperm donor who seeks to be a legal parent with equal shared parental responsibility, will never fit into a s 60H application.

Case Law

19. The position of known sperm donors have been the subject of much judicial determination, in particular whether they can be considered a legal parent and for what purposes they are considered a legal parent.

20. *Groth & Banks* (2013) 40 FamLR 510 involved a known sperm donor and a single mother. The issues that arose were whether Mr Groth was a legal parent, what appropriate orders should be made such that he is able to have contact with the child, if any, and could he have equal shared parental responsibility. The couple were in a de facto relationship for a very short period of time in 2002. They did not have any contact for a couple of years and reconnected in 2004 as very close friends. Mr Groth was diagnosed with testicular cancer in 2007 and decided to have his sperm frozen so that he could have children in the future. Shortly thereafter, Ms Banks suggested using Mr Groth's sperm at an IVF clinic with an agreement to co-parent any child that was born. Ms Banks and Mr Groth went to an IVF clinic and Mr Groth filled out the forms not only as the sperm donor but also as the parent. It came out in proceedings that Ms Banks had been hopeful that the pair would rekindle their relationship. However, Mr Groth commenced a relationship with another woman in 2009 and the baby was born in October 2010. When Ms Banks found that the biological father had formed another relationship she was quite unhappy. The parents of Mr Groth were also not aware that the child had been born and once they were made aware, Ms Banks started to renege

on the contract arrangements as she wanted to take the child away from the biological father. That is what led Mr Groth to commence proceedings.

21. Judge Cronin said at [16]:

> *The applicant fits that presumption in the Act of who is a parent. He is the biological progenitor and one of two people who set about a course of conduct with the intention of fathering a child. On the face of the language in the Act and the facts here, a logical conclusion would be that the applicant is the parent of the child. If one turns to the sections of the Act that displace biological progenitors as parents, little changes.*

This demonstrates that the determination of who is the legal parent turns on the facts of the case.

22. Instances where a finding of a de facto relationship is not found will never fit into a s 60H scenario and that was the case in *Aldridge & Keaton* [2009] FamCAFC 229. The issues that arose were whether a non-biological mother was a legal parent of a child, whether there was a de facto relationship, whether there was relevant consent at the time of conception and what is the correct approach if a party makes an application for a parenting order under s 65C of the *Family Law Act*.

SECTION 65C:

Who may apply for a parenting order

A parenting order in relation to a child may be applied for by:

- *(a) either or both of the child's parents; or*
- *(b) the child; or*
- *(ba) a grandparent of the child; or*
- *(c) any other person concerned with the care, welfare or development of the child.*

23. Ms Aldrige and Ms Keaton commenced a relationship in 2001, both attended the IVF clinic, both consented to the procedure, the partner was at the birth of the child but they only moved in together in 2006, which was a month before the baby was born. Chief Federal Magistrate Pascoe found that the partner was a person who was concerned with the care, welfare and development of the child pursuant to s 65C because he found that there was no de facto relationship at the time of consent. He made orders for the non-biological mother to have contact with the child. The biological mother appealed those orders to the Full Court of the Family Court. The central issue was whether it was appropriate for a person who had no biological connection to the child to have any parenting orders made in their favour. The biological mother questioned the status of the non-biological mother and argued that the

Family Law Act gave priority to biological parents over others since there is a hierarchy in s 65C with parents at the top. The Full Court held that s 65C does not create or imply a hierarchy of applicants in parenting matters, consequently the non-biological mother had orders made in her favour so that the child could spend time with her every three weeks.

24. In the case *Gear & Anor & Faraday & Anor* [2015] FCCA 3165, a sperm donor provided sperm to a same-sex couple. The sperm donor wanted parental responsibility, to be known as the legal parent and to spend time with child. Ms Faraday and Ms Hugo were partners and declared legal parents with equal shared parental responsibility, since they fitted within s 60H of the *Family Law Act*. The sperm donor also had orders made in his favour under s 65C so that the child could spend time with him, with the time gradually increasing to alternate weekends and holiday time. This case demonstrates that those who do not fit within s 60H, can make an application under s 65C.

