FAMILY COURT ACT 1975

IN THE FAMILY COURT OF WESTERN AUSTRALIA AT PERTH

File No. PTW3718 of 2014

BETWEEN

DAVID JOHN FARNELL
Applicant

and

WENYU LI
Second Applicant

and

PATTARAMON CHANBUA
Respondent

and

CHIEF EXECUTIVE OFFICER DEPARTMENT FOR CHILD PROTECTION AND FAMILY SUPPORT
First Intervener

and

AUSTRALIAN HUMAN RIGHTS COMMISSION
Second Intervener

and

ATTORNEY GENERAL FOR WESTERN AUSTRALIA
Third Intervener

OPENING SUBMISSIONS OF AUSTRALIAN HUMAN RIGHTS COMMISSION

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1 Intervention by the Commission

1. These submissions are the submissions of the Australian Human Rights Commission and not the Commonwealth.

2. The Australian Human Rights Commission was granted leave to intervene in this proceeding on 3 November 2014 pursuant to s 208 of the *Family Court Act 1997* (WA) (Family Court Act) and s 11(1)(o) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).

3. Pursuant to s 11(1)(o) of the AHRC Act, the Commission has the function of intervening in proceedings that involve human rights issues, where the Commission considers it appropriate to do so and with the leave of the court hearing the proceedings, subject to any conditions imposed by the court.

4. The phrase 'human rights' is defined by s 3 of the AHRC Act to include the rights and freedoms recognised in the United Nations Convention on the Rights of the Child (Convention).[1] The Convention is an international instrument relating to human rights and freedoms for the purposes of the AHRC Act.[2]

5. Pursuant to s 66 of the Family Court Act one object of Part 5 of the Act – Children, is to give effect to the Convention.

6. The Commission considers that this proceeding involves a number of rights under the Convention which are dealt with in more detail below. Many of these rights have been transposed into the Family Court Act.

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1 Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

2 *Human Rights and Equal Opportunity Commission Act 1986 - Declaration of the United Nations Convention on the Rights of the Child*, 22 October 1992.

7. These include:

   a. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration (Article 3(1) and ss 66, 66A & 66C).

   b. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents (Article 7(1) s 66(2)(c)).

   c. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognised by law without unlawful interference (Article 8(1) s 66(2)(b)).

   d. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary and in the best interests of the child (Article 9(1) and s 66C(2)).

   e. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation. The child has the right to the protection of the law against such interference or attacks. (Article 16).

   f. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child. (Article 19 and ss 66(2)(b), 66(3A) and 66C(1)).

8. The submissions that the Commission seeks to make can be summarised as follows:

   a. The first applicant can and should be recognised as Pipah's biological parent.

   b. The first applicant can and should be recognised as Pipah's legal parent.

   c. The respondent can and should be recognised as Pipah's legal parent.

   d. The special relationship between Pipah and her twin Gammy should be recognised and steps taken to ensure Pipah is able to preserve this aspect of her identity.

   e. The steps currently proposed to allow or enable the development between Gammy and Pipah are unlikely to be sufficient to protect Pipah's right to the preservation of her identity.

f. Pipah's right to preservation of her identity generally and in terms of her relationship with Gammy and the respondent would likely be best served by not changing her name.

g. The decision as to where Pipah will live and who will have parental responsibility will depend to a large degree on the nature and extent of the risk the first applicant is assessed to pose to her.

2 Application of 'Surrogacy Matters - Best Practice Principles'

9. The Family Court of Australia and a number of judges writing and speaking extra judicially[3] have noted the risks inherent in international surrogacy arrangements. These concerns were summarised by Her Honour Justice Ryan in *Ellison v Kamchanit* where she stated:

> Lest it be thought the Court's concerns are fanciful, writing ex judicially Chief Federal Magistrate Pascoe recently drew together various international reports about the extent and methods used in international baby selling and trafficking. From UNHCR and other credible reports he highlighted international concern about the extent of international baby trafficking and "... the ability of traffickers to become legal guardians of [trafficked] babies without any record to prove otherwise". Not infrequently this involves the trafficker declaring himself the biological father of the child and the birth mother refuting her parental rights. In the same paper the Chief Federal Magistrate explained how coercion may be used and that discrimination against women and poverty are major reasons why some women see no option other than to abandon or sell their babies. These are compelling reasons why it is incumbent upon agencies (including courts) to be satisfied to a high level that babies brought to this country are who it is claimed they are, about the circumstances of their birth and that the subject children have not been wrongfully taken from their parents.[4]

10. Following submissions from the Australian Human Rights Commission and Independent Children's Lawyer in that matter her Honour agreed that in surrogacy matters:

> the position of the birth mother requires close attention to ensure that she has given free and informed consent and has not been subjected to exploitation, coercion or undue influence and that her rights have been adequately protected. ... The Court must also be able to determine that the subject child or children are who the applicants say. It is thus vital that the Court has

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[3] *Cowley and Anor & Yuvaves* [2015] FamCA 111 at [24]; *Fisher-Oakley & Kittur* [2014] FamCA 123 [5]; D Bryant AO, The Hon. Chief Justice, 'Commercial Surrogacy & Australian Psyche' (Speech delivered at Affinity Intercultural Foundation Affinity Lecture Series, Sydney, 9 December 2014. At http://affinity.org.au/category/events/public-discussion-platforms/lectures/ (viewed 28 September 2015); J Pascoe, Chief Federal Magistrate 'Intercountry Surrogacy - A new form of trafficking?' (2012) Federal Judicial Scholarship 15. J Pascoe, Chief Judge 'Surrogacy – The Commodification of New-Born Children' (2015) 24(2), *Australian Family Lawyer* 21.

[4] [2012] FamCA 602 at [5] (Citations omitted).

sufficient evidence before it so that these issues can be determined with a high degree of certainty.[5]

11. Her Honour then proposed that for all surrogacy cases, the steps set out in the Surrogacy – Best Practice Principles, at Schedule 1 of these submissions, should be followed.

12. The Commission maintains that the above principles are applicable to matters before this Court and could be adapted to suit the particular circumstances of this case.

13. In all Australian jurisdictions, other than the Northern Territory where there is no law on surrogacy, commercial surrogacy arrangements are prohibited. One reason for the prohibition of commercial arrangements appears to be a concern to ensure that surrogate mothers are not subject to coercion, undue influence or exploitation.[6]

14. A number of safeguards are provided by legislation in each Australian jurisdiction to ensure that the rights of the surrogate mother are adequately protected in surrogacy arrangements. Some of these safeguards include the following (with reference to the *Surrogacy Act 2010* (WA)):

    a. the arrangement was made after the surrogate mother (and her spouse, if any) obtained independent legal advice about the surrogacy arrangement and its implications (s 17(c)(iii));

    b. the arrangement was made after the surrogate mother (and her spouse, if any) had undertaken counselling about the implications of the surrogacy arrangement and been assessed as psychologically suitable to be involved in the arrangement (s 17(c)(i)and (ii));

    c. the arrangement was made with the consent of the surrogate mother (and her spouse, if any) (s 22(2)(e)(iii));

    d. the arrangement was made before the child was conceived (s 17(2)(e)).

15. Each of these matters is also contained in the list of draft surrogacy principles developed by the Standing Committee of Attorneys-General (SCAG).[7] The draft surrogacy principles were endorsed by the SCAG in November 2009 and referred to the Australian Health Ministers' Conference and the Community Services Ministers' Conference to consider. Discussion of the draft surrogacy principles by the Health and Community Services Ministers has been deferred and the issue is generally under discussion between the Attorneys-General.

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5 [2012] FamCA 602 at [132].

6 See, for example, Select Committee On The Human Reproductive Technology Act 1991, Parliament of Western Australia, Report (1999), Chapter 18.

7 Available at: http://www.lawlink.nsw.gov.au/lawlink/SCAG/ll_scag.nsf/pages/scag_reports.

16. These principles are now reflected in the Surrogacy – Best Practice Principles proposed in *Ellison*.[8] The principles in *Ellison* were endorsed by the Family Law Council in its report on *Parentage and the Family Law Act* (2013), pp73 and 84 and recommendation 13.

17. To the extent that information is available about each of these matters, the Commission considers that it should be provided to the Court when considering a request for parenting orders in proceedings such as the present.

3 Convention on the Rights of the Child

18. The Parliament of Western Australia has recognised that the Convention should be an interpretive aid when considering the meaning of the provisions of Part 5 of the Family Court Act (dealing with children). The Family Court Legislation Amendment (Family Violence and Other Measures) Act 2013 (WA) incorporated a new object of Part 5. Section 66(4) provides:

> An additional object of this Part is to give effect to the Convention on the Rights of the Child done at New York on 20 November 1989 as ratified by Australia at 17 December 1990.

19. In interpreting the Convention, the international principles relevant for the purposes of the present proceeding are that:

    a. the treaty should be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose;[9]

    b. there shall be taken into account, together with the context, any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.[10]

20. It is therefore appropriate for the Court to have regard to relevant provisions of the Convention in providing context to the "best interests" principle and other rights transposed to the Family Court Act. It is also appropriate for the Court to have regard to General Comments published by the Committee on the Rights of the Child.[11]

4 Factual background

21. The following brief factual background is taken from the affidavits filed on behalf of the applicants and respondent and documents produced on

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[8] *Ellison v Karnchanit* [2012] FamCA 602 at [133]-[139].

[9] Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS. 331, 8 I.L.M. 679, (entered into force 27 January 1980), Article 31(1).

[10] Vienna Convention on the Law of Treaties, Article 31(3)(b).

[11] The Committee is established under Article 43 of the Convention and has functions including making general recommendations based on information received from parties to the Convention (Article 45(d)).

subpoena by 9 Network Australia, the Department of Corrective Services (WA), the Department of Child Protection and Family Support (WA) and the Department of Immigration and Border Protection (Cth), and produced on request by the District Court of Western Australia.

22. The applicants are married and live together in Western Australia. The first applicant is an Australian citizen and has his own business as an electrician. The second applicant is a Chinese National and permanent resident of Australia. The second applicant is a homemaker.

23. The first applicant has a criminal history involving sex offences including:

    a. 15 counts of indecent dealing with a child under 13 and 3 counts of procure a child to indecently deal for which he was convicted on 10 March 1997 and sentenced to 2 years for each count of procuring and 1 year for each count of indecent dealing, to be served concurrently. The offences for which occurred between 1 January 1982 and 31 December 1983.

    b. 4 counts of indecent dealing with a child under 13 for which he was convicted on 16 January 1998 and sentenced to 18 months for each offence to be served concurrently but cumulatively to the sentence for which he was already in prison. The offences for which occurred between 13 August 1994 and 1 May 1996.

    c. One count of indecently dealing with a child under 13 for which a nolle prosequi was entered on 16 January 1998.

24. In 2012 the applicants travelled to Thailand for the purpose of investigating having children through a surrogate. They were assisted by a surrogacy agency, 'Thailand Surrogacy' and IVF medical practitioners at Superior ART Clinic (the clinic).

25. The respondent is a citizen of Thailand. She agreed to act as a surrogate mother for the applicants.

26. In her affidavit sworn 14 September 2015 she says that at the time she agreed to act as a surrogate, she:

    a. went by the name Kwanrudee Minjaroen.
    b. was 19 years of age.
    c. had two children, aged 2 and 5.
    d. was single but living in a de facto relationship with the man she is currently married to.
    e. had a debt that she was unable to pay and that prompted her to enter into the agreement.
    f. did not receive legal advice before signing the agreement
    g. did not receive counselling before or during the pregnancy
    h. used a false name for the purposes of the agreement as she was told that she was under the legal age for surrogacy.

27. The first applicant provided sperm which was used to fertilise two eggs provided by an egg donor chosen by the clinic in consultation with the applicants. The respondent was implanted with the resulting embryos and became pregnant with twins in May 2013.

28. The respondent was paid various amounts of money in exchange for carrying the twins, signing various documents and attending various places.

29. On 22 October 2013 the applicants were advised that the male twin the respondent was carrying, Gammy, had Down syndrome.

30. On 23 December 2013, the respondent gave birth to twins: Gammy and Pipah. The children were born prematurely and were placed in intensive care at Vachira Phayaban Hospital. At the request of the applicants, the respondent named Pipah, Pipah Li Minjaroen. There is dispute between the parties as to who named Gammy, how he was named and what name he was given. The name on his Australian Citizenship is Nareubet Minjaroen.

31. The evidence confirms that Gammy has Down syndrome

32. On 20 January 2014 Pipah was discharged from hospital and given into the care of the applicants with the consent of the respondent.

33. With the consent of the respondent and through the execution of documents by her, the applicants applied for Australian citizenship for Pipah. On 4 February 2014 Pipah was granted Australian citizenship. On 11 February 2014 Pipah was issued with an Australian passport.

34. On 13 February 2014 the applicants left Thailand with Pipah and without Gammy.

35. Gammy remained in Thailand and from the affidavit of the respondent remained in the Vachira Phayaban Hospital until July 2014 when he was moved to a hospital closer to her home.

36. Pipah lives with the applicants, the first applicant's daughter and her son. They live in close proximity to the first applicant's other children, mother and ex-wife with whom they have a close relationship. They live in a house owned by the first applicant.

37. Gammy lives with the respondent, her husband, her two children and her grandmother, who assists her to look after Gammy. They live in a house purchased by an Australian charity, Hands Across the Water, to provide a home for Gammy. The respondent runs a small business from her house and is currently receiving an allowance from Hands Across the water to care for Gammy, and is otherwise a homemaker. The respondent's husband is a painter.

38. On 14 January 2015, the respondent applied for Australian citizenship for Gammy and on 15 January 2015 he became an Australian citizen by descent.

39. Pipah has had no contact with Gammy or the respondent since she left Thailand. The twins are now 20 months old.

40. Sometime in mid 2014 the respondent was told of the first applicant's history of sexual offences by a reporter. As a result she became concerned for Pipah's welfare and on that basis seeks her return to Thailand.

41. There is dispute between the parties as to:

    a. Whether the applicants asked the respondent to undergo a procedure during the pregnancy to abort Gammy,

    b. The circumstances surrounding Pipah's departure from Thailand and Gammy remaining there.

5 Orders sought

42. The Applicants seeks the following orders:

    a. That a declaration be made that it is in the best interests of the child, PIPAH LI MINJAROEN, born 23 December 2013 ("the Child') ("PIPAH") that her surname be changed from "Minjaroen" to "Farnell".

    b. That the Applicants David John Farnell and Wenyu Li be at liberty to change the surname of the child PIPAH from "Minjaroen" to "Farnell" at the office of the Registrar of Births, Deaths and Marriages, Western Australia.

    c. The Applicants, David John Farnell and Wenyu Li, have equal shared parental responsibility for the Child PIPAH.

    d. That PIPAH live with the Applicants.

    e. That a declaration be made that the Applicant, David John Farnell is a parent of PIPAH.

    f. That the Applicants and the Respondent exchange photographs of PIPAH and her brother GAMMY MINJAROEN, born 23 December 2013 ("GAMMY") each month.

    g. That the Applicants and the Respondent arrange for PIPAH and GAMMY to share with each other pictures or other works of art completed by them.

    h. That the Applicants and the Respondent arrange for PIPAH and GAMMY to send a card and a small gift to the other in December each year for their birthday and for Christmas.

    i. That for the purpose of the above three Orders:

        i. the parties shall correspond by mail;

        ii. the solicitors for the parties exchange the parties' postal addresses, in the first instance, within 7 days; and

iii. thereafter, the parties keep each other informed of their postal address and advise the other of any changes within 7 days of becoming aware of any changes.

j. That the Respondent:

i. speak to GAMMY in the English language (to the extent that she is able to) as well as the Thai language;

ii. arrange regular English lessons for GAMMY upon GAMMY turning 5 years of age;

iii. otherwise encourage GAMMY to be familiar with and speak the English language.

k. Upon PIPAH and GAMMY turning 5 years of age, the parties arrange for PIPAH and GAMMY to speak to each other over Skype and/or FaceTime, not less than on one occasion per month.

l. That in the event the Applicants and PIPAH travel to Thailand, the Respondent handover GAMMY to the Applicants to spend time with the Applicants and PIPAH for no less than 5 hours.

m. That in the event the Respondent and GAMMY travel to Australia. The Respondent handover GAMMY to the Applicants to spend time with the Applicants and PIPAH for no less than 5 hours.

n. That the Respondent be restrained by injunction from denigrating the Applicants, or allowing anyone else to do so, within the vicinity or hearing of GAMMY.

o. That the parties be restrained by injunction from discussing these proceedings, or allowing anyone else to do so, within the vicinity or hearing of PIPAH or GAMMY.

p. That the Respondent be restrained by injunction from conversing or corresponding with any media organisation or person affiliated with the media in any form whatsoever, or allowing anyone else to do so, in relation to the Applicants, these proceedings, the surrogacy process generally and/or PIPAH or GAMMY.

q. That the parties inform and authorise all relevant organisations, agencies and individuals to provide the parties with any reports and/or information regarding PIPAH or GAMMY.

r. Such further Orders as the Court sees fit.

