When is a Parent not a Parent?

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Over the past five years, couples have approached the Family Court of Australia seeking a declaration of parentage arising from surrogacy arrangements. But despite approaching the Court with very similar circumstances, the divergence in outcomes reflect the tensions between state and federal legislation, and legislative and policy considerations. This case study will examine three recent international surrogacy cases considered by the Family Courts, including the recent decision of the Full Court of the Family Court of Australia in *Bernieres and Anor & Dhopal and Anor*[2]. It will also briefly reflect on the implications of this decision for the parents of children born of international surrogacy arrangements.

Background

With the exception of the Northern Territory, all Australian states and territories have enacted or amended legislation to provide a legislative framework for the transfer of parentage following altruistic surrogacy.[3] With the exception of the Northern Territory, all Australian jurisdictions criminalise commercial surrogacy[4] although the extent of the criminality varies from state-to-state. Despite this, couples continue to enter into commercial surrogacy arrangements in international jurisdictions, and then seek the assistance of Australian Courts to grant them the rights of parenthood.

This article will review the similarities, the differences, and the difficulties arising in *Carlton & Bissett and Anor*[5], *Green-Wilson & Bishop*[6] and *Bernieres*. In each of these cases, the parties entered into a surrogacy arrangement in an overseas country. In each case, the child was conceived using the sperm of one party, an anonymous egg donor, and a gestational surrogate. The child is the biological child of one party. The parties applied to the Family Court of Australia seeking a declaration pursuant to s 69VA of the Family Law Act that the biological father of the child is a parent of the child. The effect of such a declaration, if made, is that to provide "conclusive evidence of parentage for the purposes of all the laws of the Commonwealth"[7].

The Relevant Legislation

Section 69VA of the Family Law Act 1975 states that "*As well as deciding, after receiving evidence, the issue of the parentage of a child for the purposes of proceedings, the court may also issue a declaration of parenting that is conclusive evidence of parentage for the purposes of all laws of the Commonwealth*."

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[1] Senior Associate, Blanchfield Nicholls Partners, 2018.
[2] [2017] FamCAFC 180 ('Bernieres').
[3] Surrogacy Act 2010 (NSW), Surrogacy Act 2008 (WA), Surrogacy Act 2010 (QLD), Parentage Act 2004 (ACT), Status of Children Act 1974 (VIC) Part IV, Family Relationships Act 1975 (SA) Part 2B, Surrogacy Act 2012 (TAS).
[4] Surrogacy Act 2010 (NSW) ss 8, 11(2), Surrogacy Act 2008 (WA) s 8, Surrogacy Act 2010 (QLD) ss56-7, Parentage Act 2004 (ACT) s41, 45(2), Family Relationships Act 1975 (SA) s 10H, Surrogacy Act 2012 (TAS) s 40. Section 44(1) of the Assisted Reproductive Treatment Act 2008 (VIC) creates an offence for surrogate mothers, but not for intended parents.
[5] [2013] FamCA 143 ('Bissett').
[6] [2014] FamCA 1031 ('Green-Wilson').
[7] Family Law Act 1975 (Cth) s 69VA.

Section 60H was inserted into the Family Law Act to address how the Act applies to children born of artificial conception procedures that are not surrogacy arrangements,[8] for example IVF scenarios. Section 60HB was inserted to address children born under surrogacy arrangements[9]. Section 60HB states that:

> *(1) If a court has made an order under a prescribed law of a State or Territory to the effect that:*
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> *(a) A child is the child of one or more persons; or*
>
> *(b) Each of one or more persons is a parent of the child;*
>
> *then for the purposes of this Act, the child is the child of each of those persons.*

Carlton & Bissett and Anor

In this case, Mr Bissett commissioned a surrogacy arrangement in his home country (and his then usual place of residence) of South Africa. The surrogacy was altruistic rather than commercial, and was undertaken in accordance with the relevant domestic legislation in South Africa. Mr Bissett is the biological father to the triplets that were born from the surrogacy. A South African Court granted an Order approving the surrogacy agreement, the substantive effect being that:

- the children are "for all purposes" Mr Bisset's children;
- he is the sole parent recorded on the birth certificates; and
- the surrogate mother had no rights of parenthood or care of the children.[10]

The parties, being Mr Bissett and his partner Mr Carlton, subsequently relocated to Australia with the children and sought various orders from the Family Court of Australia. The South African Order could not be registered in the Family Court as an overseas child order because South Africa is not a prescribed overseas jurisdiction for the purposes of the Regulation,[11] nor was it found to be a reciprocating jurisdiction to enable a presumption of parentage to arise from the findings of the South African Court.[12]

