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SURROGACY – A PATH OF OBSTACLES

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Surrogacy - a path of obstacles.

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Surrogacy has become an effective and accepted form of reproductive technology. It enables couples, regardless of gender or sexuality, to achieve the dream of becoming a parent in circumstances where other forms of reproductive technology and adoption are either not possible or have failed. To its credit, the Queensland parliament has recently brought this state up to date by enacting surrogacy laws that are in line with the majority of statutes implemented throughout the country.[1] *The Surrogacy Act 2010* (Qld) allows for the court to make a parentage order in certain circumstances where parties have entered into a surrogacy arrangement.[2] A parentage order effectively transfers parental rights from the birth mother (and her spouse or de facto if there is one) to the intended parents.[3] The requirements which must be satisfied to obtain a parenting order are comprehensive and onerous, making the path to parenthood through a surrogacy arrangement by no means easy.[4]

At the heart of the surrogacy issue lies a question, the answer to which has shifted and continues to shift as reproductive technologies continue to increase in success, method and popularity - *what is a parent?*

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[1] For further information on the recent history and development of surrogacy legislation in Queensland, see Brown C, 'The Queensland Investigation into the Decriminalisation of Altruistic Surrogacy' (2008) 29 *Qld Lawyer* 78.

[2] This is necessary because the *Status of Children Act 1987* (Qld) provides that where a child is born as a result of artificial insemination or an implantation procedure (which will occur in a surrogacy arrangement) the person who became pregnant as a result of the procedure is deemed to be the mother of the child, and the father is that person's husband or de facto, if there is one. The person who donated the sperm or ova as the case may be has no rights or liabilities in respect of the child born. See also *Family Law Act 1975* (Cth) ss 60H, 60HB.

[3] For the purpose of this paper, a reference to 'intended parents' is a reference to the infertile couple who has engaged the services of a surrogate to assist with the conception and gestation of a child.

[4] The application must be made by the intended parents no less than 28 days and no more than 6 months after the birth of the child and the child must have resided with the applicants for at least 28 consecutive days before the day of the application. All parties must have obtained legal advice and counselling about the surrogacy arrangement and its implications. Affidavits must be sworn by all parties, including lawyers and counsellors, stating that the parties involved understand the social, psychological and legal implications of the surrogacy arrangement. In particular the court must be satisfied that all parties were aware, before the surrogacy arrangement was made, of the legal ramifications if the birth mother does not relinquish the child, the intended parents do not want to be responsible for the child's custody and guardianship or neither party wants to be permanently responsible for the child. Attestations as to the age of the participants, their occupation and the current and proposed arrangements for the child must also be sworn. See *Surrogacy Act 2010* (Qld), ss 21-33.

A recent decision of the Administrative Appeals Tribunal, *Hudson v Minister for Immigration and Citizenship,*[5] brought to attention the meaning of the word 'parent' as it appears in s 16(2) *Australian Citizenship Act 2007* (Cth) ('the Act'). Section 16(2) deals with citizenship by descent and provides that a person born outside Australia may make an application to the Minister to become an Australian citizen if a parent of the person was an Australian citizen at the time of the birth.[6]

Decision of the Administrative Appeals Tribunal

In October 2009 the application for Australian citizenship by descent of Neo Wang Hudson was refused by the Minister for Immigration on the basis that the child was not descended from an Australian citizen parent, and had no genetic link to an Australian citizen. Neo was born in China in September 2008. Three months before his birth, Neo's mother (Ms Wang), a Chinese citizen, and Mr Hudson, an Australian citizen by birth, were married. Mr Hudson was not Neo's biological father, and this point was not disputed. However, he had accepted Neo as his child from the time of Neo's birth. Ms Wang, acting as Neo's representative, applied to the Administrative Appeals Tribunal for a review of the Minister's decision. However her application was denied. The reason for refusing to review Neo's application for Australian citizenship was based on the Tribunal's interpretation of the word 'parent'.

The Tribunal found the word 'parent' in s 16(2) of the Act meant 'biological' parent. As Neo had no biological parent who was an Australian citizen at the time of his birth, he was not eligible to become an Australian citizen by descent.

The finding has ramifications in the world of reproductive technology. The number of children born as a result of overseas surrogacy arrangements and brought to Australia is projected to number 350 this year.[7] The Tribunal's decision supports a significant caveat on the eligibility of children born overseas and with no genetic link to their intended parents, becoming Australian citizens. The Australian Citizenship Instructions (2010) ('ACIs') issued by the Department of Immigration and Citizenship[8] refer to children born overseas as a result of a surrogacy arrangement. The ACIs state that where there is no genetic link with either parent, even if the birth certificate records them as parent, the child is ineligible for

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[5] [2009] AATA 833.

[6] A person is automatically an Australian citizen if born in Australia to a parent or parents who are Australian citizens, if adopted by a person who is an Australian citizen at the time of adoption or if an abandoned child. In addition a person may be registered as a citizen by descent if born overseas to at least one parent who was an Australian citizen at the time of birth.

[7] This is seven times the number two years ago. Mark Dunn, 'Twins victory for gay Melbourne couple' *Herald Sun*, January 22, 2011, http://www.heraldsun.com.au/news/victoria/twins-win-for-gay-dads/story-e6frf7kx-1225992617998 viewed at 4 February 2011.