43. The Respondent seek the following orders:

a. The first Respondent do have sole parental responsibility for the child Pipah Li Minjaroen born 23 December 2013.

b. The child Pipah Li Minjaroen do live with the first Respondent.

c. The first and second Applicants do all things and sign all documents and make all arrangements to facilitate the return of the child Pipah Li Minjaroen to the care of the first Respondent in Thailand.

6 Issues arising for determination

44. A number of issues arise for determination by the Court in the context of this application.

a. Is the appropriate jurisdiction the Family Law Act 1975 (Cth) or the Family Court Act 1986 (WA)?

b. Who are Pipah's biological and legal parents?

c. Who should have parental responsibility for Pipah?

d. With whom should Pipah live?

e. What arrangements should be made to ensure an ongoing relationship between Pipah and her twin, Gammy?

f. Should Pipah's surname be changed from Minjaroen to Farnell?

7 Best interests of the child

45. In dealing with actions involving children, and resolving these issues, the Family Court Act and the Convention share a common underlying purpose or object, namely, a concern that decisions are made that are in children's best interests. Art 3(1) of the Convention provides that:

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

46. The Family Court Act takes this requirement one step further in s 66A by providing that:

> In deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration.

47. Pursuant to s 66 of the Family Court Act, the objects of Part 5 in relation to children are to ensure that best interests of children are met in certain ways which reflect various articles of the Convention. The requirement in Art 3(1) will therefore be applicable to each of the issues to be determined in this proceeding.

48. The Committee on the Rights of the Child has underlined that

> the child's best interests is a threefold concept:
>
> A substantive right: The right of the child to have his or her best interests assessed and taken as a primary consideration when different interests are

being considered in order to reach a decision on the issue at stake, and the guarantee that this right will be implemented whenever a decision is to be made concerning a child, a group of identified or unidentified children or children in general. Article 3, paragraph 1, creates an intrinsic obligation for States, is directly applicable (self-executing) and can be invoked before a court.

A fundamental, interpretative legal principle: If a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child's best interests should be chosen. The rights enshrined in the Convention and its Optional Protocols provide the framework for interpretation.

A rule of procedure: Whenever a decision is to be made that will affect a specific child, an identified group of children or children in general, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned. Assessing and determining the best interests of the child require procedural guarantees. Furthermore, the justification of a decision must show that the right has been explicitly taken into account. In this regard, States parties shall explain how the right has been respected in the decision, that is, what has been considered to be in the child's best interests; what criteria it is based on; and how the child's interests have been weighed against other considerations, be they broad issues of policy or individual cases.[12]

49. The committee has also suggested that in giving full effect to the child's best interests, the following parameters should be borne in mind:

i. The universal, indivisible, interdependent and interrelated nature of children's rights;

ii. Recognition of children as right holders;

iii. The global nature and reach of the Convention;

iv. The obligation of States parties to respect, protect and fulfil all the rights in the Convention;

v. Short-, medium- and long-term effects of actions related to the development of the child over time.[13]

50. The Commission submits that in resolving the complex issues in this case it may be guided by the above principles.

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[12] UN Committee on the Rights of the Child (CRC), *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration*, UN Doc CRC /C/GC/14, (2013) at [6]. At: http://www.refworld.org/docid/51a84b5e4.html (viewed 1 October 2015).

[13] UN Committee on the Rights of the Child (CRC), *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration*, UN Doc CRC /C/GC/14, (2013) at [16]. At: http://www.refworld.org/docid/51a84b5e4.html (viewed 1 October 2015).

8 Jurisdiction - Family Law Act or Family Court Act

51. The ability of the court to make the orders sought by both parties in the primary application and the application for DNA testing varies depending on whether the court is sitting in its jurisdiction under the Family Law Act or the Family Court Act. The position in this regard is unclear. Pursuant to s109 of the *Commonwealth of Australia Constitution Act* and s 69B(1) of the Family Law Act, if the application can be dealt with under the Family Law Act it must be dealt with under that Act and in particular Part VII. If not it should be dealt with under the Family Court Act.

52. In Western Australia, Part VII applies in accordance with s 69ZH which provides as follows:

> (1) Without prejudice to its effect apart from this section, this Part also has effect as provided by this section.
>
> (2) By virtue of this subsection, Subdivisions BA and BB of Division 1, Divisions 2 to 7 (inclusive) (other than Subdivisions C, D and E of Division 6 and sections 66D, 66M and 66N), Subdivisions C and E of Division 8, Divisions 9, 10 and 11 and Subdivisions B and C of Division 12 (other than section 69D) have the effect, subject to subsection (3), that they would have if:
>
> (a) each reference to a child were, by express provision, confined to a child of a marriage; and
>
> (b) each reference to the parents of the child were, by express provision, confined to the parties to the marriage.
>
> (3) The provisions mentioned in subsection (2) only have effect as mentioned in that subsection so far as they make provision with respect to the parental responsibility of the parties to a marriage for a child of the marriage, including (but not being limited to):
>
> (a) the duties, powers, responsibilities and authority of those parties in relation to:
>
> (i) the maintenance of the child and the payment of expenses in relation to the child; or
>
> (ii) whom the child lives with, whom the child spends time with and other aspects of the care, welfare and development of the child; and
>
> (b) other aspects of duties, powers, responsibilities and authority in relation to the child:
>
> (i) arising out of the marital relationship; or
>
> (ii) in relation to concurrent, pending or completed divorce or validity of marriage proceedings between those parties; or
>
> (iii) in relation to the divorce of the parties to that marriage, an annulment of that marriage or a legal separation of the parties to that marriage, that is effected in accordance with the law of an

overseas jurisdiction and that is recognised as valid in Australia under section 104.

(4) By virtue of this subsection, Division 1, Subdivisions C, D and E of Division 6, section 69D, Subdivisions D and E of Division 12 and Divisions 13 and 14 and this Subdivision, have effect according to their tenor.

53. For the Family Law Act to apply, Pipah must be a child of a marriage within the meaning of s 60F of the Family Law Act. If she is not, the Family Court Act will apply.

54. The relevant impact of this section is as follows:

a. Division 1, which includes ss 60F, 60H and 60HB take effect according to their tenor – although Subdivisions BA and BB – both in relation to the application of the principle of the Child's Best Interest - also have the effect of being confined to a child of a marriage and parties to a marriage in accordance with ss 69ZH(3)[14].

b. Division 2 – Parental Responsibility – is limited to child of a marriage and parties to a marriage.

c. Division 5 – Parenting Orders - is limited to child of a marriage and parties to a marriage.

d. Division 6 - Parenting orders other than child maintenance orders – relevantly, ss 65A, 65AA, 65C and 65D - is limited to child of a marriage and parties to a marriage.

e. Division 12 - Proceedings and jurisdiction:

i. sections 69A, 69B, 69C, 69E and 69F are limited to child of a marriage and parties to a marriage.

ii. the remainder of the sections apply according to their tenor.

55. The orders sought by the applicants include parenting orders and a declaration that the first applicant is a parent, which is not a parenting order. The applicants have not specified the basis for that declaration.

56. The orders sought by the respondent are parenting orders.

57. Pursuant to s 69B if proceedings can be instituted under Part VII they must be. While s 69B does not include any reference to 'child' or 'parent' as is required for s 69ZH(2) to operate, the High Court has held that the impact of 69ZH(2) is to confine the operation of sections that don't necessarily include such terms, to the parental responsibilities of the parties to a marriage for a child of the

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[14] Section 69ZH(2).

marriage.[15] That this was the intention of s 69ZH is also clear from the explanatory memorandum for the Bill which inserted the section, which states:

> 2. The implementation of the reference of powers means that the provisions of the Act relating to the custody, guardianship and maintenance of children may now cover ex—nuptial children within the limits of the enlarged legislative power of the Parliament resulting from the referral of powers. Apart from the operation of the Act in the Territories to which it applies, the provisions of the Act as so enlarged may for constitutional reasons extend only to the referring States. In relation to Queensland and Western Australia, the Act will continue to operate as in the past. To accommodate this extended operation of the Act, it has been found convenient to bring together in a single part of the Act - proposed new Part VII — the provisions relating to children.
>
> 3. Insofar as the Act will extend to the four referring States and will apply in the Australian Capital Territory, the Northern Territory and Norfolk Island, the provisions relating to children will apply generally to all children, whether children of a marriage or not, and their parents, whether married or not. In relation to the non—referring States, those provisions will be confined, as at present, to children of a marriage and to parties to a marriage. In particular, this means that the procedures under the Act, including the provisions for counselling and conciliation, will be available in disputes concerning ex-nuptial children except in relation to the non—referring States. In these two States, existing procedures under State law will continue to apply and the Family Court of Australia will have no enlarged jurisdiction over ex—nuptial children.
>
> 4. Consequent upon the extension of the Act to include all children within the enlarged legislative power arising from the reference of powers, the Bill includes evidentiary provisions relating to parentage. The provisions in Division 7 of new Part VII provide for presumptions of parentage of children. Provision is now made under most State and Territory laws for presumptions of paternity and parentage, but the provisions in Division 7 will provide a statement of relevant presumptions of parentage for the purposes of determination of these issues under the Family Law Act. Division 8 of new Part VII, providing for evidence as to parentage, re-enacts in amended form sections 99 and 99A of the Act. [16]

58. Section 65C, which is limited by s69ZH, provides that the parents of a child and any other person concerned with the care, welfare or development of the child may apply for a parenting order. Given its limited application, the child in question must be a child of a marriage and the parents must be the parties to the marriage.

59. Uncertainty arises on the face of the Act in the apparent conflict between the limitations sought to be imposed by s 69ZH and the terms of s 65C which allows people that are not parties to the marriage to bring an application. If the intention of s 69ZH was to ensure constitutional validity of the expanded

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[15] *Minister for Immigration and Multicultural and Indigenous Affairs v B and Another* 219 CLR 365 at [74] and [105] in that case 69ZC.

[16] Explanatory Memorandum, Family Law Amendment Bill 1987 (Commonwealth), p 2-3.

jurisdiction to cover referring states only, the conflict should be resolved in this light.

60. While earlier decisions of the High Court held that to come within the scope of the marriage power in the Constitution[17] children's matters must involve only the parties to a marriage and not third parties,[18] more recent judgments have clarified that people that are not parties to the marriage may bring applications in children's proceeding so long as the law in question has the requisite connection to 'marriage'.[19] This is so even in cases where there has been no previous order of the Court in relation to the child. The reasoning for this position is that the marriage power

> extends to to allow the Parliament to provide that the rights of the parties to the marriage, which arose from the marital relationship, may be defeated or diminished, e.g., by an order granting custody or access to a stranger. A law which provides for the adjudication of conflicting claims by a party to a marriage and a stranger to the custody of or access to a child of the marriage is a valid exercise of the marriage power, because such a law provides for the regulation of rights and duties (declared in the first instance by s. 61 (I)) that arise out of the marriage relationship.[20]

61. On this basis, an application by a stranger to the marriage which relates to the child of a marriage is valid. The question for this matter is whether Pipah is a child of the marriage. There are two possible marriages that are relevant, the marriage between the applicants and the marriage between the respondent and her husband.

8.1 Is Pipah a child of either marriage

62. A 'child of a marriage' is defined in s 4 of the Family Law Act

> "child of a marriage" includes a child who is, under subsection 60F(1) or (2), a child of a marriage, but does not include a child who has, under subsection 60F(3), ceased to be a child of a marriage.

63. Sections 60F(1) of the Family Law Act extends the ordinary meaning of 'children of a marriage' to include, relevantly:

    b. a child of the husband and wife born before the marriage[21]

    c. a child who is, under subsection 60H(1) or section 60HB, the child of the husband and wife.

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[17] Section 51(xxi).

[18] *Russell v Russell; Farrelly v Farrelly* (1976) 134 CLR 495.

[19] *V v V* (1985)156 CLR 228.

[20] *V v V* (1985)156 CLR 228 at 232 – 233.

[21] Section 60F(1)(b).

63. Section 60H, which applies according to its tenor under s 69ZH, relevantly provides as follows:

(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.

64. Section 60H, which applies according to its tenor under s 69ZH, relevantly provides as follows:

> (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.

65. Sections 60H was added to the Act as s 5A in 1983[22] to expand the jurisdiction of the Court to cover children born as a result of artificial insemination by donor and IVF,[23] it was not intended to cover the status of children born through a surrogacy arrangement.[24] Section 60HB was inserted in 2008 by the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* the purpose of the Bill was to allow opposite-sex and same-sex de facto couples to access the federal family law courts on property and spouse maintenance matters on relationship breakdown and to bring all family law issues faced by families on relationship breakdown within the federal family law regime. [25]

66. Section 60HB was not initially in the Bill and was added after concerns were raised in the inquiry into the Bill by the Senate Legal and Constitutional Committee.[26]

67. At the same time as 60HB was added, a new definition of child was added to section 4 with a note as follows:

> ***"child "*** : Subdivision D of Division 1 of Part VII affects the situations in which a child is a child of a person or is a child of a marriage or other relationship.
>
> Note: In determining if a child is the child of a person within the meaning of this Act, it is to be assumed that Part VII extends to all States and Territories.[27]

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[22] *Family Law Amendment Act 1983* (Cth).

[23] Commonwealth, *Parliamentary Debates*, Senate, 1 June 1983, 1098 (The Hon Senator G Evans, Attorney-General). In 1987 it was moved into the newly created Part VII and renumbered 60B by the *Family Law Amendment Act 1987*. In 1995 it was re-enacted as 60H by the *Family Law Reform Act 1995*.

[24] Commonwealth, *Parliamentary Debates*, Senate, 1 June 1983, 1066 (The Hon Senator G Evans, Attorney-General).

[25] Commonwealth, *Parliamentary Debates*, House of Representatives, 25 June 2008, p 5823 (The Hon R McClelland MP, Attorney-General).

[26] Standing Committee on Legal and Constitutional Affairs Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 [Provisions], p 38-41.

[27] *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008.*

68. The revised supplementary explanatory memorandum for the Bill stated:

> ***Item 1: Subsection 4(1) (definition of 'child')***
> 70. This item amends the definition of 'child' in subsection 4(1). It expands the definition of child to reflect new provisions in Subdivision D of Division 1 of Part VII dealing with the parentage of children born as the result of artificial conception procedures while the woman who gave birth to the child was married to, or a de facto partner of another person. It will also expand the definition of child to include a child born under surrogacy arrangements as set out in a new section 60HB.
>
> 71. A note has been included to indicate that Part VII of the Act is to be assumed as extending to all States and Territories for the purpose of working out if a person is a child within the meaning of the Act. The Government's intention is that all children who would fit within the meaning of child as detailed in subsection 4(1) will be covered by any other provisions which relate to this subsection. In particular, the Government wants to ensure West Australian children who are not covered by Part VII of the Act pursuant to subsection 69ZE(s) as they are not children of a marriage will be treated as though they are for the purpose of any legislation referring to a child 'within the meaning of the Family Law Act 1975', howsoever expressed.

69. Section 4 of the Family Law Act provides that

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

70. Given that surrogacy includes the implantation of an embryo in the body of a woman, it is an artificial conception procedure for the purposes of the Act. Both s 60H and s 60HB therefore appear to apply to a surrogacy situation. A question arises as to whether, in the absence of an order of the State Court under a prescribed law under s 60HB, the court is then required or able to have reference to s 60H so that if no order is made under surrogacy law, the deeming provisions in relation to artificial conception in s 60H apply.