In the alternative to the above claims, Mr Bissett sought a declaration of parentage pursuant to s 69VA. After reviewing the historical and legislative background, in a short four paragraphs, Ryan J made the declaration as sought by the parties – that Mr Bissett is a parent, namely the father, of the children. In circumstances where this was an altruistic surrogacy arrangement, Ryan J stated that "*the only factors relate to what is in the children's best interests; there being no issues of public policy that may intrude into those deliberations*."[13] More significantly, given what was to follow in Bernieres,[14] Ryan J found that "*I have accepted that Mr Bissett is able to rely on the general presumptions of parentage notwithstanding the provisions of s 60H and s 60HB*"[15]. Bisset is distinguishable from subsequent cases, perhaps, due to Justice Ryan's finding that "*those*

[8] Family Law Act 1975 (Cth) s 60H.
[9] Ibid s 60HB.
[10] Ibid [5].
[11] Family Law Regulation 1984 (Cth) s 70, Schedule 2.
[12] Family Law Act 1975 (Cth) s 69S(1A); Bissett [29].
[13] Bissett [32].
[14] And see also Mason & Mason and Anor [2013] FamCA 424 that was also determined by Ryan J.
[15] Bissett [33].

provisions are not directed to children born in another country ***to a person or people ordinarily resident in that country*** *at the time of conception and birth*."[16]

Green-Wilson & Bishop

In Green-Wilson, Mr X Green-Wilson and Mr Z Green-Wilson commissioned a commercial surrogacy arrangement in India (although Mr Z Green-Wilson was not party to the surrogacy agreement). Mr X Green-Wilson is the biological father of the child and the Indian birth certificate recorded him as the child's father and the mother as "nil". The Court found that applications made by Mr Green-Wilson pursuant to s 60H[17] and s 69R[18] of the Act could not be maintained and then turned to the application of s 60HB to the case.

The Court found that the surrogacy agreement entered into could not meet the strict requirements of the Victorian legislation and therefore a s60HB could not apply.

Although the Court found it was not open for the surrogacy agreement to meet the Victorian state framework, there was an emphasis on the fact that the Victorian legislation does not prohibit intended parents from entering into commercial surrogacy agreements.[19] In those circumstances, there was found to be a "lacuna" between state and federal legislation.[20] In this space where the state legislation is silent Johns J found it appropriate to make a declaration of parentage pursuant to section 69VA in favour of Mr X Green-Wilson stating "*To do otherwise would be to elevate public policy considerations…above a consideration of the welfare of children born of [commercial surrogacy] arrangements*."[21]

Bernieres

In the matter of Bernieres, the parties had commissioned a commercial surrogacy arrangement in Country T. Mr Bernieres is the biological father of the child. Mr and Ms Bernieres initially sought orders for parental responsibility and live with Orders and by amended application sought a declaration of parentage in relation to Mr Bernieres, the biological father of the child, and leave to apply for step-parent adoption to Ms Bernieres.

At first instance, Berman J found the Court unable to make a declaration of parentage pursuant to s 69VA. He found that s 69VA is not a standalone power and requires "parentage" to be an issue in the proceedings to enliven the power of s 69VA and that the Court does not have any inherent power to make the declaration as sought. After considering the provisions of s 69VA and s 60HB

[16] Ibid, emphasis added.
[17] The Applicant attempted to argue that the presumptions of parentage arising pursuant to s 60H did not apply extraterritorially to the Indian surrogate and her husband; Green-Wilson [28].
[18] Section 69R provides, relevantly, a presumption of parentage if a person's name is entered as a parent of a child in a register of a prescribed overseas jurisdiction. The Regulations do not declare any country or part of a country to be a prescribed overseas jurisdiction for the purposes of s 69R.
[19] The offence arises in the surrogate mother receiving a material benefit or advantage as a result of a surrogacy agreement, rather than the intended parents commissioning a commercial surrogacy arrangement: Assisted Reproductive Treatment Act 2008 (Vic) s 44.
[20] Green-Wilson [41].
[21] Ibid [44], cf Ryan J in Mason & Mason and Anor [2013] FamCA 424 who was satisfied that making a declaration would be in the children's best interests, but declined to make that declaration on the basis that the New South Wales legislation with respect to surrogacy "covers the field"..

