



SURROGACY- A Medical Miracle but a Legal Nightmare

Unlike Victoria, ACT and Western Australia there is no clear State legislation dealing with surrogacy.

At the Family Court in 2009 a surrogacy case involving a child by the name of Michael was heard. The child was born as a result of a family surrogacy arrangement. The essential question to be determined by the Family Court was who were the child's parents. The parties involved were the child's biological parents, Sharon and Paul who were married, Sharon's mother Lauren and Lauren's de facto partner Clive. Sharon was unable to fall pregnant. Suffering from cervical cancer, she had her eggs harvested and fertilized by her husband's sperm. With the consent of all the parties, the embryo was implanted into Sharon's mother who subsequently gave birth to Michael. Immediately on the birth of the child, the birth mother (the grandmother) handed the child to Sharon and Paul who cared for the child.

Michael's birth certificate was to be registered as Sharon and Paul being his parents. The authorities would not issue the birth certificate with Sharon and Paul noted. Lauren and Clive considered themselves to be Michael's grandmother and de facto grandfather.

Sharon and Paul brought processing before the Federal Magistrates Court. Paul and Sharon wished to adopt Michael and applied to do so under s 60G of the Family Law Act in order that they would be registered as Michael's parents on the birth certificate. The proceeding were moved to the Family Court of Australia.

Section 60G of the Family Law Act allows a parent to apply for adoption proceedings. Accordingly, the Court had to determine whether Sharon and Paul were Michael's parents and thus could they bring adoption proceedings before the Family Court.

New South Wales does not have a clear law regarding surrogacy parentage. If there are no orders made under the state law regarding parentage then the child should be taken to be a child of the birth mother and the birth mother's partner. Further, the Family Law Act specifically provides that the parties who have provided genetic material for the child are not parents for the purpose of the Family Law Act.

The Family Law Act provides a presumption that parents named on the birth certificate are the child's parents. However the Court found that by provisions of the Family Law Act that the birth mother (the grandmother) and her partner (Clive) were the child's parents.

Given that legally, as distinct from biologically, Sharon and Paul were not Michael's parents, the Court correctly found it could not make an order in favour of Sharon and Paul to adopt Michael under the provisions of the Family Law Act.

However, all was not lost, as the Court found that Sharon and Paul jointly could make application to the New South Wales Supreme Court under the New South Wales Adoption Act to adopt Michael.

Whilst this will lead to the parties intended outcome, it does not allow for the anxiety, delay and costs suffered by the parties.

Obviously, there needs to be a legislative amendment.

At Everingham Solomons we have the expertise and experience to assist you with all legal matters associated with Family Law because *Helping You is Our Business*.



Everingham Solomons
SOLICITORS
Incorporating Thomas & Hargreaves and Creagh, O'Brien & Co.

Consultant:
Ted Heazlett

Directors:
John Boag
Terry Broomfield
Ken Sorrenson
Terry Robinson
Mark Grady
Jennifer Blissett

Associate:
Lesley McDonnell

Level 3, Ray Walsh House,
437 Peel Street, Tamworth NSW 2340

Ph: 6766 1066 Fax: 6766 4803

Email: solicitors@eversol.com.au

Previous articles available at
www.eversol.com.au



Liability limited by a scheme approved under Professional Standards Legislation