71. The interplay between these two sections and their application have been considered in a number of recent cases albeit in the slightly different context of consideration of an application for a declaration of parentage.

Re Michael: Surrogacy Arrangements [2009] FamCA 691 (3 August 2009) Watts J.

a. In his first decision on this issue His Honour Watts J noted the problems with the legislation and suggested certain amendments. At that stage, no NSW laws had been prescribed for the purposes of s 60HB. His Honour made the following comments:

> [29] There is an argument, which was not made before me, that the words "the other intended parent" in s 60H(1)(a) of the FLA, not only required that person to consent to the artificial conception procedure but require that person to also intend, by giving that consent, to become a parent of the child conceived. Clive did not have the intention to become Michael's parent.

[30] That argument has some attraction because:

(30.1) Section 60H of the FLA is not expressed to be subject to s 60HB of the FLA. If s 60HB of the FLA was in the future enlivened in New South Wales by State law and Federal regulations, it might mean that ss 60HB and 60H of the FLA produce irreconcilable results. Michael could be said to be a child of Sharon and Paul by s 60HB of the FLA and said not to be a child of Sharon and Paul by s 60H of the FLA. Reading s 60H of the FLA as not applying to surrogacy arrangements, would avoid this inconsistent result.

(30.2) Extraneous material can be considered if the ordinary meaning conveyed by the text leads to a result that is manifestly absurd or is unreasonable: s 15AB Act Interpretation Act (Cth). The Supplementary Explanatory Memorandum to the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008, at p 14, indicates that the legislative purpose of s 60H of the FLA was to cover the situation where the female partner of a married, heterosexual de facto couple or lesbian couple became pregnant as a result of an artificial conception procedure. Surrogacy arrangements were meant to be covered by s 60HB of the FLA.

(30.3) The surprising result achieved in this case could be avoided if s 60H of the FLA was found to have no application to the facts of this case.

(30.4) If possible, a purposive construction must be given to legislation (s 15AA of the Acts Interpretation Act (Cth)) and it could be argued that parliament would not have intended an inconsistent or surprising result.

[31] Having considered those arguments, I discount them because in my view the words of the statute are clear and the result reached, while surprising, can not be said to be manifestly absurd. Also, to borrow from the words of Nygh J in In the Marriage of R and P Heath; Westpac Banking Corporation (1983) 9 Fam LR 97 at 107; (1983) FLC 91-362 at 78,427: ...Section 15AA(1) of the Acts Interpretation Act 1901 instructs the court to choose the construction which will best advance the purposes of the legislation, but it does not permit a court to ignore the ordinary and grammatical meaning of words of a statute which allow the court no alternative option.

[32] The words "other intended parent" draws its own internal definition from the words of s 60H(1)(a) of the FLA. The phrase is used as an abbreviated expression to refer to, inter alia, the de facto partner of a woman who gives birth to a child as a result of the carrying out of an artificial conception procedure. For s 60HB FLA to have effect, there will need to be further amending legislation in the States and companion regulations made under the Family Law Regulations.

...

[71] It would be useful to:

71.1. Amend s 60H FLA to make it clear that s 60H FLA is subject to the provisions of s 60HB FLA.

71.2. Amend s 69U FLA to make it clear that parentage presumptions can be rebutted by the operation of other parts of the FLA.

71.3. If it is intended that s 60H FLA has no application to surrogacy arrangements, to amend s 60H FLA to make that clear or alternatively amend the definition of "artificial conception procedures" to exclude surrogacy arrangements from that definition.[28]

b. Ultimately his Honour found that in circumstances where there is no order under State law, s 60HB cannot apply but s 60H then operates. He found that:

> The definition in s 4 FLA of artificial conception procedure includes the implantation of an embryo in the body of a woman and does not exclude that implantation happening in the context of a surrogacy arrangement.
>
> It is my view that it was the legislative intention of s 60HB FLA to grant the status of parents to the providers of genetic material in a surrogacy arrangement if that was consistent with an order made in accordance with the provisions of a prescribed State law. In circumstances where State law did not allow an order to be made recognising the providers of genetic material as parents, it was Parliament's intention that they not be recognised as parents. Consequently the provisions of s 60H(1)(d) FLA then apply and a child is not to be considered a child of those who have provided genetic material.[29]

c. This application of s 60H also rebutted the presumption under s 69R of the Family Law Act.

Dudley and Anor & Chedi [2011] FamCA 502 (30 June 2011) Watts J.

a. The second decision, also of Watt J dealt with a case where the woman who gave birth to the child was never married. His Honour again found that the two provisions could operate in relation to a child of a surrogacy arrangement. He stated:

> The reason these facts [that the surrogate mother was not married] are important is because it means that the current provisions of s 60H FLA are not enlivened in this case (see in comparison *Re: Michael - Surrogacy Arrangements* [2009] FamCA 691). The twins are therefore not precluded from being the children of the applicants, by virtue of s 60H(1)(d) FLA (I have previously referred to the potential conflict between s 60H FLA and s 60HB FLA in *Re: Michael*).[30]
>
> ...
>
> These State laws have been prescribed for the purposes of s 60HB FLA. Once a State order is made about who is a parent, the federal law will recognise it. By enacting s 60HB FLA, the Federal Government resolved any issue as to whether or not the transfer in the 1980s by the States of powers relating to children created any issue as to whether or not laws about parentage in relation to surrogate children should be made at Federal or State

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[28] *Re Michael: Surrogacy Arrangements* [2009] FamCA 691 at [70]-[71].

[29] *Re Michael: Surrogacy Arrangements* [2009] FamCA 691 at [33]-[34].

[30] *Dudley and Anor & Chedi* [2011] FamCA 502 at [27].

level. Section 60HB FLA provides that State law will govern the determination of parentage and that State law will be recognised by Federal law.[31]

b. *Ellison and Anor & Karnchanit* [2012] FamCA 602 (1 August 2012) Ryan J dealt with a matter in which the surrogate mother was not married and the *Status Of Children Act* (Qld) did not preclude Mr Ellison from being a father. She found that as there was no order by the State, s 60HB did not apply and it did not prevent 60H from applying. In this regard she disagreed with the finding in *Dudley & Chedi* and found:

> The gravamen of all counsel's submissions is that s 60HB applies only in circumstances where an order of the type referred to in that section has been made so as to deem that order to be conclusive for the purposes of federal law. In other words, the section does no more than say that if a relevant order is made by a state court, then for the purposes of the Act, it will apply. With these submissions I agree. In my view, absent words of exclusion, the wording of s 60HB is specific and only applies in situations where an order had been made under a prescribed law of a state or territory. As there has been no order made under a prescribed law of a state or territory s 60HB does not apply to the facts of this case.[32]

c. *Mason & Mason and Anor* [2013] FamCA 424 (7 June 2013) Ryan J. This was also a case in which the surrogate mother was not married at the relevant time, nor in a defacto relationship. Her Honour reconsidered her position in Ellison in relation to the application of s 60H and s 60B and ultimately stood out of the list the issue of a declaration of parentage to allow further submissions to be made if that was though appropriate by the applicant. The issue she was deciding was whether the general parentage presumptions in the Family Law Act should be applied or did s 60H and s 60HB together deal with the situations of children born under artificial conception procedures and surrogacy arrangements. In this regard her Honour found that on reflection she agreed with the court in *Dudley & Chedi* that the vernal presumptions in the Family Law Act were not available.

d. Her Honour did not need to and did not directly consider the broader issue of the interplay between those sections. In this context she noted the following:

> In circumstances where there is no definition of the words "surrogacy arrangements" used in s 60HB, it would appear that a surrogacy arrangement would meet the definition of an artificial conception procedure. However, this invites the question, why would Parliament simultaneously introduce two different provisions; one general and one specific more limited than the general? The answer would appear to be that Parliament intended to adopt the same scheme that operates in the states and territories. Namely a scheme for the declaration of parentage and, for children born of a surrogacy

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[31] *Dudley and Anor & Chedi* [2011] FamCA 502 [29] (Citations omitted).

[32] *Ellison and Anor & Karnchanit* [2012] FamCA 602 at [68].

arrangement, the transfer of parentage in accordance with an order made by the Supreme Court of NSW.[33]

e. *Bernieres and Anor & Dhopal and Anor* [2015] FamCA 736 (9 September 2015) Berman J. This is the most recent case that has considered these sections. Without deciding the issue the court declined to make and order for parentage and appeared to accept the decision of the court in *Mason*, finding that the child was clearly not a child of the marriage and noting the following:

> Accordingly, her Honour considered that she was not permitted to make a declaration as to parentage as the parties should have first obtained an order pursuant to the relevant surrogacy legislation in New South Wales. Her Honour considered that "a cautious approach" to the issue of statutory interpretation was required.[34]

72. In *Dudley & Chedi* the court found that if s 60HB was triggered, state law must prevail and regard could not be had to the other presumptions in the Family Law Act. While her Honour Justice Ryan initially disagreed with this position in her decision in *Ellison*, she reconsidered the issue in *Mason* and agreed with the court in *Dudley & Chedi*. Both of these decisions were in the context of consideration of whether declarations of parentage could be made in favour of the biological father in surrogacy arrangements. While Justice Watts in *Dudley & Chedi* declined to make an order on grounds discussed later in these submissions, Justice Ryan in *Mason* stood the issue out of the list and left it open to the applicant to make further submissions, nothing that recourse could be had to the relevant state Supreme Court.

73. While the Court in *Mason* did not consider the interplay between s 60H and s 60HB, the analysis in relation to the interplay between the general parentage provisions in the Act and the specific provisions in s 60H and s 60HB are equally apt to the consideration of the interplay between those sections. The analysis was as follows:

> Another issue which was not considered in *Ellison* but which requires consideration is the effect of a later specific provision in an Act in relation to a general statutory provision. The starting point is that when any Act is amended by a later Act, the two are to be regarded as one connected and combined statement of the will of the Parliament (*Sweeney v Fitzhardinge* [1906] HCA 73; (1906) 4 CLR 716).
>
> Where, as in this case, a later amendment contains a provision which deals with a particular topic that conflicts with a provision that deals generally with that topic, the relationship between the two provisions must be considered. By the application of the *generalia specialibus* rule of statutory construction, where the specific provision is passed after the general provision, the specific provision must be followed and the general provision is thereby displaced

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[33] *Mason & Mason and Anor* [2013] FamCA 424 at [28].

[34] *Bernieres and Anor & Dhopal and Anor* [2015] FamCA 736 at [97].

(*Commissioner of Taxation v Hornibrook* [2006] FCAFC 170; (2006) 156 FCR 313).

As is explained by DC Pearce and RS Geddes in Statutory Interpretation in Australia, Seventh Edition, it remains open for the Court to consider that the earlier general provision was not intended to be subject to the specific provision. In other words, the *generalia* may derogate from the *specialia* either explicitly or by implication.

The rebuttable nature of the rule is described in *Associated Minerals Consolidated Ltd v Wyong Shire Council* (1974) 4 ALR 353 at [359] where the Privy Council said:

> The principle [*generalia specialibus non derogant*] is, of course, unexceptionable, but cases are rarely so simple as this, for even where the earlier statute deals with a particular and limited subject-matter which is included within the general subject-matter with which the later statute is concerned, it is still a matter of legislative intention, which the courts endeavour to extract from all available indications, whether the former is left intact or is superseded, and the cases in which the latter has been held are almost as numerous as the former.[35]

74. Contrary to the finding in *Mason* that s 60H and s 60HB were inserted at the same time in 2008,[36] as indicated above, s 60H was initially inserted as s 5A in 1983, re-enacted as s 60B in 1987 and renumbered as s 60H in 1995. It is therefore earlier than s 60HB. It is also more general than s 60HB as surrogacy is clearly a subset of the definition of 'artificial conception procedure'.

75. As suggested above, the ultimate question is one of parliamentary intention. Due in part to the relatively recent burgeoning of surrogacy arrangements, in comparison to the more general artificial conception procedures, parliament has not intended, at any stage of the history of section 60H that it should cover surrogacy situations. It is for this reason that s 60HB was added to the Act.[37] It was an initial limited attempt to recognise that State Courts were already making orders for transfer of parentage pursuant to surrogacy arrangements and the situation created by the orders should be recognised.[38]

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[35] *Mason & Mason and Anor* [2013] FamCA 424 at [29]-[32].

[36] *Mason & Mason and Anor* [2013] FamCA 424 at [27].

[37] Commonwealth, *Parliamentary Debates*, Senate, 1 June 1983, 1066 (The Hon Senator G Evans, Attorney-General), Standing Committee on Legal and Constitutional Affairs Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 [Provisions], p 38-41. Commonwealth; *Parliamentary Debates*, Senate, 14 October 2008, 40- 41 (Senator Hanson-Young), *Parliamentary Debates*, Senate, 14 October 2008, 44-46 (Senator Barnett); *Parliamentary Debates*, Senate, 14 October 2008, 51 (Senator Trood).

[38] Above.

76. As Justice Ryan in *Ellison* found,

> The effect of this is that unless an order is made in favour of the applicant pursuant to the Surrogacy Act, the provisions of the Act do not permit this Court to make a declaration of parentage in his favour.[39]

77. As no such order has been made in this case Pipah is not a child of the marriage between the applicants and the extended meaning of child of a marriage in s60H does not apply so she is not a child of the marriage between the respondent and her husband. Section 60H has no application to the intended parents in surrogacy situations. She is therefore not a child of a marriage for the purposes of the Family Law Act and the relevant jurisdiction is the Family Court Act.

78. If, to the contrary, in the absence of an order of the State Court, regard may be had to s 60H, the respondent and her husband are Pipah's mother and father and the first applicant is not her parent.[40] Pipah will be deemed to be a child of their marriage and the matter should be dealt with under the Family Law Act.

79. It would follow from the above cases, that if the matter is dealt with under the Family Law Act the issue of parentage must be dealt with under s 60H and s 60HB and not the general presumptions in the rest of the Act, including s 69VA.

8.2 Child born before a marriage

80. As shown above, s 60F(1)(b) also extends the definition of child of a marriage to a child of the husband and wife born before the marriage. Given its context and the discussion above regarding specific provisions overriding general, such a child must be the natural or adopted child of the parties to a marriage. This is supported by the decision of the High Court in *In the marriage of Cormick.*[41]

9 Findings as to Pipah's biological and legal parents

81. For the reasons set out below, the Commission submits that the first applicant should be recognised as Pipah's biological parent. Further, the first applicant and the respondent can and should be recognised as Pipah's legal parents, and that the question of what parenting orders are appropriate should be assessed in the light of these findings.

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[39] *Ellison and Anor & Karnchanit* [2012] FamCA 602 at [34].

[40] This assumes that the respondent's husband consented to the artificial conception procedure. It appears from the evidence that he did and no evidence to the contrary. The presumption in s 60H(5) would be sufficient in these circumstances.

[41] *In the Marriage of Cormick; Salmon (Respondent)* (1984) 156 CLR 177 at 177 and 183 subsequently followed in a number of cases including *V v V* (1985)156 CLR 228 and *Re F; Ex parte F* (1986) 161 CLR 376.

9.1 Human rights issues arising

82. There are a number of rights arising under the Convention that are relevant to whether orders can and should be made as to who Pipah's biological and legal parents are. Whether or not children are able to enjoy these rights may be affected by whether or not a finding of parentage is made in the present circumstances.

83. As indicated above, many of these rights are reflected in provisions of the Family Court Act. They include:

    a. **To know and be cared for by her parents**: The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents (Article 7(1) s 66(2)(a)).

    b. **Identity**: States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognised by law without unlawful interference (Article 8(1) s 66(2)(b)).

    c. **Health:** A child has the right to enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health (Art 24).

    d. **Maintenance:** States Parties shall take appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child (Art 27(4)).

84. There are significant consequences for a child, born as a result of an international surrogacy arrangement, that he or she has an Australian parent. Such a finding has the potential to impact on a child's fundamental rights. Where such a finding is open to the court and is a natural part of the court's reasoning process, the Commission considers that it is appropriate for such a finding to be made.

85. Section 191(1) of the Family Court Act deals with presumptions of parentage arising out of court findings. It provides that, if during the lifetime of a particular person, a court has found expressly that the person is a parent of a particular child, or made a finding that it could not have made unless the person was a parent of a particular child, and the finding has not been altered, set aside or reversed, the person is conclusively presumed to be a parent of the child. Pursuant to s 193(3), the provisions in s 193 relating to the rebuttal of presumptions do not apply to s 191(1).