Summary of Steps for Family Law Practitioners When Faced with IVF Cases

25. There are two paths that can be taken. If the facts fit into s 60H and the requirements are met (e.g. there was a marriage or de facto relationship with consent or alternatively orders were made in a State court) then the child will be deemed to be the child of the woman who carried the child and her partner and they can seek appropriate orders as the legal parents of that child. If the facts do not fit within s 60H application (e.g. known sperm donors, grandparents, partners who form relationship after the conception of the child), it is necessary to consider s 65C of the *Family Law Act* and then make an application for parenting orders pursuant to s 64B of the *Family Law Act* (which defines the meaning of a parenting order).

Altruistic Surrogacy in Family Law

26. Altruistic surrogacy is the only legal form of surrogacy in Australia, but the fact that it is altruistic does not mean it is free from issues. It usually involves arrangements with family members and friends. Currently, there is no uniform legislation that governs altruistic surrogacy between States and Territories, but rather a piecemeal arrangement around Australia.

27. There are two different types of altruistic surrogacy. Firstly, there is gestational surrogacy in which the woman who carries the child has no genetic link to the child i.e. the egg and sperm are donated, usually from the intending parents. Secondly, there is traditional surrogacy in which the woman carrying the child as a surrogate provides her eggs for the conception and the sperm can be donor sperm or from the intending parent.

28. While there can be no commercial payment involved with altruistic surrogacy, the surrogate can be reimbursed for their reasonable costs. Reasonable costs can include the surrogate's lost earnings, medical costs, legal counselling costs, travel and accommodation costs. The determination of the reasonable costs of a surrogate is often an issue involved with altruistic surrogacy.

29. The rates of altruistic surrogacy in Australia are very low. In 2011, only 80 women offered to be a surrogate for altruistic surrogacy, according to statistics from the University of New South Wales.

30. There are several dangers associated with altruistic surrogacy. Disputes can relate to money, the intending parents not coming through with what they promised the surrogate, as well as who will be in the photos when the baby is born. The largest issue that intending parents are worried about is that the surrogate will renege on the agreement and want to keep the baby.

31. The *Surrogacy Act 2010* (NSW) highly regulates altruistic surrogacy and introduced a scheme where new parentage orders may be granted in the Supreme Court to transfer parentage from the surrogate to the intended parents as long as strict criteria was met. Part 3, Division 4 of the *Surrogacy Act* sets out the preconditions to making parenting orders, including that it must be altruistic without financial gain, the birth mother must be at least 18-years-old, there must be medical and social needs for the surrogacy to have taken place which is demonstrated (e.g. women unable to carry a baby due to health reasons or same-sex relationship), counselling or advice must be obtained prior to the surrogacy and the birth of the child must be registered. If all the criteria is met, it is a fairly simple application to the Supreme Court under the *Surrogacy Act* to have the parentage transferred to the intended parents.

32. Practitioners should be mindful that when the criteria is not met, they will need to have regard to ss 4, s 60H and 60HB of the *Family Law Act*, the *Family Law Regulations*, and r. 56A.9 of the *Uniform Civil Procedure Rules 2005* (NSW). Section 60HB of the *Family Law Act* gives federal effect to State law. Rule 56A.9 of the *Uniform Civil Procedure Rules* is an important rule because it relates to the evidence that is required by practitioners for the making of a parentage order in the Supreme Court.

SECTION 60HB

Children born under surrogacy arrangements

(1) If a court has made an order under a prescribed law of a State or Territory to the effect that:

(a) a child is the child of one or more persons; or

(b) each of one or more persons is a parent of a child;

then, for the purposes of this Act, the child is the child of each of those persons.

RULE 56A.9:

Affidavit of Australian legal practitioner

(1) An application for a parentage order must be accompanied by an affidavit sworn by each Australian legal practitioner who gave advice to a person for the purpose of satisfying the precondition to the making of a parentage order referred to in section 36 of the Surrogacy Act 2010 .

(2) The affidavit must state:

(a) the name of the affected party to whom the advice was given, the role of the affected party and the date the advice was given, and

(b) that independent legal advice was given to the person before the person entered into the surrogacy arrangement, and

(c) the Australian legal practitioner's belief that the person appeared to understand the legal advice given.

(3) This rule does not apply in respect of a pre-commencement surrogacy arrangement (within the meaning of the Surrogacy Act 2010).