Berman J found, as had Johns J in Green-Wilson, that there was a legislative vacuum between the state and federal legislation. However, Berman J declined to make the declaration as sought by the parties, stating that despite the outcome "*may well be an unsatisfactory position… I am not satisfied however that the definition of a parent should be extrapolated*."[22] Berman J made the parenting orders as sought by the parties,[23] but declined to make any declarations of parentage in favour of either or both of the parties.

On appeal to the Full Court of the Family Court of Australia, Mr and Ms Bernieres did not dispute the Orders made in the first instance, but appealed on the basis that Berman J had failed to make the s 69VA declaration of parentage. The three Justice bench of Bryan CJ, Strickland and Ryan JJ noted that the determination to be made was "*whether it is in fact open to apply s 69VA here, and that would depend on whether s 60HB covers the field in relation to surrogacy agreements, and where s 60H sits in the statutory scheme*."[24]

The Full Court noted the conflicting provisions of the Family Law Act in relation to parentage, presumptions of parentage and declarations of parentage. Specifically, the Court found that if certain sections of the Act apply, then those specific sections will prevail over any general provisions. In this case, the Court was satisfied that s 60HB (children born of surrogacy arrangements) and s 60H (children born as a result of artificial conception procedures) should prevail over the general presumptions found in Division 12, subdivision D of the Act. In citing Ryan J in Mason[25] the Full Court agreed with the proposition that state law will govern the determination of parentage, and where state legislation does not apply, that void cannot be filled by the application of s 69VA.

In contrast to Johns J in Green-Wilson, the Full Court found that "*it is not possible to discard the plain meaning of legislation where public policy considerations may not be seen to be in the best interests of the children affected.*"[26] Section 69VA therefore did not apply because s 60HB 'covered the field' and it was not open to the Court to fill any vacuum through judicial interpretation.

The appeal was dismissed in its entirety.

Conclusion

In dismissing the appeal, the Full Court conceded that the "unfortunate result" is that the parentage of the child of some surrogacy arrangements, particularly international commercial surrogacy arrangements[27] is in doubt. The reality may be beyond a 'doubt' such that the legal parentage does not exist in the 'parents' of the child at all. The simple fact of being the child's biological father cannot be relied upon to assert that person is a parent for the purposes of the Act. The spouse of the biological father has even less claim to being a legal parent of the child.

[22] Bernieres [2015] FamCA 736 [120-121].
[23] Such Orders provided that the parties have equal shared parental responsibility for the child and that the child live with the parties.
[24] Bernieres [2017] FamCAFC 180, [40].
[25] *Mason & Mason and Anor* [2013] FamCa 1031 [34].
[26] Bernieres [54].
[27] But note that Bernieres was also cited in Parsons and Anor & Masson [2018] FamCAFC 115, a case arising from a domestic altruistic surrogacy arrangement.

A full analysis of the potential implications of the decision in Bernieres is beyond the scope of this paper, however it is worth noting the following practical issues are within contemplation:

- Without legal parentage there may be difficulties in accessing government benefits for the child, including Medicare, child care rebates, and family tax benefits.
- In the event that parties separate, meeting eligibility requirements for child support and other benefits in circumstances where proof of parentage may be necessary.
- A lack of parentage restricts the availability of adoption as a means by which the non-biological parent could attain legal status as a parent.
- There may be implications in respect of inheritance and whether the status of the child may be compromised by virtue of there not being a connection of legal parenthood. This may extend to other circumstances where a child (or parent of a child) may be the beneficiary of an entitlement, such as a compensation, superannuation or insurance claim.
- In the event that the surrogate is a known surrogate, the risk of the surrogate seeking to enforce their legal parentage in relation to the child.

In each of the cases considered in this paper, the Court made orders granting the 'parents' of the child parental responsibility, effectively providing them the authority to make decisions for the long-term welfare of the child, including educational and medical decisions. Without the benefit of these Orders, the capacity of the parties to manage the practical realities of raising children would be severely impeded. Other issues, such as citizenship, are able to be established by virtue of the biological connection between the child and one or both of the intended parents.

Beyond the practical legal considerations, and perhaps more importantly, Bernieres raises questions of identity and personal history, of cultural and genetic heritage and the significance (or otherwise) of having the practical reality of the family unit officially recognised. There may be tension between these matters as they relate to the child, and from the perspective of the parents. There is also tension between the public policy position discouraging commercial surrogacy arrangements and the need to be making decisions that are in the best interests of the child. How, or if, the legal and non-legal tensions are able to be resolved remains a matter for the judiciary and legislature in the future.