86. This appears to mean that a finding by the Family Court in the course of its reasons for judgment that a person is a parent of a child may conclusively establish this fact (unless that finding is altered, set aside or reversed), even if orders in relation to parentage have not been sought. This may have implications in other circumstances which are relevant to the human rights of the child.

87. There are a number of implications for children born of surrogacy arrangements that flow from the decision of the Court to grant the intended parents the legal status of 'parent' under the Family Court Act. These are listed in *Dudley & Chedi* [2011] FamCA 502 at [21]-[22] and include the impact recognition may have on:

a. citizenship;

b. medical treatment and registration for Medicare and other health funds;

c. applications for passports or school;

d. rights for a child arising upon the death of a parent, including rights to intestacy and superannuation and the ability of a child to be referred to as 'a child' in a will;

e. complications arising under the child support regime and schemes of workers compensation.

9.2 Particular implications of findings of parentage

88. While the issue of citizenship and access to Medicare will not be issues for Pipah, there is still significance of a finding that the first applicant is a parent of Pipah for her rights in particular areas. These submissions are not intended to be a comprehensive treatment of each of these areas, but rather merely to indicate that parentage findings have the potential to impact on the human rights of children.

(a) To know and be cared for by her parents

89. The definition of "parents" for the purposes of Article 7 of the Convention can reasonably be assumed to include genetic parents and birth parents as these are important to children in terms of their identity.[42] A third category of parents that are relevant, psychological parents, this would presumably extend to the gestational mother in a surrogacy situation.[43] The Committee on the Rights of the Child (Committee) has recognised that practices that prevent a child from knowing who their biological parents are is a denial of this right.[44]

90. Identification of both biological and legal parents will enable orders to be appropriately directed to ensure the right to know and be cared for by her parents.

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[42] R Hodgkin and P Newell, *Implementation Handbook for the Convention on the Rights of The Child* (Fully Revised 3rd edition, 2007), p105-106.

[43] R Hodgkin and P Newell, *Implementation Handbook for the Convention on the Rights of The Child* (Fully Revised 3rd edition, 2007), p105-106.

[44] Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Luxembourg,* UN doc CRC/C15/Add.250 (2005) at [28] and [29].

91. As submitted below, a finding of parentage also impacts on the factors in s 66C to be taken into account when considering what parenting orders are appropriate.

(b) To preserve her identity

92. Preservation of 'Identity' for the purposes of article 8 includes both non-interference and the maintenance of records relating to genealogy.[45] As noted by Hodgkin and Newell, for medical reasons alone this knowledge is of increasing importance[46] particularly in this situation where the identity of the egg donor is unknown.

(c) Health

93. While access to Medicare is assured given the grant of citizenship, access to some healthcare funds may be limited if the first applicant is not recognised as a parent of Pipah.

(d) Maintenance

94. For the purposes of the Child Support Assessment Act 1989 (Cth), 'parent' is defined as follows:

a. when used in relation to a child who has been adopted—means an adoptive parent of the child; and

b. when used in relation to a child born because of the carrying out of an artificial conception procedure—means a person who is a parent of the child under section 60H of the Family Law Act; and

c. when used in relation to a child born because of a surrogacy arrangement—includes a person who is a parent of the child under section 60HB of the Family Law Act.

95. Therefore, unless there is a parentage order from a relevant court, the first applicant will not be liable for Child Support.

(e) Parent-child relationship at State law

96. The Victorian Law Reform Commission has identified a broad range of State laws in Victoria which contain a range of obligations and entitlements which

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[45] R Hodgkin and P Newell, *Implementation Handbook for the Convention on the Rights of The Child* (Fully Revised 3rd edition, 2007), p114-115 citing *the Committee on the Rights of the Child, Report of the Fortieth session, (2005) CRC/C/153 [680].*

[46] R Hodgkin and P Newell, *Implementation Handbook for the Convention on the Rights of The Child* (Fully Revised 3rd edition, 2007), p105-106.

arise out of the parent-child relationship.[47] A similar range of obligations and entitlements is also applicable under Western Australian law.

(f) Intestacy/Succession

97. Under the family provisions of the *Family Provisions Act 1972* (WA), a child is not defined but is said to include illegitimate children: s 4. The *Administration Act 1903* (WA) likewise does not contain a definition of child. There are no specific provisions in either Act relating to children born of surrogacy arrangements. It seems that parent-child relationships would be determined in accordance with the *Interpretation Act 1984* (WA) (Interpretation Act), *Artificial Conception Act 1985* (WA) (Artificial Conception Act) and Family Court Act. In these circumstances, there is a risk that unless an order had been made under the Surrogacy Act (WA) a child born as a result of an international surrogacy arrangement (who has reached the age of 18 and is no longer a dependant) would not be entitled to a share of the estate of an intended parent.

9.3 Previous decisions concerning surrogacy

(a) Decisions of the Family Court of Australia

98. There have been a number of judgments of the Family Court of Australia dealing with international surrogacy arrangements in which different approaches have been taken as to whether it was appropriate (or necessary) to make findings that the biological father is a 'parent' of any children born as a result of the arrangement. Relevantly, in each of these cases, discussed below, the child was conceived overseas through an artificial conception procedure using the sperm of the applicant and (in most cases) an ovum donated by an anonymous woman who was not the surrogate mother.

99. Findings that the biological father was a parent have been made in a number of cases under the Family Law Act 1975 (Cth) (Family Law Act) dealing with international surrogacy arrangements. A number of these relied on s69VA of the Family Law Act, which has no equivalent in the Family Court Act.[48] Other decisions have specifically found they could not rely on s69VA.[49] The following

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[47] Victorian Law Reform Commission, Report: *Assisted Reproductive Technology and Adoption*, June 2007, p 113-114. At http://www.lawreform.vic.gov.au/projects/art-adoption/art-and-adoption-final-report (viewed 29 September 2015).

[48] Section 69VA provides that after receiving evidence and deciding the issue for the purposes of the proceedings, the Court may make a declaration of parentage for the purposes of all laws of the Commonwealth.

[49] *Mason & Mason and Anor* [2013] FamCA 424; *Bernieres and Anor & Dhopal and Anor* [2015] FamCA 736. Note the the decision of Justice Ryan in *Mason & Mason* followed a period of reflection on her decision in *Ellison* by her in which she relied on 69VA. In *Mason* she decided that 69VA could not be relied on and that State law must be used.

cases did not rely on 69VA or found that they did not need to rely on 69VA to make such a finding.

a. *Collins & Tangtoi* [2010] FamCA 878 in which Loughnan J said at [16] (under the Family Law Act – Qld):

> In the circumstances here, even though no formal declaration is sought on behalf of the applicants, it seems to me that Mr Collins is the father of the children. He is recorded on the birth certificate. He is acknowledged by the person who, under Thai law is the mother of the children [the surrogate mother]. We have scientific evidence that the children are his [as a result of DNA testing]. In those circumstances I am comfortable that Mr Collins is the father of these children.

b. *O'Conner & Kasemsarn* [2010] FamCA 987 in which Ainslie-Wallace J said at [21] (under the Family Law Act – NSW)

> What is clear beyond doubt in this case is that the applicant provided his genetic material through IVF and is the biological father of the children. I am satisfied that he is a parent in the sense of having 'begotten' the children.

c. *Dennis & Pradchapet* [2011] FamCA 123 (under the Family Law Act – Queensland), where Stevenson J made the finding based on :

    i. DNA testing establishing the applicant as the biological father of the child;

    ii. the applicant being registered as the father on the child's Thai birth certificate;

    iii. the applicant assuming the role of father almost immediately after the child's birth;

    iv. the applicant's intention to provide ongoing care and support for the child; and

    v. the fact that neither the surrogate mother nor the anonymous egg donor intended to play a role in the child's life.

d. *Ronalds & Victor* [2011] FamCA 389 at [8] (under the Family Law Act – Victoria), dealing with a surrogacy arrangement in India.

e. *Groth v Banks* [2013] FamCA 430 at [16] where Cronin J after citing *Tobin*[50] and *Re Mark*[51] and the definition those cases referred to, "a person who has begotten or borne a child", found that:

> 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

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[50] *Tobin & Tobin* (1999) 24 Fam LR 635.

[51] *Re Mark* (2003) 31 Fam LR 162.

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.

100. In four separate judgments delivered by Watts J on 30 June 2011 in relation to international surrogacy arrangements, no findings were made identifying the biological father as a parent. It appears that his Honour took this course as a result of public policy concerns about surrogacy arrangements which may have been commercial and, as such, potentially in breach of relevant State law. The cases follow:

a. *Dudley & Chedi* [2011] FamCA 502, discussed above, in which Watts J noted at [32] that:

i. Queensland state law made the surrogacy arrangement illegal;

ii. there was no State law at that time that would recognise a relationship between the twins and the applicant;

iii. if the arrangement was altruistic, there is now State law that would allow such recognition;

iv. the applicant could seek a remedy through State adoption legislation; and

v. the orders sought could be made without recognising the applicant as the father of the twins.

b. *Findlay & Punyawong* [2011] FamCA 503 which Watts J described as "virtually identical" to *Dudley & Chedi.*

c. *Hubert & Juntasa* [2011] FamCA 504. Again, the case involved a surrogacy arrangement in Thailand. However, here, the applicants were from New South Wales and Watts J considered that at the time the arrangement was entered into the New South Wales prohibition on surrogacy arrangements did not have extraterritorial effect. Nevertheless, Watts J at [18] declined to make an assessment of the child's parentage 'because of the public policy concerns behind how current surrogacy laws have been framed in New South Wales and consistently with other places in Australia'.

d. *Johnson & Chompunut* [2011] FamCA 505 which had facts and reasons substantially the same as *Hubert & Juntasa.*

101. In two other cases dealing with international surrogacy arrangements, the Court considered that it was unnecessary to make a finding as to whether the biological father was a parent:

a. *Wilkie & Mirkja* [2010] FamCA 667: Cronin J found that Mr Wilkie contributed his sperm but considered that there was 'no evidence to establish' that he was a parent (at [10]). His Honour considered that there was 'little point in pursuing a definition of a parent' (at [19]). Rather, what was important in the context of an application for parenting

orders was looking to the benefits that children receive from the parenting responsibilities that the people who care for them undertake.

b. *Cadet & Scribe* [2007] FamCA 1498: Brown J referred to *Re Mark* (2003) 31 Fam LR 162 at 170, but did not make any positive finding that the biological father was a parent.

102. All of these cases were considered by the Court in *Ellison* where a finding was made that the biological father was parent. Her Honour specifically dealt with each of the reasons why the Court in *Dudley v Chedi* declined to make a parentage order and found, by reference to the a number of rights in the Convention, namely Articles 2(2), 3(2), 5 and 18(1), that each of the reasons were overridden by the bests interests of the child in having a parentage order made.[52] In this regard, her Honour relied on the decision of the High Court in *G v H*:[53]

> in which it was said, with respect to a declaration of parentage, that such a finding may well be of the greatest significance to a child in establishing his or her lifetime identity. In this case, to the children, a declaration of parentage has the significance there stated.[54]

103. As discussed above, following her decision in *Ellison*[55] Justice Ryan had cause to reflect on the use of s 69VA to make such an order in *Mason & Mason* and 'stood out of the list' the application for a declaration as to parentage.[56] She did so on the basis of the finding in *Dudley & Chedi* that section 60HB of the Family Law Act provides that State law will govern the determination of parentage in relation to children born under surrogacy arrangements, and that State law will be recognised by Federal law. In *Dudley & Chedi* the court found that if s 60HB was triggered, state law must prevail and regard could not be had to the presumptions in the Family Law Act. Her Honours findings in relation to the importance of a finding of parentage and the reasons for doing so remain valid.

104. The divergence in decisions has led to different outcomes between decisions and even different outcomes within the same family. In *Dennis & Pradchapet*, Stevenson J found that the biological father was a parent of the child born to Ms Pradchapet. *Dudley & Chedi* dealt with the same man and a different surrogate woman and Watts J declined to make a finding that the man was the parent of the twins born to Ms Chedi.

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[52] [2012] FamCA 602 at [86] – [102].

[53] (1994) 181 CLR 387,(Brennan and McHugh JJ).

[54] [2012] FamCA 602 at [91].

[55] [2012] FamCA 602 at [68] where her Honour found that s 60HB of the Family Law Act only applies if the State Court has in fact made an order. If no such order has been made the court may have regard to the remaining presumptions.

[56] [2013] FamCA 424 at [34].

(b) Decisions of this Court

105. There are two reported decisions of this Court on this issue. The first, in 2009 *W and C* [2009] FCWA 61 did not relate to surrogacy but considered the issue of parentage for a child born to a woman who had agreed to co-parent with a gay couple, one of whom provided his sperm. The Court found that the Interpretation Act and the Artificial Conception Act – which apply for the purposes of all State laws - when read together meant that the man who provided his sperm was not a parent. This was despite the fact he was a biological parent within the meaning of s 3 of the *Human Reproductive Technology Act 1991* (WA).

106. The second decision in 2013, *Blake & Anor*[57] related to a step-parent application under the Adoption Act WA for adoption by the non biological father of twins born in India through surrogacy. In order to make the order for adoption it was necessary to determine if the biological father was a parent. Following analysis of the interaction of the various State Acts the Court concluded that the definition of parent in the Interpretation Act was inclusive and noted

> To suggest that Mr Marston is anything other than a parent or a father within its ordinary meaning is to turn a blind eye to the reality of "family" in present day society. It is also turning a blind eye to the reality of the situation presently before the Court. The objective facts surrounding the birth and the manner in which various agencies have treated those circumstances coupled with the fact of the genetic father acting in that role since the birth of the twins points to the use of an expanded definition of parent.
>
> To adopt any other interpretation would serve no purpose in addressing any public policy issues if, indeed, any exist. It would serve no purpose in enhancing the future welfare and best interests of these children.[58]

107. The issues for the Court are whether it is open to it and appropriate for it to make a finding in this case that the first applicant is the father of the subject children. The Commission submits that it appears both open and appropriate for such a finding to be made.

9.4 Relevance of finding as to parentage for present proceedings

108. On one view, it is not necessary for the Court to make a finding about who a child's parents are in order for an applicant to have standing to bring an application for parenting orders.

109. In each of the cases referred to above where a finding has not been made that a biological father was a parent, the Court has nevertheless considered the applicant to be a person with standing under s 65C of the Family Law Act (88

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[57] [2013] FCWA 1.

[58] *Blake & Anor* [2013] FCWA 1 at [51] – [52]

of the Family Court Act) to seek parenting orders on the basis that he was a person concerned with the care, welfare or development of the child.

110. However, such a finding will be relevant both to the prerequisite procedural steps to making an order, and to the reasoning process adopted by the Court in assessing what parenting orders to make.

111. As to procedural steps, if a court proposes to make a parenting order pursuant to which:

a. a child would not live with a parent, grandparent or other relative; or

b. no parent, grandparent or other relative would be allocated parental responsibility for the child,

then pursuant to s 92 of the Family Court Act, the court must not make the order unless the parties to the proceeding (which would relevantly include the surrogate mother) have attended a conference with a family consultant, or the court is satisfied that such a conference is unnecessary.

112. However, it appears that in each of the international surrogacy cases referred to above where no finding of parentage has been made, the court has been satisfied that it was appropriate to make the parenting order even though it appears the parties have not attended a conference with a family consultant.

113. As to reasoning process, the Court is required to treat the best interests of the child as the paramount consideration in deciding whether to make a particular parenting order (s 66A). This requires a consideration of the factors set out in s 66C, several of which turn on the identity of the parents of the child. For example a primary consideration is the benefit to the child of having a meaningful relationship with both of the child's parents (s 66C(2)(a)). These issues are dealt with in more detail in paragraphs 209 to 246 below.

114. It is therefore both natural and appropriate for the court to inquire into, and make findings about, the identity of a child's parents when an application for parenting orders is sought.

9.5 Countervailing considerations: public policy

115. As noted above, in four decisions given in June 2011, Watts J declined to find the intended father was a 'parent' for the purposes of the Family Law Act. In part, this was because it appeared that in two cases the surrogacy arrangements may have been unlawful under Queensland law, and in the other two cases the surrogacy arrangements may have been unlawful if they had taken place in New South Wales.