33. *JSC & RSC* [2013] NSWSC 440 is a very important case for the law of altruistic surrogacy as it demonstrates the requirements of advice for legal practitioners and the evidence required pursuant to r. 56A.9 of the *Uniform Civil Procedure Rules*. Reference should be made to the published judgment of Justice Hallen.

34. If an application cannot be made to the Supreme Court under the *Surrogacy Act*, practitioners can make an application in the Family Court under the *Family Law Act*. The case *Re Michael: Surrogacy Arrangments* [2009] FamCA 691 dealt with a complex surrogacy arrangement decided prior to the *Surrogacy Act* being enacted. Consequently, his Honour had to determine who the child's parents were pursuant to the *Family Law Act*. The facts of the case were as follows: Sharon and Paul were a married couple, Sharon had breast cancer and decided to have her eggs harvested prior to chemotherapy which would render her infertile, Paul donated his sperm, the embryo was conceived and Sharon's mother, Lauren, offered to be the surrogate, Lauren had a partner named Clive, on the birth certificate of the child (named Michael) Paul was listed as a parent as well as the surrogate, Lauren. Justice Watts said that the starting position in any surrogacy case that comes before the Family Court under the *Family Law Act* is s 60H. As a result, the mother-in-law Lauren and her partner Clive were deemed to be the legal parents of the child Michael.

35. The case *Blaze & Grady* [2015] FamCA 1064 involved a surrogate reneging on the agreement she made with the intended parents. As a result of the application of s 60H, the surrogate was considered to be the biological and legal mother of that child, which displaced the other intended parents.

36. In the case *Crisp & Clarence* [2015] FamCA 964, the following issues arose: Did Ms Crisp have standing as a legal parent either in regard to State or Family Law legislation? Could she make an application for parental responsibility? Was there a de facto relationship at the time of conception? And what would be appropriate contact arrangements? The fact scenario was quite unusual. The parties commenced co-habitation in 2004 and separated in 2011 (but in dispute as to the exact time). In August of 2007, Ms Crisp underwent a medical procedure where she preserved her eggs and used donor sperm to create an embryo. The embryo was then offered to her partner, Ms Clarence. In 2011, the embryo was transferred to Ms Clarence. From the facts, the parties had a very hostile and emotionally charged relationship while they were together. A month after the implantation of the embryo in Ms Clarence, their separation was evident and a month after that in September 2011, Ms Crisp commenced a relationship with another person and moved to Brisbane while the surrogate mother, Ms Clarence, remained living in Adelaide. In April 2012, the child was born and continued to live with the surrogate mother even though the biological mother was living in Brisbane. The surrogate mother restricted contact with the biological mother. For 7 months the biological mother had not seen the child in 2013, which prompted the biological mother to commence proceedings. Again, s 60H applied and as a result of that, since the biological mother was in a de facto relationship with the surrogate mother at the time of conception and they both consented, the biological mother was the legal parent of the child. Consequently, the birth certificate could be amended and equal shared responsibility was ordered in favour of the biological mother.

<u>Summary of Steps for Practitioners in Surrogacy Cases</u>

37. The first port of call is to examine the *Surrogacy Act*. If the conditions are met, an application can be made to the Supreme Court to transfer the parentage and as a result the intended parents can have legal status in regards to the child and the surrogate loses all legal rights in regards to the child that she carried. If the criteria are not met or if s 18 of the *Surrogacy Act* (which allows for the making of a parentage order) does not apply, an application would need to be made to the Family Court under the *Family Law Act*, however this is usually not helpful for the intended parents in surrogacy arrangements.

Commercial Surrogacy

38. While commercial surrogacy is illegal throughout Australia, the trend for engaging in it by Australians has increased despite criminal sanctions for NSW, Queensland and ACT residents. The definition of commercial surrogacy differs depending on the State or Territory, however there is a common theme that the woman who carries the child obtains some material benefit from carrying the child. Section 9 of the *Surrogacy Act 2010* (NSW) defines what commercial surrogacy is in NSW.