[8] Department of Immigration and Citizenship National Office, *Australian Citizenship Instruction (ACIS)*, updated 1 May 2010, 52 http://www.citizenship.gov.au/_pdf/acis-may-2010.pdf viewed 9 March 2011.

citizenship by descent and parents should seek an adoption order and sponsor the child for migration to Australia. [9]

Section 8 of the Act refers to children born as a result of artificial conception procedures or surrogacy arrangements. If a court has made a parentage order pursuant to a surrogacy arrangement the child is deemed to be the child of the person or persons in whose favour the order has been made. If at least one of them is an Australian citizen, then the child automatically acquires Australian citizenship.[10] However the court order must be made under a prescribed law of a state or territory of Australia.[11]

The ACIs specifically provide that if there is no biological link between one intended parent, who is an Australian citizen, and a child born overseas as a result of a surrogacy arrangement, the child will not be eligible for citizenship by descent. This suggests these intended parents are not 'parents' for the purpose of section 8, regardless of whether or not a parenting order is in place. Other, more complicated avenues for citizenship eligibility must therefore be sought. [12]

The Decision of the Federal Court of Australia

A more progressive approach to Neo's plight was taken on appeal by the Federal Court.[13] In interpreting s 16(2) the court gave the word 'parent' a broader meaning than the Tribunal and found that being a parent may depend on various matters including social, legal and biological influences. Rather than simply a matter of biology, parentage today is an 'intense commitment to another which is expressed by acknowledging and treating a person as one's own.'[14] The court considered the parent's conduct before, at the time of, and to some extent, after, the birth of the child to determine whether or not the person under observation can be described as the child's parent.[15]

This logical conclusion takes into account the myriad of circumstances created by reproductive technologies. It could have resolved citizenship difficulties faced by children,

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[9] Section 13 of the Act governs citizenship by adoption and provides automatic citizenship to those children adopted under a law in force in a state or territory where the child is adopted by a person who is an Australian citizen at the time of the adoption or by 2 persons jointly at least one of whom is an Australian citizen at the time and present in Australia as a permanent resident at that time. Abandoned children are also Australian citizens unless and until the contrary can be proved.

[10] *Australian Citizenship Act (2007)* (Cth) s 12.

[11] Department of Immigration and Citizenship National Office, *Australian Citizenship Instructions (ACIS)*, updated 1 May 2010, 52 http://www.citizenship.gov.au/_pdf/acis-may-2010.pdf viewed 9 March 2011.

[12] Another option is citizenship by conferral pursuant to s 21(5) *Australian Citizenship Act 2007* (Cth). There are a number of policy requirements which the child must satisfy including holding an adoption visa.

[13] *Hudson v Minister for Immigration and Citizenship* [2010] FCAFC 119.

[14] *Hudson v Minister for Immigration and Citizenship* [2010] FAFC [129].

[15] *Hudson v Minister for Immigration and Citizenship* [2010] FAFC [130].

born as a result of surrogacy arrangements, who are not genetically related to either parent.[16]

However, the court went further in its interpretation of s 16(2) to find that the section contains a narrow time requirement in that the claimant must show that, at the time of birth, he or she had a parent who was an Australian citizen. This could be interpreted in two ways. Firstly, that the person who is the child's parent at the time of the *application*, whether through birth, adoption or surrogacy, must have been an Australian citizen at the time the child was born. The second and preferred interpretation of the court is that a person, who is a parent of the child at the point in time the child is *born,* must be an Australian citizen. The court found the reference in s 16(2) to parent was a reference to the child's parent when the child was born, and not a reference to a person who subsequently becomes the child's parent. Fortunately Mr Hudson was an Australian citizen at the time of Neo's birth.

However, at the time a child is born as a result of a surrogacy arrangement, the child's mother is deemed to be the woman who delivers the child, and that person's spouse or partner is deemed to be the child's father. Until such time as a parenting order is made, the intended parents are not the child's parents for the purpose of s 16(2). In this regard, the same situation applies where children are adopted. At the time an adopted child is born the adoptive parents are not the child's parents. However the Act deals with adoption and surrogacy differently in terms of acquiring citizenship. The Act specifically provides that children adopted by a person who is an Australian citizen *at the time of the adoption*, automatically acquire Australian citizenship.[17] There is no such provision for surrogacy. Essentially, the child must be adopted by his or her intended parents in order to be able to apply for citizen by descent.[18]

Traditionally, with the exception of adoption, the word parent encompassed a genetic relationship with the child concerned. However, social change combined with advances over the last 30 years in reproductive technology has significantly affected the constitution of families and familial relationships. As a result, a genetic connection can no longer be a necessary requirement for parenthood. Surrogacy, in particular, has added challenges and dimension to the parental question. In addition to the potential for lack of genetic connection to the child due to the use of donated gametes, the intended mother has not

[16] A number of privileges are earned by becoming an Australian citizen. Many of these concern voting and employment eligibility and election to Parliament. However, of significance to a young child, is eligibility to apply for an Australian passport and re-entry into Australia. http://www.citizenship.gov.au accessed on 21 February, 2011.

[17] *Australian Citizenship Act 2007 (*Cth) s 13. There are also specific provisions dealing with adoption of children outside Australia which also require the adoptive parent to be an Australian citizen at the time of adoption: s 19C(2).

[18] While the subject of adoption is beyond the scope of this editorial, it is noted that Australian State and Territory adoption authorities do not generally support privately arranged adoptions. See Australian Government Department of Immigration and Citizenship Adoption Visa (subclass 102) http://www.immi.gov.au/migrants/family/child/102/ accessed 18 March 2011.

actually gestated and delivered the child. At the time the child is born, she is not the mother of the child. Her spouse or de facto, if she has one, is not the father (or mother). Yet, clearly the intention of a surrogacy arrangement such as the one described is that these ‘genetically-unrelated’, ‘non-delivering’ parties are to be the child’s parents.

Concluding comments

The principle underpinning the *Surrogacy Act 2010* (Qld) is that the well-being 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. Further, the child should be cared for in a safe, stable and nurturing family environment where the child’s emotional, mental, physical and social well-being is promoted. One must question whether the current hurdles presented by the *Australian Citizenship Act 2007* (Cth) are consistent with these principles.