116. In *Dudley & Chedi* at [32], Watts J further questioned whether the parenting orders sought should be refused on public policy grounds. His Honour observed at [37] that the making of such orders:

> could be perceived in some sense to sanction acts which were illegal in Queensland at the relevant time, and which were against public policy.

117. Despite these considerations, Watts J granted the parenting orders in favour of the biological father and his wife as persons concerned with the care, welfare and development of the children. His Honour affirmed that the paramount consideration in his decision whether to grant the orders was the best interests of the twins. His Honour then referred a copy of his reasons for judgment in that matter and in *Findlay & Punyawong* to the Queensland DPP for consideration of whether a prosecution should be instituted.

118. Courts in other countries have hesitated before making parenting orders in international surrogacy cases where there has been a question about the legality of the surrogacy arrangement.[59] However, there is a real risk that in adopting such a course orders may not be made that are in the best interests of the child.

119. In *W: Re Adoption* (1998) 23 Fam LR 538, Windeyer J stated that in a decision to grant an application for adoption following a surrogacy arrangement the interests and welfare of the individual child are paramount. Whether to grant the order depends on the circumstances of the particular case. In considering the public policy question, Windeyer J said:

> It is not the role of the court to make its decisions in order to act as a warning for others not to enter into surrogacy arrangements. If that is to be done, it is to be done by legislative means.[60]

120. As mentioned above, this aspect of the decision in Dudley v Chedi was also considered by the Court in *Ellison* and dismissed in the best interests of child. Her Honours comments set out in paragraph [71] above are related specifically to this reason for refusal. Her Honour went on to say there;

> Lest it be overlooked, irrespective of how State law views the applicant's actions, the children have done nothing wrong.[61]

121. The Commission submits that in this case the Court should not refuse to either make a finding as to parentage or to make parenting orders that would otherwise be in the best interests of Pipah, only because the surrogacy arrangement may have been unlawful under State law. Such a course would have a significant risk of compromising the rights of Pipah who clearly has no culpability.

9.6 Countervailing considerations: alternative remedies?

122. One of the reasons given by Watts J in *Dudley & Chedi* for declining to make a finding that a biological father was a parent was that the applicant could seek

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[59] For example, see: *Re: X & Y* [2008] EWHC 3030 (Fam) at [24] - [29] and *Re K (Minors) (Foreign Surrogacy)* [2010] EWHC 1180 (Fam).

[60] *W: Re Adoption* (1998) 23 Fam LR 538 (Windeyer J), 543.

[61] [2012] FamCA 602 at [92].

a remedy through State adoption legislation. There is some doubt about whether that is so in the present matter.

123. This issue was raised in *Blake*.[62] As mentioned above, in that case, twins were born as a result of a surrogacy arrangement in India. The biological father, Mr Marston, and his defacto partner (the intended parents), applied to this Court of for a step-parent adoption order. They also sought orders dispensing with the need for consent by the birth mother.

124. In order to be able to obtain a step-parent order, the partner of the biological father had to establish the biological father was a father for the purposes of the Act. The court considered the various provisions of the Adoption Act, Surrogacy Act and Interpretation Act and determined that he was a father for the purposes of the Adoption Act. The evidence upon which the decision was based included birth certificates for the children that named Mr Marston as the father and a signed statement made to the Department of Immigration for the purposes of obtaining a visa for the twins and DNA evidence that did not meet the requirements of the Family Court Rules.

125. In the current situation, the first applicant is not named on Pipah's birth certificate however he too signed documents provided to the Department of Immigration acknowledging he was Pipah's father and that was relied on by the Department to grant Australian Citizenship to Pipah.

126. However, a further obstacle the first applicant may face in this regard is the nature of his criminal record, see s 38 and 39 of the Adoption Act, and the fact that such order requires the consent of the mother, unless there is a basis, as there was in *Blake*, for waiving such consent.

10 Identification of Pipah's legal parents

127. On the basis of the following analysis, the Commission submits the Court is able to make a finding that the first applicant and the respondent are Pipah's parents for the purposes of the Family Court Act. The Commission does not seek to make any submissions about any extra-territorial application of the Family Court Act, the application of State or Territory law or the law of Thailand to the issues in this proceeding, or how principles relating to conflicts of law should be applied if they are relevant.

128. There are a number of possible paths for the first applicant to be found a parent. In summary:

    a. in the absence of any other relevant statutory provision, the first applicant as a biological father would ordinarily be considered to be a parent within its ordinary meaning.

    b. based on the affidavit evidence of the respondent the deeming provision in s 7 of the Artificial Conception Act, (dealing with parentage following

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[62] [2013] FCWA 1.

an artificial fertilisation procedure) does not apply to the first applicant's situation;

c. the first applicant and the second applicant do not meet the criterion for a parentage order to transfer parentage from the respondent to them under the Surrogacy Act;

d. the presumption in s192 of the Family Court Act will apply to the first applicant's situation;

e. it is open and appropriate that the Court make an order pursuant to s 162 of the Family Court Act that the first applicant is a parent of Pipah.

10.1 Ordinary meaning of 'parent'

129. The primary meaning of the term 'parent' is the biological mother or father of a child.[63] Unless statute provides otherwise, this means that it ordinarily includes the donor of the sperm that results in the birth of a child following an artificial conception procedure.[64]

130. In some decisions, there has been a suggestion that a 'mere' sperm donor would not be a parent under ordinary principles, and that there must also be an intention to become a parent. For example, in *Re Mark*, Brown J said:

> Mr X provided his genetic material with the express intention of fathering (begetting) a child he would parent. He is not a sperm donor (known or anonymous) as that term is commonly understood. ...
>
> I am satisfied that the ordinary meaning of the word 'parent' encompasses a person in Mr X's position.[65]

131. It appears that this reasoning is influenced by the expectation of anonymous sperm donors (supported by State and Territory law) that they would not have responsibilities in relation to children born as a result of artificial conception procedures using their genetic material.

132. It may be that the ordinary meaning of the term 'parent' encompasses a broader range of people than just biological parents. The Full Court of the Federal Court held in *H v Minister for Immigration and Citizenship*[66] that the term 'parent' as used in s 16(2) of the *Australian Citizenship Act 2007* (Cth) was not limited to biological parents, and had its ordinary English meaning.

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[63] *B v J* [1996] FLC 92-716 at 83,614; *Tobin & Tobin* (1999) 24 Fam LR 635 at [40]-[42]; *Re Mark* (2003) 31 Fam LR 162 at 169.

[64] See *W v G* (1996) 20 Fam LR 49 at 62- 64 in relation to the position of a sperm donor.

[65] *Re Mark* (2003) 31 Fam LR 162 at 170 at [59]-[60]. Note that Brown J did not ultimately make a positive finding that Mr X was a parent for the purposes of the Family Law Act: see [81]. See also *Baker v Landon* (2010) 43 Fam LR 675 at [29]-[47].

[66] *H v Minister for Immigration and Citizenship* (2010) 188 FCR 393 at [47]-[48] and [127]-[131] (the Court).

The Court observed that the term is used today to signify a social relationship to another person and reflected a widespread contemporary awareness of families that include non-biological parent-child relationships.[67] The Court considered that being a parent within the ordinary meaning of the word was a question of fact and may depend on various factors, including social, legal and biological factors.[68]

133. The decision in *H* underpins the application of Migration and Citizenship Law.

(a) Migration law

134. The identification of the first applicant as a parent is consistent with the Commonwealth's policy in dealing with applications on behalf of children born of international surrogacy arrangements for either a Child (Subclass 101) visa or Citizenship by descent.

135. A Child (Subclass 101) visa is available for a person under 25 years old who is a dependent child of an Australian citizen.[69] Citizenship by descent is available to a person if they were born overseas to a parent who was, relevantly, an Australian citizen at the time of birth.[70]

136. Section 5(1) of the *Migration Act 1958* (Cth) provides the following definition of parent:

> ***parent***: without limiting who is a parent of a person for the purposes of this Act, someone is the parent of a person if the person is his or her child because of the definition of child in section 5CA.

137. Section 5CA(1) of the Migration Act provides:

(1) Without limiting who is a child of a person for the purposes of this Act, each of the following is the child of a person:

a. someone who is a child of the person within the meaning of the *Family Law Act 1975* (other than someone who is an adopted child of the person within the meaning of that Act);

b. someone who is an adopted child of the person within the meaning of this Act.

138. The Department of Immigration and Border Protection publishes instruction manuals addressed to officers administering migration law, in particular those officers who are ministerial delegates. This manuals are called the

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[67] *H v Minister for Immigration and Citizenship* (2010) 188 FCR 393 at [48] (the Court).

[68] *H v Minister for Immigration and Citizenship* (2010) 188 FCR 393 at [129]-[130] (the Court).

[69] Migration Regulations 1994 (Cth) Sch 2.

[70] *Australian Citizenship Act 2007*, section 16(2).

Procedures Advice Manual (PAM3) and Australian Citizenship Instructions (ACI3 and ACI19). PAM3 and the ACI have status as:

a. official departmental instructions within the Department's centralised departmental instructions system; and

b. 'operational instructions' as defined in the *Freedom of Information Act 1982* (Cth).

139. PAM3 provides advice to ministerial delegates charged with issuing visas about the nature of child-parent relationships. At [P A217.7], the instructions note:

> The Family Law Act 1975 (FLA) does not exhaustively define the relationships that are child-parent relationships. As a starting point, however, the concept ordinarily refers to the relationships between a child and each of its biological parents.

140. In relation to overseas surrogacy arrangements, PAM 3 provides at [P A217.22]:

> Some Australians choose to pursue surrogacy options outside of Australia. There may also be situations where foreign parties have a child through an overseas surrogacy arrangement, then seek to come to Australia as a family unit.
>
> It is important to note that, while migration law recognises certain children born under surrogacy arrangements (that is, those born under arrangements prescribed under Australian state/territory law as per the FLA), there is no such automatic recognition of overseas surrogacy arrangements.
>
> Consequently, for migration purposes, surrogacy arrangements undertaken outside of Australia must be assessed differently. Unlike surrogate children born in Australia (who are covered under the FLA and state and territory law), ultimately for surrogate children born overseas, it comes down to whether or not there is a biological link between the child and the commissioning parent.
>
> Therefore, if officers suspect a child has been born through a surrogacy arrangement, officers must confirm that there is a biological link between the child and the commissioning parent.

141. Advice is provided to departmental officers about assessing a biological link in general, and in the cases of specific countries where surrogacy arrangements are more common. Relevantly PAM3 provides at [P A217.23] and [P A217.24]:

> Usually, a biological link would be demonstrated by a DNA test or through advice from the specialist doctor who undertook the surrogacy procedure. ...
>
> Local laws in Thailand and India are currently (as of May 2011) in a state of flux. However, it is likely that a DNA test will be required for nearly all surrogacy cases in these countries in order to determine if there is a biological link between the child and the commissioning parent.

142. If one commissioning (or 'intended') parent is an Australian citizen and can demonstrate that he or she has a biological link to a child born as a result of an overseas surrogacy arrangement, that parent may sponsor the child for a Child (Subclass 101) visa (PAM3 [P A217.27]).

143. The provisions in *ACI19 – Determining if a parent-child relationship exists* are broader than in PAM3. Paragraph 19.2 of ACI19 provides

> Up until the decision of the Full Federal Court (FFC) in *H v Minister for Immigration and Citizenship* [2010] FCAFC 119 ('H')) on 15 September 2010, the department interpreted 'parent' in the Act as a biological parent, unless there was a contrary intention in a specific provision. For example, adoptive relationships are provided for in s13 and Subdivision AA of the Act. In 'H', the FFC held that in the absence of a definition of parent in the Act, the meaning of parent in section 16 (concerning citizenship by descent) is not limited to biological parents. The FFC held that it is sufficient that, at the time of birth, an Australian citizen is a parent as that word is understood in ordinary usage.
>
> Therefore citizenship by descent, until then available under the Act to children of Australian citizen biological parents, can also be accessed by children of Australian citizen nonbiological parents.
>
> Under policy, the decision of the FFC in relation to the meaning of the word parent in s16 also is applied to the word parent where it is used elsewhere in the Act.

144. These instructions have been relied on in this case to recognise the first applicant as Pipah and Gammy's biological parent and to grant Australian citizenship to them. To ensure consistency across Commonwealth legislation it is appropriate to adopt a meaning of parent that is consistent, to ensure greater protection of Pipah's rights to know who her parents are and to have her status as a child of the first applicant appropriately reflected.

145. This is particularly the case where there has been a finding by Commonwealth that the first applicant is a parent and the vesting, through Citizenship, of a significant set of rights and obligations on Pipah and Gammy under Australian law as a result.

10.2 The Artificial Conception Act

146. The Artificial Conception Act deems certain parental relationships to exist for the purposes of the Act. These provisions displace the ordinary meaning of 'parent' in certain circumstances. For the reasons set out below, it appears that these provisions do not have any application to the first applicant.

147. Section 7 of the Artificial Conception Act provides that where a woman becomes pregnant in consequence of an artificial fertilisation procedure and a man (not being the woman's husband (including de facto)) produced sperm used for the purposes of the procedure, then for the purposes of the law of the State, the man is 'conclusively presumed' not to have caused the pregnancy and is not the father of any child born as a result of the pregnancy.

148. Section 4 of the Artificial Conception Act specifically includes for the purposes of this section procedures that have been carried out outside Western Australia.

149. There is no explanatory memorandum for the Artificial Conception Act. Its history is set out in *W and C.*[71] It is based on a model bill which had been introduced in New South Wales, Victoria and South Australia.[72] In the second reading speech the Attorney-General noted

> The Bill seeks to ensure that a child who is born as a result of a fertilisation procedure using donor gametes will be the child of the couple who have consented to the procedure. The Bill covers fertilisation procedures which involve the donation of ova and/or semen. It is designed to-- recognise that the social father and/or mother of the child should be regarded in law as the legal parents of the child; and sever any legal relationship between the child and its genetic or biological parent or parents.[73]

150. The 'mischief' the Bill sought to address was the uncertainty about the legal status of the children born in such circumstances and the need to recognise that the social father and/or mother of the child should be regarded in law as the legal parents of the child.[74] The correlated 'mischief' was to ensure the people who donated genetic material to the couple intending to be parents were not legally liable.

151. In the second reading debate on 19 March 1985, Mr Mensaros notes the following:

> This Bill does not cater for all legal aspects directly related to artificial conception, which is the title of the Bill. No mention is made of the surrogate mother situation which, although fairly rare presently, will no doubt occur in larger numbers in the future. No mention is made of the frozen embryo situation which apparently also will occur more frequently. ... That is one shortcoming and one hopes the Government will not forget about it because it is always better to provide a legal background for situations which are being created even though they are just beginning to emerge. Through the practical experience gained one can amend legislation and eliminate loopholes or areas which have not been given attention.[75]

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[71] *W and C* [2009] FCWA 61 at [27] – [29].

[72] Western Australia, *Parliamentary Debates*, Legislative Council 27 February 1985, the Hon JM Berinson, Attorney-General, p 173.

[73] Western Australia, *Parliamentary Debates*, Legislative Council 27 February 1985, the Hon JM Berinson, Attorney-General, p 173.

[74] Western Australia, *Parliamentary Debates*, Legislative Council 27 February 1985, the Hon JM Berinson, Attorney-General, p 173.

[75] Western Australia, *Parliamentary Debates*, Legislative Assembly 19 March 1985, p 1048 (Member for Floreat).

152. These limitations were also noted by the NSW Parliament on the passing of its *Artificial Conception Act 1984* also based on the model Bill.[76]

153. The purpose of the deeming provision in s 5 of the Act was to ensure that a woman who sought to become pregnant through an artificial insemination procedure and have parental responsibility for the child was the legal mother of that child.[77]

154. The purpose of the deeming provision in s 7 of the Act was to ensure that the donors of sperm did not have liability for the child, for such things as child support.[78]

155. It therefore appears the Artificial Conception Act was not intended to cover surrogacy situations, that is, situations in which the woman who becomes pregnant does not intend to have any parental responsibility for the child and the man who provides sperm for the pregnancy does intend to be a parent of the child. This view is supported by the fact it was not amended when the Surrogacy Act was introduced. Unlike other jurisdictions such as Victoria.[79]

156. Pursuant to s 18 of the Interpretation Act, in the interpretation of a provision of a written law, a construction that would promote the purpose or object underlying the written law (whether that purpose or object is expressly stated in the written law or not) shall be preferred to a construction that would not promote that purpose or object.