SECTION 9:

Commercial surrogacy arrangement-meaning

(2) For the purposes of this Act, a surrogacy arrangement is a "commercial surrogacy arrangement" if the arrangement involves the provision of a fee, reward or other material benefit or advantage to a person for the person or another person:

(a) agreeing to enter into or entering into the surrogacy arrangement, or

(b) giving up a child of the surrogacy arrangement to be raised by the intended parent or intended parents, or

(c) consenting to the making of a parentage order in relation to a child of the surrogacy arrangement.

(3) However, a surrogacy arrangement is not a commercial surrogacy arrangement if the only fee, reward or other material benefit or advantage provided for is the reimbursement of a birth mother's surrogacy costs.

39. As one of the biggest concerns in surrogacy is that the surrogate will renege on the agreement, many intended parents go overseas to where commercial surrogacy is legal. Research has shown that Australians are the biggest users of commercial surrogacy in the world. There was a 1000% increase in the use of commercial surrogacy between 2008 and 2010. Surrogacy Australia has estimated that 605 babies were born overseas to Australian parents in 2015 using commercial surrogacy.

40. The countries in which Australians are able to access commercial surrogacy are shrinking. In 2015, India and Thailand banned commercial surrogacy. It is strongly suggested Australians do not engage in commercial surrogacy in Nepal. Commercial surrogacy is no longer available to foreigners in Mexico. It was also banned in Cambodia in 2014 and there can be penalties of imprisonment.

41. The most popular destinations for Australians are the USA, Canada and the Ukraine. In the USA, there are 22 States in which it is legal to engage in commercial surrogacy. While it is open for Australians to engage in commercial surrogacy in the USA, it is also very costly (over

$100,000 for one pregnancy). The process of commercial surrogacy involves obtaining a custody order from the USA, the *Family Law Act* then enables final orders made overseas with some exceptions to have the same force as if made here in Australia (s 60J), however since it is an illegal activity it would be very difficult to say what success a person would have in making an application under that particular provision.

42. The typical scenarios for commercial surrogacy relate particularly to heterosexual couples. In 2013, two-thirds of the couples who engaged in commercial surrogacy were heterosexual couples. When cases are brought before the Family Court after the child is brought to Australia, there is real inconsistency as to who will and will not be declared a legal parent, despite being biological parents. Parentage presumptions in the *Family Law Act* exist but do not indicate the scope that they apply to overseas commercial surrogacy arrangements, although most are expected to have some sort of application since ss 69S, 69R and 69T all state that "under a law of the Commonwealth or of a State, Territory or prescribed overseas jurisdiction, the person is presumed to be a parent of the child." However, there has been no prescribed overseas jurisdiction that the parenting presumptions have applied to – thus it is not not known where they actually apply. The parentage presumptions also pose a problem because the intended parents often have no legal right to take medical samples from the child. This leads to the question of whether DNA evidence can be admitted if tests are carried out on samples taken from a child without proper authorisation. The application of s 60H also causes issues since in most instances s 60H will not provide a suitable outcome in surrogacy cases.

43. When faced with a commercial surrogacy case, practitioners need to look at ss 4, 60H and 60HB of the *Family Law Act*, Schedule 3 of the *Family Law Amendment (Arbitration and Other Measures) Rules 2015* which describes what evidence is required to be put before the court in order for the court to make orders, the *Family Law Regulations* in regards to reports of DNA evidence and ss 128 and 138 of the *Evidence Act 1995* (Cth) in order to seek a certificate that clients which are engaging in illegal activity are not be sent to the DPP for further prosecution and get illegally obtained DNA samples into evidence.

44. There were a number of cases up until 2012 where the provider of genetic material, often a male, had been declared the legal parent. However, after 2012, there have not been any cases in which this has occurred. Since the case of *Ellison and Anor & Karnchanit* [2012] FamCA 602 which was a Thai surrogacy case, there have been no declarations of legal parentage to sperm donors. This was a pivotal case in which a gay couple used a commercial surrogate and one of the men gave genetic material. The couple came back to Australia, made an application to the Family Court for a declaration of parentage and appropriate orders. Ryan J found that ss 60H and 60HB did not operate to exclude the general presumptions of parentage and made a declaration of parentage. The judgment discusses

how to get evidence into family law cases, but s 138 of the *Evidence Act* (which provides the discretion to exclude improperly or illegally obtained evidence) was not dealt with in the case.

45. The variance of decisions in the Family Court can be demonstrated by the cases *Dennis and Anor & Pradchapet* [2011] FamCA 123 and *Dudley and Anor & Chedi* [2011] FamCA 502, both based on the same heterosexual couple which had gone to Thailand and engaged two surrogates through commercial surrogacy - one surrogate had twins and the other surrogate had just one child. The couple made two applications to the Family Court. In *Dennis and Anor & Pradchapet*, Stevenson J held that the biological father was the legal parent of the child for the purposes of the *Family Law Act*, but in *Dudley and Anor & Chedi*, Watts J declined to make such a declaration and referred the party to the DPP for consideration of prosecution for engaging in an illegal activity. This shows how the same facts can lead to completely different outcomes.

46. When making decisions, courts need to balance considerations of the best interests of the child (because if orders are not made, the child may end up legally parentless) against considerations of the clear direction from Parliament that commercial surrogacy is illegal.

Immigration

47. Immigration is an area of law that family law practitioners need to be aware of as children who are born as a result of surrogacy arrangements overseas are entitled to be declared Australian citizens by means of the *Australian Citizenship Act 2007* (Cth) if they were born overseas and they have at least on parent who is an Australian citizen. If the parent is seeking Australian citizenship for their child, there may be additional testing which is involved and other evidence may be required to demonstrate the parent-child relationship. When an international commercial surrogacy case is entered into, medical procedure records, surrogacy agreement records and documents will be required to support such an application. A person may be declared a parent under immigration law, but may not be a parent when it comes to the *Family Law Act*.

Summary of Steps for a Commercial Surrogacy Case

48. It does not matter whether the couple is a heterosexual couple or a gay couple. Firstly, it is necessary to look at Schedule 3 of the *Family Law Amendment (Arbitration and Other Measures) Rules* to determine the evidence that is required when running such a case. It is also necessary to refer the clients to immigration and estate lawyers. If the requirements are met, s 60H will be the first section courts will examine when it comes to a surrogacy arrangement. Practitioners should also look at the presumptions of parentage under the

Family Law Act and apply to the Family Court for legal parentage with supporting evidence or if that is not possible, make an application under s 65C of the *Family Law Act*.

Future for IVF and Surrogacy Laws

49. There is currently a parliamentary inquiry being undertaken, with a report due at the end of June 2016, focusing on a broad set of social and legal issues relating to international and domestic surrogacy arrangements including how various States and Territories regulate surrogacy, the medical and welfare issues involved in surrogacy including issues of exploitation and informed consent, Commonwealth laws and policies relevant to surrogacy including whether changes are needed to better protect children and others involved in surrogacy arrangements, surrogacy laws in other countries and the effect of Australia on their international obligations with regards to surrogacy. The report is expected to be very comprehensive with changes expected with respect to altruistic and commercial surrogacy.

BIOGRAPHY

Louise Mathias

Barrister, Elizabeth Street Chambers, Sydney

Louise Mathias is a Barrister and Accredited Mediator, providing advice and advocacy in Family Law, Medical Negligence and Personal Injury matters. She has assisted leading firms implement effective dispute resolution strategies, manage client expectations and achieve the best possible litigation outcomes. Louise also offers innovative, effective and sustainable alternatives to litigation, as an effective mediator. Louise has lectured in law at the University of Sydney, and developed the Family Law Masters Parenting Masters course for the College of Law Australia. Her articles have been widely published, including in the Law Society Journal and Commercial Law Quarterly, and she has contributed content to The Laws of Australia encyclopaedia. Louise regularly writes on diverse legal, business and social topics on her blog at http://www.sydneybarrister.net.au

Jaimee Burke

Solicitor, A R Conolly & Company Lawyers, Sydney

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Dudley and Anor & Chedi [2011] FamCA 502

Legislation

Family Law Act 1975 (Cth)
Family Law Regulations 1984 (Cth)
Status of Children Act 1996 (NSW)
Child Support Assessment Act 1989 (Cth)
Surrogacy Act 2010 (NSW)
Uniform Civil Procedure Rules 2005 (NSW)
Family Law Amendment (Arbitration and Other Measures) Rules 2015
Evidence Act 1995 (Cth)
Australian Citizenship Act 2007 (Cth)