157. Should it be considered that the Artificial Conception Act has application, that application is ambiguous and as such, regard may be had to the Convention to assist in construction of the Statute.

158. It is well settled that, as a general proposition, legislative provisions that are ambiguous are to be interpreted by reference to the presumption that

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[76] New South Wales, *Parliamentary Debates*, Legislative Council 28 February 1984, the Hon DP Landa, Attorney-General and Minister for Justice and Minister for Consumer Affairs, p 4682.

[77] Select Committee On The Human Reproductive Technology Act 1991, Parliament of Western Australia, Report (1999). Recommendation 12a. That gamete donors have no legal responsibilities for offspring and that any conflicting legislation, such as the Artificial Conception Act 1985 be amended accordingly.

[78] Select Committee On The Human Reproductive Technology Act 1991, Parliament of Western Australia, Report (1999). Recommendation 12a. That gamete donors have no legal responsibilities for offspring and that any conflicting legislation, such as the Artificial Conception Act 1985 be amended accordingly.

[79] Assisted Reproductive Treatment Bill 2008 (Victoria).

Parliament did not intend to violate Australia's international obligations.[80] This applies to State laws as well as Commonwealth laws.[81]

159. The requirement of ambiguity has been interpreted broadly; as Mason CJ and Deane J observed in *Teoh*:

> there are strong reasons for rejecting a narrow conception of ambiguity. If the language of the legislation is susceptible of a construction which is consistent with the terms of the international instrument and the obligations which it imposes on Australia, then that construction should prevail.[82]

160. The principle that legislation is to be construed so as to give effect to, and not to breach, Australia's international obligations assists in minimising the risk of legislation inadvertently causing Australia to breach international law. Any breach of international law occasioned by an Act of Parliament ought to be the result of a deliberate decision by Parliament. To this end, where a construction that is consistent with international law is open, that construction is to be preferred over a construction that is inconsistent with international law.[83]

161. As indicated above, there are a number of rights set out in the Convention that would favour a construction allowing a finding that the first applicant is a parent of Pipah. Such construction would be that the Artificial Conception Act does not apply to surrogacy situations.

162. In *W and C* [2009] FCWA 61, her Honour Crisford J when considering whether a gay man who provided sperm to a lesbian woman with whom he and his partner agreed to co-parent a child, was a parent under the Family Court Act found that. Her Honour found that the Interpretation Act and the Artificial Conception Act – which apply for the purposes of all State laws - when read together meant that he was not a parent. This was despite the fact he was a

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[80] This principle was first stated in the Commonwealth context in *Jumbunna Coal Mine No Liability v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 363. It has since been reaffirmed by the High Court on many occasions: see, eg, *Zachariassen v Commonwealth* (1917) 24 CLR 166 at 181 (Barton, Isaacs and Rich JJ); *Polites v Commonwealth* (1945) 70 CLR 60 at 68-69 (Latham CJ), 77 (Dixon J), 80-81 (Williams J); *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 38 (***Chu Kheng Lim***) (Brennan, Deane and Dawson JJ); *Dietrich v R* (1992) 177 CLR 292 at 306 (Mason CJ and McHugh J); *Minister for Immigration & Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287 (Mason CJ and Deane J) (***Teoh***); *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 384 (Gummow and Hayne JJ); *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 33 (McHugh and Gummow JJ); *Al-Kateb v Godwin* (2004) 219 CLR 562 (***Al-Kateb***); *Coleman v Power* (2004) 220 CLR 1 at 91 (Kirby J). Despite his stringent criticism of the rule, in *Al-Kateb* at [63]-[65] McHugh J acknowledged that "it is too well established to be repealed now by judicial decision".

[81] *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 384 (footnotes omitted, emphasis added). See also *Cornwell v R* (2007) 231 CLR 260 at 320-322, where Kirby J applied the principle in relation to the construction of a State Act.

[82] (1995) 183 CLR 273 at 287-8.

[83] *Teoh* (1995) 183 CLR 273 at 362 (Mason CJ and Deane J); *Chu Kheng Lim* (1992) 176 CLR 1 at 38 (Brennan, Deane and Dawson JJ).

biological parent within the meaning of s 3 of the *Human Reproductive Technology Act 1991* (WA).

163. In contrast to this decision in *Blake*, Her Honour Crisford J was dealing with a factual situation very similar to the current one, in that a children were born through an international surrogacy arrangement and the intended parents brought a step-parent application under the Adoption Act. To satisfy the requirements of being a step-parent, the Court had to find that the other parent was a legal parent of the child. Following a similar analysis to that in *W and C* and having regard to the decision in *Ellison* and the submissions of the Commission in that case, the Court ultimately concluded that he was a parent.

164. Her Honour found that:

> To adopt any other interpretation would serve no purpose in addressing any public policy issues, if ended, any exist. It would serve no purpose in enhancing the future welfare and best interests of these children. ...
>
> There is no valid reason to disadvantage children of surrogacy arrangements.[84]

165. While her Honour did not mention her earlier decision in *W and C*, in line with the above submissions, it could be distinguished on the different factual basis and the intention of the man providing the sperm. indeed, the differing decisions by her Honour reinforces the submission that the Artificial Conception was not intended to cover the situation where the man who provides his sperm does so with the view to 'begetting' a child that he will be a parent of and have parental responsibility for.

166. While the decision in *Blake* was made pursuant to an application under the Adoption Act, the absence of relevant definition in both the Adoption Act and the Family Court Act make the principles directly applicable to the Family Court Act.

10.3 The Surrogacy Act

167. On the evidence of both parties Pipah is the product of a surrogacy agreement between them. There is uncertainty about when and where the agreement was entered into and as to the exact terms of the agreement. There is therefore also uncertainty about whether the agreement falls within the *Surrogacy Act 2008* (WA) (Surrogacy Act). It appears that, subject to a finding that the amount of money paid to the respondent exceeded what could reasonable expenses as defined in s 6 of the Act, which seems likely, if the Surrogacy Act applies, the agreement was a 'surrogacy agreement for reward' within the meaning of that term in the Surrogacy Act and therefore falling within Division 2 of that Act.

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[84] *Blake & Anor* [2013]FCWA 1 at [52]– [53].

168. It is also the case that as the Respondent was under the age of 25 at the time any agreement was entered into and at the time the children were born the applicant's are not entitled to make an application for transfer of parentage.

169. The following submissions are made without an examination of the extraterritorial application of the Surrogacy Act or whether the agreement falls within the Surrogacy Act.

170. If the agreement fell within the Surrogacy Act, the Act would:

a. Make the agreement unenforceable except to a limited extent - s7(1).

b. In any event, allow an order under Part 3 – Order giving parental status to arranged parents – s7(2)

c. require that:

i. In deciding whether to make a particular decision concerning a parentage order or proposed parentage order about a child, the court must regard the best interests of the child as the paramount consideration.

ii. For the purposes of this Act it is presumed to be in the best interests of the child for the arranged parents to be the parents of the child, unless there is evidence to the contrary – s 13

d. Prevent the making of a 'parentage order' as defined in s 14 – s16(1)

e. Prevent the making of an order, under s 25(1), declaring the name by which the child is to be known.

171. Pursuant to s 14 'parentage order' is defined as:

> An order that the court made under this Part transferring the parentage of a child.

172. Section 12 of the Surrogacy Act identifies the purpose of Part 3 – Order giving parental status to arranged parents – as;

> to enable the court to transfer, from the birth parents to the arranged parents, the parentage of a child born under a surrogacy arrangement in certain circumstances.

173. One of the circumstances in which a parentage order cannot be made is when the surrogacy arrangement has not been approved in writing under s 17 by the Western Australian Reproductive Technology Council, as is the case here.

174. While this means that an order can not be made transferring parentage from the respondent to both the applicants, it does not purport to oust the jurisdiction of the Court under the Family Court Act to make an order recognising that the first applicant is a parent in addition to the respondent. Section 42 of the Surrogacy Act specifically deals with the application of the Family Court Act. It does not in any way restrict the jurisdiction of the Court.

10.4 Family Court Act

175. The Family Court Act does definition of parent is as follows:

> when used in Part 5 in relation to a child who has been adopted, means an adoptive parent of the child.

176. Pursuant to s 3 of the *Interpretation Act 1984* (WA) (Interpretation Act), the provisions of that Act apply to every written law, made at any time, unless:

> (a) express provision is made to the contrary; or
>
> (b) in the case of an Act, the intent and object of the Act or something in the subject or context of the Act is inconsistent with such application;

177. While the Family Court Act makes express provisions for a presumption of parentage in certain circumstances it does not contain an exhaustive definition. Nothing in the intent or object of the Act is inconsistent with the application of the Interpretation Act. In contrast, a specific object of Part 5 of the Family Court Act is to have the best interests of the child as the paramount consideration.

178. "Parent" is defined in the Interpretation Act as follows:

> parent includes the following —
>
> (a) a person who is a parent within the meaning of the *Artificial Conception Act 1985*;
>
> (b) a person who is an adoptive parent under the *Adoption Act 1994*;
>
> (c) a person who is a parent in a relationship of parent and child that arises because of a parentage order under the *Surrogacy Act 2008*;

179. It is a non-exhaustive definition and does not exclude a biological parent.

180. In respect of Pipah, genetic testing undertaken for the purpose of obtaining an Australian passport appears to have confirmed that the first Applicant is the biological father. This is accepted as sufficient proof of parentage for the purposes of citizenship and immigration legislation in Australia.

181. As submitted above, the primary meaning of the term 'parent' is the biological mother or father of a child.[85] Pursuant to general principles of statutory construction and the Interpretation Act,[86] the text of a provision should be given its ordinary meaning. Further, as required by the Vienna Convention, the terms of the Convention should be given their ordinary meaning.

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[85] *B v J* [1996] FLC 92-716 at 83,614; *Tobin & Tobin* (1999) 24 Fam LR 635 at [40]-[42]; *Re Mark* (2003) 31 Fam LR 162 at 169.

[86] *Interpretation Act 1984* (WA), s19.

182. If it is found that the first Applicant is the biological father of Pipah for the purposes of the Family Court Act then without the application of any other legislative provision he would be accepted to be a parent. However, the Family Court Act is subject to the provisions of the Artificial Conception Act and the Surrogacy Act as discussed above.

183. As submitted above, the Artificial Conception Act does not apply to the current circumstances. The Court is unable to make a 'parentage order' under the Surrogacy Act to transfer parentage from the respondent to the applicants so that Act is also not applicable.

(a) Parentage presumptions

184. There are parentage presumptions in ss 188 to 192 of the Family Court Act. These include presumptions arising from marriage, cohabitation, certain marriage certificates, court findings, and executed instruments acknowledging parentage. The presumptions in 188 -191 do not apply to the first applicant.

185. As Pipah's Thai birth certificate does not record the first applicant, neither s 216 nor s 190 would apply.

(i) Presumption of paternity arising from acknowledgments – s 192

186. The Commission submits it is open to the court to apply the presumption in s 192 to the first applicant. Section 192 relevantly provides as follows:

> If —
>
> (a) under the law of the Commonwealth ...a man has executed an instrument acknowledging that he is the father of a specified child; and
>
> (b) the instrument has not been annulled or otherwise set aside,
>
> the man is presumed to be the father of the child.

187. The court has held on a number of occasions that an affidavit sworn by the biological father of a child is an instrument for such purposes.[87] This court in *Blake v Anor* noted the submission of the Department of Child Protection

> that the Court is able to take into account any declaration of parentage made by Mr Marston under a law of the Commonwealth of Australia or the law of any Australian state or territory. The Department includes in this the documents provided to the Department of Immigration and Citizenship for the purpose of obtaining Certificates of Citizenship by descent for each of the twins and as set out in Mr Blake's affidavit. The documents signed by Mr Marston in support of the certificates of citizenship were not provided.[88]

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[87] *Al v JN* (2006) 204 FLR 160, *S & M* [2002] FMCAfam 217.

[88] *Blake & Anor* [2013] FCWA 1 at [38].

188. Without making a specific finding in relation to this submission, the court did find that the biological father in that case was a parent for the purposes of the Adoption Act.

189. As noted by the Court in *AI v JN*,

> The "instrument" referred to in s.69T of the Family Law Act is not a legislative or quasi-legislative instrument of the type discussed in *Azevedo v Secretary, Department of Primary Industries and Energy* (1992) 35 FCR 284 at pp.299-300 per French J, or *Australian Capital Equity Pty Ltd v Beale* (1993) 41 FCR 242. That much is clear from the terms of s.69T which talk of a "man", and not a legislature, governmental or public authority, executing the instrument. The "man" referred to is obviously the person claiming to be the father, in this case, the Applicant.[89]
>
> ...
>
> The answer to whether an affidavit is an instrument lies in the plain meaning of the word "instrument". The Oxford English Dictionary, 2nd Edn. (Oxford: Clarendon Press, 1989), Vol VII, p.1051 relevantly defines "instrument" as:
>
> Law. A formal legal document whereby a right is created or confirmed, or a fact recorded. (emphasis added)[90]

190. The Oxford English Dictionary on Historical Principles, 3rd Edn, 1992 Reprint. (Oxford: Oxford University Press, 1992), Vol I, p.1086 adds to the above definition of "instrument" as follows:

> ; a formal writing of any kind, as an agreement, deed, charter, or record, drawn up and executed in technical form.

191. On 12 January 2014 the first applicant executed a Form 118 Application for Citizenship by Descent for the purposes of making application for Australian citizenship for Pipah. That form, in Part I, specifically requires the person claiming to be the responsible parent of the child on whose behalf the application is being made to declare the following:

> I declare that I am the responsible parent of the applicant.
>
> I consent to the registration of Australian citizenship by descent for my child with my full acceptance of the consequences resulting form citizenship status under law

192. The Commission submits this document falls within the ordinary meaning of 'instrument' and as they were made under the Citizenship Act, a law of the Commonwealth, they are an instrument acknowledging that he is the father of a specified child. He is then presumed to be the father of the child.

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[89] *AI v JN* (2006) 204 FLR 160 [16].

[90] *AI v JN* (2006) 204 FLR 160 [21].

193. In this vein, in *Bateman v Kavan* the court accepted that a declaration lodged by a father for the registration of the birth of a child under the Registration of Births, Deaths and Marriages Act 1995 (NSW) would be such an instrument.[91]

194. No evidence has been put to rebut this presumption.

(b) Orders for the welfare of the child – s 162

195. In addition to the presumption under s 192, the Commission submits that it is open to the Court to utilise its jurisdiction in s 162 to make an order recognising the first applicant as Pipah's father and that this is in her best interest.

196. Section 162 of the Family Court provides:

> (1) In addition to the jurisdiction that a court has under this Part in relation to children, the court also has jurisdiction to make orders relating to the welfare of children.
>
> (2) In deciding whether to make an order under subsection (1) in relation to a child, a court must regard the best interests of the child as the paramount consideration.

197. Section 162 is in the same terms as s 67ZC of the Family Law Act but differs fundamentally in that it is not subject to the constraints of s 75 and 76 of the Constitution[92] as detailed in *Minister for Immigration and Multicultural and Indigenous Affairs v B.*[93]

198. Following the decision in *Department of Health and Community Services (NT) v JWB and SMB*[94] (Re Marion) the Family Law Act was amended to insert s 67ZC. The Explanatory Memorandum for that Bill stated

> The new section 67ZC provides the court with jurisdiction relating to the welfare of children in addition to the jurisdiction that the court has under Part VII in relation to children. This jurisdiction is similar to the parens patriae jurisdiction, explained by the High Court in *SMB and JWB; Secretary, Department of Health and Community Services* (Re Marion) (1992) 175 CLR 218.

199. The parens patriae jurisdiction was explained by the majority in *Re Marion* as follows:

> As already mentioned, the welfare jurisdiction conferred upon the Family Court is similar to the parens patriae jurisdiction. The history of that jurisdiction was discussed at some length by La Forest J in *Re Eve*. His Lordship pointed

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[91] *Bateman v Kavan* [2014] FCCA 2521 at [49]-[50]

[92] *Commonwealth of Australia Constitution Act 1900* s 75 and 76.

[93] (2004) 219 CLR 365.

[94] (1992) 175 CLR 218.

out that "[t]he Crown has an inherent jurisdiction to do what is for the benefit of the incompetent. Its limits (or scope) have not, and cannot, be defined." In *Wellesley v Duke of Beaufort*, Lord Eldon LC, speaking with reference to the jurisdiction of the Court of Chancery, said:

> [I]t belongs to the King, as parens patriae, having the care of those who are not able to take care of themselves, and is founded on the obvious necessity that the law should place somewhere the care of individuals who cannot take care of themselves, particularly in cases where it is clear that some care should be thrown round them.

When that case was taken on appeal to the House of Lords, Lord Redesdale noted:

> Lord Somers resembled the jurisdiction over infants, to the care which the court takes with respect to lunatics, and supposed that the jurisdiction devolved on the Crown, in the same way.

Lord Redesdale went on to say that the jurisdiction extended "as far as is necessary for protection and education".

To the same effect were the comments of Lord Manners who stated that "[i]t is... impossible to say what are the limits of that jurisdiction". The more contemporary descriptions of the parens patriae jurisdiction over infants invariably accept that in theory there is no limitation upon the jurisdiction. That is not to deny that the jurisdiction must be exercised in accordance with principle. However, as appears from the authorities discussed earlier, the jurisdiction has been exercised in modern times so as to permit medical operations on infants which result in sterilisation.[95]

200. The parens patriae jurisdiction has been found to form the basis for jurisdiction in Section 27(5) of the *Family Court Act 1975* (repealed)[96] where the High Court in *AMS v AIF* held:

> It may be taken that the jurisdiction conferred by s 27(5) of the 1975 WA Act "to make an order containing a provision for the ... welfare of, a child" is a jurisdiction similar to the parens patriae jurisdiction exercised by the Court of Chancery "without the formal incidents of one of the aspects of that jurisdiction, [namely] the jurisdiction to make a child a ward of court". It has been said that the parens patriae jurisdiction is "an unrestricted jurisdiction to do whatever is considered necessary for the welfare of a [child]" and that "[i]ts limits ... have not, and cannot, be defined". However, the jurisdiction is not in principle supervisory. Rather, it is a jurisdiction which, in general terms, is exercised when there is some risk to a child's welfare.
>
> If there is a risk to the welfare of a child, the parens patriae jurisdiction will support a great variety of orders and orders of great width. It has been said that it will support orders related to "categories of cases ... such as custody, care and control, protection of property, health problems, religious upbringing,

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[95] *Department of Health and Community Services (NT) v JWB and SMB* (1992) 175 CLR 218 [68- 70][references omitted].

[96] *AMS v AIF* [1999] HCA 26, (1999) 199 CLR 160, Gaudron J at [85-88] [references omitted].The majority not making findings in relation to this section.

> and protection against harmful associations" and that "[t]hat list is not exhaustive ... [for] the powers of [a] court in this particular jurisdiction have always been described as being of the widest nature."
>
> Notwithstanding that the welfare jurisdiction is similar to the parens patriae jurisdiction and that that jurisdiction will support a wide variety of orders and orders of great width, it would be reading too much into a statute simply conferring jurisdiction with respect to the welfare of a child to read it as authorising any order that would promote the child's welfare. That would be to convert a jurisdiction designed to protect against risk into a jurisdiction to supervise parents and guardians in the exercise of their rights and responsibilities.
>
> Moreover, it is impossible to read ss 27(5) and 36(a) of the 1975 WA Act as conferring a supervisory jurisdiction in a context in which the right and responsibility to make decisions as to the daily care and control of children is, by s 34, expressly conferred on a custodial parent. Were ss 27(5) and 36(a) construed to extend to any order that would promote the welfare of a child, those provisions would allow for the curtailment of a parent's rights not only as a parent, but as an individual, regardless of any risk to the child's welfare. In my view, neither s 27(5) nor s 36(a) of the 1975 WA Act can be read as authorising that course. Rather, they are to be read as authorising "orders" which, in the words of Sir John Pennycuick in In re X (A Minor) are "necessary for the welfare of a [child]", or, perhaps, more accurately, orders which are appropriate and adapted to avert a risk to the child's wellbeing.[97]

201. In this context, the parens patriae jurisdiction has been used in a number of state jurisdictions as a basis for orders to protect children from harmful publicity,[98] to permit a child to be known by her father's name,[99] to allow a 15 year-old girl to undergo a termination of pregnancy,[100] and to secure a blood transfusion for a child with leukaemia.[101]

202. When enacted in 1997 the Family Court Act contained s 162 which is in the same terms as s 67ZC. Section 162 therefore provides the court with a very wide jurisdiction to make orders. Even taking the jurisdiction to be limited in the manner specified by Gaudron J in *AMS v AIF* so as to require the orders to be 'necessary' or 'appropriate and adapted to avert a risk to the child's wellbeing', in the circumstances where the best interest of the child are the paramount consideration, such orders should include an order that a biological father be found to be a parent. This was at least contemplated by the court in *Blake & Anor* [2013] FCWA 1.

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[97] *AMS v AIF* [1999] HCA 26, (1999) 199 CLR 160 at [85] – [88]

[98] *P v P* (1985) 2 NSWLR 401.

[99] *G v P* [1977] VR 44.

[100] *K v Minister for Youth & Community Services* [1982] 1 NSWLR 311.

[101] *Rolands v Rolands* (1983) 9 Fam LR 320 (NSWSC).

10.5 Conclusion on parentage

203. As indicated above, Pipah has a number of rights under the Convention and with those rights comes obligation on State Parties. In resolving the issue as to whether parentage orders can and should be made, the Court may be guided by those rights and obligations.

204. In addition to the rights identified above, Article 2(2) of the Convention relevantly provides that State Parties shall take all appropriate measures to ensure that children are protected against all forms of discrimination on the basis of the status of their parents, legal guardians or family members. The Commission submits that children born of surrogacy arrangements should not be subjected to a disadvantage or detriment as a result of any difference in legal status conferred on their parents or guardians.

205. From the above analysis of the relevant State laws, the following conclusions can be drawn:

a. the Family Court Act does not relevantly define parent;

b. the Interpretation Act, which applies to all State laws, does include a definition but this does not include the intended father in a Surrogacy arrangement, however it is not exhaustive and therefore will not preclude a finding in relation to parentage under the Family Court Act;

c. the Surrogacy Act also does not define 'parent'. While it would, if applicable, prevent the 'transfer of parentage' under a 'parentage order' being made under that Act, it would not prevent a finding in relation to parentage under the Family Court Act;

d. the Artificial Conception Act was not intended to apply to surrogacy situations, and particularly where a man provides his sperm with the intention of being a father to the child and having parental responsibility, and likewise does not prevent an order under the Family Court Act declaring the intended father in a surrogacy arrangement is a parent;

e. in the absence of other relevant statutory provision, the meaning of 'parent' in the Family Court Act will take its ordinary meaning;

f. the question as to who is a parent within it ordinary meaning is a question of fact and may depend on various factors, including social, legal and biological factors;

g. as a starting point, the ordinary meaning of parent ordinarily refers to the relationships between a child and each of its biological parents;

h. the ordinary meaning of a parent will include a situation where a man provides genetic material with the express intention of fathering (begetting) a child;

i. a rebuttable presumption arises under s 192 of the Family Court Act on the basis of any instruments signed by the first applicant for the purpose

of obtaining citizenship for Pipah under the Australian Citizenship Act, being a law of the Commonwealth.

j. should the Court need to avert the risks to Pipah of not having the first applicant recognised as her parent, it is able to utilise the jurisdiction in s 162 of the Family Court Act.

206. On the above analysis, the surrogate mother would be considered a mother in the ordinary meaning of that term and is recognised under Thai law as the children's parent. This was relevant to the applications made on behalf of the children for visas, and it is relevant to the current application for parenting orders.

11 Parental Responsibility for Pipah

207. The Commission submits that if the Court is satisfied that the respondent and the first applicant are parents, it should make this finding, and that the question of what parenting orders are appropriate should be assessed in the light of this finding. However, if there is no finding that the first applicant is a parent, but that he is a person concerned with the care, welfare and development of Pipah, it would still be open to the Court to make parenting orders on that basis. There is no presumption that parenting orders should be made in favour of parents (as opposed to another person concerned with the care, welfare or development of the child).

208. In this case, assuming the first applicant is found to be a parent, there are competing claims for parental responsibility by Pipah's parents and as to where she should live. In either event the Court should be guided by the principles set out by the Full Court in *Goode v Goode.*[102]

11.1 Human rights issues arising

209. There are a number of articles of the Convention that deal with particular rights that involve the relationship between children and their parents or guardians. In addition to the rights in Article 7 – to know and be cared for by her parents and Article 8 – preservation of identity including family relations, identified above, the rights include the following:

a. States parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures (Article 3(2) and ss 66, 66A & 66C).

b. States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or

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[102] *Goode V Goode* (2006) 36 Fam LR 422 at [43], [47] and [65].

community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of their rights (Article 5 and s 66(2)(c)).

c. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence. (Article 9(1) and ss 66, 66A & 66C)

d. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests. (Article 9(3) and ss 66, 66A & 66C)

e. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern (Article 18(1)) s 66(1) and (2)).

f. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child (Article 19(1) and s 66C(2)(b)).

210. Subdivision 1 of Div 1 of Part 5 of the Family Court Act sets out how the best interests of the child are to be determined for the purposes of Part 5. As noted above, the Court must regard the best interests of the child as the paramount consideration in making a particular parenting order (s 66A). This reflects Australia's obligations under Art 3(1) of the Convention.

211. When making a parenting order, the court must apply a (rebuttable) presumption that it is in the best interests of the child for the child's parents to have equal shared parental responsibility (s 70A(1)).

212. Section 66C identifies that of the above rights, the two most important in determining what is in the child's best interests, are:

a. the benefit to the child of having a meaningful relationship with both of the child's parents – Articles 7(1),8(1) and 9(3) (s 66C(2)(a)); and

b. The need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence – Article 19 (s 66C(2)(b)).

213. Section 66 also provides, however, that in applying the above two considerations, the court is to give greater weight to the need to protect the child from harm or abuse (s 66C(3A)). This subsection was added to the Family Court Act in 2012 'to respond to reports received by the Commonwealth Government into the 2006 family law reforms and how the family law system deals with family violence. The reports indicate that the Family Court Act fails to adequately protect children and other family members from family violence and child abuse.'[103]

214. The Explanatory Memorandum for the Bill went on to say

> The safety of children is of critical importance and the Government takes the issue of addressing and responding to family violence and child abuse very seriously. The family law system must prioritise the safety of children to ensure the best interests of children are met. The Family Violence Bill sends a clear message that family violence and child abuse are unacceptable. These amendments address issues of significant community concern by strengthening the role of family courts, advisers and parents in preventing harm to children while continuing to support the concepts of shared parental responsibility and shared care, where this is safe for children.
>
> The key amendments made by the Family Violence Bill will:
>
> - prioritise the safety of children in parenting matters;
> - change the definitions of 'abuse' and 'family violence' to better capture harmful behaviour. [104]

215. For the purposes of the Family Court Act, 'abuse' in relation to a child means:

> (a) an assault, including a sexual assault, of the child; or
>
> (b) a person (the ***first person***) involving the child in a sexual activity with the first person or another person in which the child is used, directly or indirectly, as a sexual object by the first person or the other person, and where there is unequal power in the relationship between the child and the first person; or
>
> (c) causing the child to suffer serious psychological harm, including (but not limited to) when that harm is caused by the child being subjected to, or exposed to, family violence.[105]

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[103] Explanatory Memorandum, Family Court Amendment (Family Violence and Other Measures) Bill 2011 (WA), p 1.

[104] Explanatory Memorandum, Family Court Amendment (Family Violence and Other Measures) Bill 2011 (WA), p 2.

[105] Section 4.

(a) *Meaningful relationship with both of the parents - The right to know and be cared for by her parents*

216. As submitted above, for the purposes of Article 7, 'parent' includes, biological parents, birth parents and 'psychological parents'.[106] Given the period that the second applicant has been caring for Pipah, this will mean that Pipah has the right to know and be cared for by each of the parties.

217. There is no general presumption that orders be made in favour of parents, and s 88 (dealing with who may apply for a parenting order) does not prescribe a "hierarchy of applicants".[107] In *Aldridge v Keaton* (2009) 42 Fam LR 369 at [60], the Full Court referred with approval to comments of a previous Full Court in *Re Evelyn (No 2)* (1998) 23 Fam LR 73 that, while the fact of parenthood is an important and significant factor in deciding on an appropriate parenting order, there is no presumption in favour of a biological parent. Rather each case must be decided on its particular facts with the welfare of the child the paramount consideration. The Court stated:

> ... the Act in its present form enables a court dealing with a parenting application the flexibility to recognise and accommodate "new" forms of family, including families with same-sex parents, when making orders which are in the best interests of a child who is part of such a family. ...
>
> Children who have been brought up in these new forms of family may be children who fall within s 60H. ... More commonly, they may have been conceived as the result of a private agreement with a known donor and without formal consent documentation. These children's best interests are the paramount consideration to be taken into account, not the circumstances of their conception or the sex of their parents.
>
> In summary, in dealing with any parenting application by a person interested in the care, welfare or development of a child, a court will determine that application applying the relevant provisions of Part VII to determine whether making (or not making) a parenting order would be in the child's best interests.[108]

218. As outlined by the Court in *Stack v Searle*[109]

> It is now accepted that "meaningful" in this context is synonymous with "significant". Thus, to have a meaningful relationship is to have an important relationship or one of some consequence (*McCall & Clark* (2009) FLC 93-405).
>
> To be meaningful, a relationship "must be healthy, worthwhile and advantageous to the child" (*Loddington v Derringford* (No 2) [2008] FamCA

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[106] R Hodgkin and P Newell, *Implementation Handbook for the Convention on the Rights of The Child* (Fully Revised 3rd edition, 2007), p105-106.

[107] *Aldridge v Keaton* (2009) 42 Fam LR 369 at [83].

[108] *Aldridge v Keaton* (2009) 42 Fam LR 369 at [77]-[79].

[109] *Stack v Searle* [2015] FCWA 44.

925). It is one that is "important, significant and valuable to the child" (*Mazorski v Albright* (2007) 37 Fam LR 518).[110]

219. A corollary of this right is the right in Article 9 of the Convention, not to be separated from her parents unless it is necessary for the best interests of the child.

(b) Risk of harm – the right to protection from all forms of violence

220. The affidavit evidence of Victoria Jane Harrod sworn 29 October 2014 and JulieAnne Davis sworn 30 October 2014 is that Pipah is at risk of abuse within the terms of s 66C(2)(b). Ms Davis states that she has assessed that Pipah and children who attend the home of the first applicant are at risk of future sexual harm.[111] Ms Harrod states that the Department has so assessed that risk.[112]

221. On 25 June 2015, the Court ordered that a Clinical Psychologist, Mr Darren Cairns, be appointed single expert witness in these proceedings to inquire into and report on specified things including:

a. Taking into account the First Applicant's history of sexual offending:

(i) whether Pipah is at risk of harm from either the First or Second Applicants, if Pipah remains living with the First and Second Applicants and whether any risk of harm could be sufficiently reduced in the short, medium and long term with an appropriate Safety Plan;

(ii) in the event the answer to the previous question is that the risk can be sufficiently reduced with an appropriate safety plan, then any recommendations as to the nature and extent of the safety plan, taking into account the current proposal by the Department for Child Protection and Family Support to withdraw from involvement at the conclusion of a supervision order for the period of 12 months;

(iii) what is the capacity of the Second Applicant to act protectively in the interests of Pipah?

222. Mr Cairns' report identifies the risk to Pipah as low and expresses the opinion that the risk

> Has likely been sufficiently reduced without a safety plans, however, a safety plan would reduce the risk even further.

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[110] *Stack v Searle* [2015] FCWA 44 at [25]-[26].

[111] Affidavit of Ms Davis at [7].

[112] Affidavit of Ms Harrod at [8].

(i) Weighing the risk of harm against the right to have a meaningful relationship with both parents

223. In circumstances such as the current one, where there are competing rights and obligations and competing claims for parental responsibility the Court must have regard to Pipah's best interests as the paramount consideration.[113] The Committee on the Rights of the Child has provided practical guidance in its General Comment No. 14 on how this principle should be applied.[114] A number of key points arise from that guidance:

a. The concept of the child's best interests is aimed at ensuring both the full and effective enjoyment of all the rights recognized in the Convention and the holistic development of the child.115

b. In situations where preservation of the family environment conflicts with the need to protect the child from the risk of violence or abuse by parents the elements will have to be weighted against each other in order to find the solution that is in the best interests of the child or children, an exercise reflected in s66C(3A).116

c. In the best-interests assessment, one has to consider that the capacities of the child will evolve. Decision-makers should therefore consider measures that can be revised or adjusted accordingly, instead of making definitive and irreversible decisions. To do this, they should not only assess the physical, emotional, educational and other needs at the specific moment of the decision, but should also consider the possible scenarios of the child's development, and analyse them in the short and long term. In this context, decisions should assess continuity and stability of the child's present and future situation.[117]

224. As indicated above, Parliament has already determined that greater weight should be given to Pipah's right to protection from harm than her right to have a meaningful relationship with the first applicant. In this regard, the test remains as set out in *M v M*[118] where the full court of the High Court stated:

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[113] Section 66A Family Court Act.

[114] UN Committee on the Rights of the Child (CRC), *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration*, UN Doc CRC /C/GC/14, (2013) At: http://www.refworld.org/docid/51a84b5e4.html (viewed 1 October 2015).

[115] The Committee expects States to interpret development as a "holistic concept, embracing the child's physical, mental, spiritual, moral, psychological and social development" (General comment No. 5, para. 12).

[116] UN Committee on the Rights of the Child (CRC), *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration*, UN Doc CRC /C/GC/14, (2013) at [81]. At http://www.refworld.org/docid/51a84b5e4.html (viewed 1 October 2015).

[117] UN Committee on the Rights of the Child (CRC), *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration*, UN Doc CRC /C/GC/14, (2013) at [84]. At http://www.refworld.org/docid/51a84b5e4.html (viewed 1 October 2015).

[118] *M v M* (1988) 166 CLR 69.

> To achieve a proper balance [between the conflicting rights], the test is best expressed by saying that a court will not grant custody or access to a parent if that custody or access would expose the child to an unacceptable risk of sexual abuse.[119]

225. The Family Court of Australia applied *M v M* and the principles of unacceptable risk in *Murphy & Murphy* [2007] FamCA 795 and expanded upon it. In extra curial writing His Honour Fogarty J[120] re-examined the test in *M v M* and subsequent application of its principles and reiterated the desirability of applying the test it propounded. His Honour pointed out that the principle requires the court to ascertain the nature and degree of risk and make any orders that may be necessary to protect the child. These principles have been repeatedly applied by this court[121]

226. From the above cases and analysis it would appear the following principles would apply in this case:

a. Unless Pipah's welfare otherwise dictates, she is entitled to have a proper parental relationship with the first applicant.122

b. The fundamental issue is the protection of Pipah from unacceptable risk.123 This requires the court to ascertain:

   i. The nature of the risk, and

   ii. The degree of risk

   and then make the necessary orders to ensure she is adequately protected.[124]

c. That is, to determine what form the relationship with the first applicant will take. This will require an assessment of whether the circumstances of the case contain the necessary elements to justify limiting or terminating the relationship, temporarily or permanently.[125] If it is not possible for the objects of the legislation to be achieved and a meaningful relationship with both parents is not practicable consistently with the child's safety or welfare, a no parenting time order might be

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[119] *M v M* (1988) 166 CLR 69, p 78.

[120] John Fogarty AM, *Unacceptable risk -- A return to basics*, (2006) 20(3) Australian Journal of Family Law 249.

[121] See for example *Stack v Searle* [2015] FCWA 44.

[122] *Murphy & Murphy* [2007] FamCA 795 at [87].

[123] John Fogarty AM, *Unacceptable risk -- A return to basics*, (2006) 20(3) Australian Journal of Family Law 249, p 1.

[124] John Fogarty AM, *Unacceptable risk -- A return to basics*, (2006) 20(3) Australian Journal of Family Law 249, p 1.

[125] *Murphy & Murphy* [2007] FamCA 795 at [87].

unavoidable. This should be reserved for extreme cases.[126] There is no presumption or rule that even gross misbehaviour such as child sexual abuse disqualifies the offending parent.[127]

d. Limitations should only be to the extent necessary to avert or manage the assessed risks.[128]

e. There is an obligation on the Court to consider all possible forms of contact either as a supplement or substitute.[129]

227. In addition to the affidavit evidence of Victoria Jane Harrod sworn 29 October 2014 and JulieAnne Davis sworn 30 October 2014 the Court must have regard to the following documents to assess the nature and degree of risk:

a. The report of Mr Darin Cairns,

b. Documents produced by:

i. the Department of Corrective Services (WA),

ii. the Department of Child Protection and Family Support (WA) and

iii. the District Court of Western Australia.

(c) Additional considerations

228. While the Family Court Act gives primacy to the rights set out in s66C(2) it also recognises a number of other key rights in the additional considerations in s66C(3). These reflect the rights under Article 8 of the Convention, the right to preserve her identity including her family relations.

229. Additional considerations in determining what is in the child's best interests relevantly include:

a. the nature of the relationship of the child with each of its parents (s 66C(3)(b)(i)); and

b. the nature of the relationship of the child with other persons (including any grandparent or other relative of the child); (s 66C(3)(b)(ii)); and

c. the likely effect on the child of any separation from either of his or her parents (s 66C(3)(d)(i)).

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[126] *Murphy & Murphy* [2007] FamCA 795 at [59].

[127] *Murphy & Murphy* [2007] FamCA 795 at [86].

[128] *Murphy & Murphy* [2007] FamCA 795 at [58].

[129] *Murphy & Murphy* [2007] FamCA 795 at [75].

d. the likely effect on the child of any separation from any other child, or other person (including any grandparent or other relative of the child) (s 66C(3)(d)(ii)).

e. the practical difficulty and expense of a child spending time with and communicating with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis(s 66C(3)(e)).

230. In its General Comment 7 on Implementing child rights in early childhood, the Committee noted that early childhood is a critical period for realizing children's rights and in particular, is a period in which:

> (b) Young children form strong emotional attachments to their parents or other caregivers, from whom they seek and require nurturance, care, guidance and protection, in ways that are respectful of their individuality and growing capacities;
> (c) Young children establish their own important relationships with children of the same age, as well as with younger and older children. Through these relationships they learn to negotiate and coordinate shared activities, resolve conflicts, keep agreements and accept responsibility for others;
> (d) Young children actively make sense of the physical, social and cultural dimensions of the world they inhabit, learning progressively from their activities and their interactions with others, children as well as adults.[130]

(d) Nature of relationship with parents

231. Pipah has no ongoing relationship with the respondent other than that she developed as a result of being carried by her and in the first few weeks after she was born while she was in hospital.

232. The first applicant attests that Pipah has a close and loving relationship with him and the second applicant. He does not elaborate on this. Further information on the nature of this relationship is available in Mr Cairns report.

233. In response to the question of the possible short, medium and long term effects that being subject to the supervision of the Department for Child Protection and Family Support and subject to a "Safety Plan", in particular the "signs of safety" and "words and pictures" aspect of the plan will have on that relationship and her capacity to form healthy adult relationships Mr Cairns' raises a concern about the effects of the signs of safety and words and pictures. He suggests an alternative to achieve the desired result.

(e) Nature of relationship with other members of her family

234. Article 8 of the Convention requires that:

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[130] UN Committee on the Rights of the Child (CRC), *General comment No. 7 (2005) Implementing child rights in early childhood*, UN Doc CRC/C/GC/7/Rev.1 (2005) at [6]. At http://www.refworld.org/docid/460bc5a62.html (viewed 1 October 2015).

States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.[131]

235. As Hodgkin and Newell point out, 'the child's identity means more than just knowing who one's parents are'.[132] As submitted by Hodgkin and Newell, siblings and grandparents can be as, or more, important to her identity than her parents.[133] For Pipah, there are a number of aspects to her family relations that need to be considered. On the evidence it appears she has developed a relationship with both of the first and second applicant's immediate and extended family, particularly the first applicant's older children. She has the right to preserve these relationships.

236. However, one critical family relationship which she has, to date, been unable to preserve is that with her twin, Gammy.

(i) Special relationship with her twin

237. The evidence indicates that Pipah and Gammy are both biological and gestational twins.[134] It well recognised that twins share a bond that is unique and exceptional.[135] The relationship between twins have 'unique characteristics, many evident since birth and many more that exist before birth'.[136] They are more likely than their non-twin siblings to be 'attached' to their twin in the sense that the bond they share is one similar to an infant-caregiver relationship characterized by: use for 'proximity maintenance',

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[131] Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

[132] R Hodgkin and P Newell, *Implementation Handbook for the Convention on the Rights of The Child* (Fully Revised 3rd edition, 2007), p 114.

[133] R Hodgkin and P Newell, *Implementation Handbook for the Convention on the Rights of The Child* (Fully Revised 3rd edition, 2007), p114.

[134] Affidavits of the applicants and the respondent.

[135] N LSegal, *Entwined Lives: Twins and What they tell us about Human Behaviour* (1999). C Fraley and C M Tancredy, 'Twin and Sibling Attachment in a Nationally Representative Sample' (2012) 38(3), *Personality and Social Psychology Bulletin* 2012. This special relationship has been recognised by courts in the United States of America in wrongful death suits. Brynne D McBride, 'NOTE: And then there was one: Defining a "Special Relationship" in Iowa's Wrongful-Death Statute for the Relief of Twins' (2003) 88 *Iowa Law Review* 471.

The Commission notes the findings of the Full Court in *McGregor and McGregor* (2012) FLC 93-507 and has provided a copy of the social science papers relied on herein to the expert witnesses.

[136] K Fortuna, I Goldner and A Knafo, 'Twin relationships: A comparison across monozygotic twins, dizygotic twins, and nontwin siblings in early childhood' (2010) 1(3 -4), *Family Science*, 205-211. Brynne D McBride, NOTE: And then there was one: Defining a "Special Relationship" in Iowa's Wrongful-Death Statute for the Relief of Twins, p 12.

separation distress, serving as a 'safe haven' and use as 'secure base'.[137] This is the case for non-identical twins as well as identical twins.[138]

238. On this basis, Pipah and Gammy have, or have the potential to have, a relationship that will be very significant to them throughout their lives, more significant than the relationships with their other siblings, and potentially as significant as that with their individual caregivers.

239. The evidence suggests that following their birth, they spent a short period in hospital together before Pipah was removed to Australia. There has been no contact between them since then, a period of over 20 months. As indicated above, [230] in its guidance material the Committee has made it plain how critical early childhood is for a child's development. That no steps have been taken to preserve this relationship to date is likely in breach of their individual rights under the Convention.

240. The applicants seek some orders in relation to the development of this relationship, namely:

    a. Monthly exchange of photographs, the sharing of pictures or other works of art completed by them and the exchange of birthday cards and small gifts - by mail,
    b. That the Respondent take certain steps to assist Gammy to be familiar with and speak the English language, and
    c. Monthly skype calls between the twins once they turn 5.

241. Given the critical nature of the years before the twins turn 5 it is unlikely the above arrangements would be sufficient to ensure Pipah's right to develop her relationship with Gammy.

242. Further, given Pipah's right to develop her relationship with the respondent, it is likely that her familiarity with and ability to speak the Thai language would assist her to develop both her relationship with Gammy and the respondent.

(f) Likely effect on the child of any separation from either of his or her parents

243. Continued separation of Pipah from the respondent at this young age will likely detract from her right to develop and preserve a relationship with the respondent and through her, with Gammy.

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[137] C Fraley and C M Tancredy, 'Twin and Sibling Attachment in a Nationally Representative Sample' (2012) 38(3), *Personality and Social Psychology Bulletin* 2012, p 308-309.

[138] C Fraley and C M Tancredy, 'Twin and Sibling Attachment in a Nationally Representative Sample' (2012) 38(3), *Personality and Social Psychology Bulletin*, p 310-314. K Fortuna, I Goldner and A Knafo, 'Twin relationships: A comparison across monozygotic twins, dizygotic twins, and nontwin siblings in early childhood' (2010) Vol 1, Nos 3 -4, *Family Science*, 205-2011.

244. Separation from the second applicant at this stage is likely to have a significant impact on Pipah given that the second applicant has been her Primary carer since returning to Australia.

(g) Likely effect on the child of any separation from any other child, or other person including any grandparent or other relative of the child

245. As submitted above, the relationship with Gammy is critical for Pipah, the continued separation from him is likely to have a significant impact on her ability to develop and preserve a relationship with him.

246. A separation from her half siblings and grandmother in Australia will likely be negative. It is relevant there is a big age difference between the children and that two of them no longer live with the applicants.

11.2 Views of the surrogate mother

247. As indicated above, the consent of the surrogate mother is necessary before transferring parentage, under the Surrogacy Act, to the intended parents. It is recognised that the bond between the surrogate mother and the child she carries may mean that when the time comes for her to give up the child she may not be able to.[139] It is for this reason that surrogacy agreements under the Surrogacy Act (WA), and all other states, are not enforceable, save to a limited extent.[140] As the Explanatory Memorandum for the Surrogacy Bill 2007 states

> A surrogacy arrangement is not enforceable. This means that a birth mother would not be forced to give a child to the arranged parents solely because this was agreed as part of a surrogacy arrangement.

248. In each case it will be the best interests of the child that will determine the orders that will be made.[141]

249. In this case, the surrogate mother seeks orders that she have sole parental responsibility for Pipah and that Pipah be returned to Thailand to live with her and Gammy and the other members of her family.

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[139] Victorian Law Reform Commission, *Assisted Reproductive Technology & Adoption Final Report* (2007) p 187; V Jadva, C Murray, E Lycett, F MacCallum and S Golombok, 'Surrogacy: The Experiences of Surrogate Mothers' (2003) 18(10) *Human Reproduction*, 2196; S Imrie, V Jadva 'The long-term experiences of surrogates: relationships and contact with surrogacy families in genetic and gestational surrogacy arrangements' (2014) 29(4) *Reproductive BioMedicine Online* 424–435. At http://www.sciencedirect.com/science/article/pii/S1472648314003538#bib0050 (viewed 1 October 2015).

[140] Surrogacy Bill 2007(WA), clause 7; Standing committee on legislation, Parliament of Western Australia, *Report 12 in relation to the Surrogacy Bill 2007* (2007), Recommendation 3 and 4.

[141] Surrogacy Act ss 21, 23 and 31; Victorian Law Reform Commission, *Assisted Reproductive Technology & Adoption Final Report* (2007) p 185.

250. The respondent is represented and has filed an affidavit detailing the circumstances by which she came to agree to have the children and the events during and after their birth.[142] She deposes that:

- She was born on 20 July 1993 and at the time of entering into the Surrogacy Agreement and the birth of the children was under the age of 21
- She does not read or speak English and left school when she was 13.
- She has two children other than Gammy and Pipah, the first of which was born when she was 14. Both children live with her and her husband and grandmother.
- In February 2013 she was living in Sriracha with her grandmother and children and her boyfriend [who she later married]. At the time her boyfriend and she had debt which they were not able to pay. During 2013 in response to an advertisement she contacted the Surrogacy Agency and spoke to someone called Joy. She told Joy her date of birth and was told that she needed to be more than 20 years old. The agency suggested she use the identity of another person who was over the age of 20, which she did. She did not know any other surrogates and was not told much about what would happen. She was told she would become pregnant.
- She was told that after the baby was born, the baby would be given to the parents who had contracted for it. She was under the belief that she would have no contact with the child or children once they were born.
- In May 2013 she visited a doctor and became pregnant. After her pregnancy was confirmed, she received a written agreement from the Surrogacy Agency. The agency did not explain the terms of the Surrogacy Agreement to her, other than to tell her that if she signed it she was agreeing to hand the baby she was having to the other couple. This copy of the Surrogacy Agreement was signed in the name of Thinanoy Jiraporn. The Surrogacy Agreement was written in the Thai language and she was able to read it.
- She did not receive legal advice before she signed the Surrogacy Agreement.
- She was not offered and did not have any counselling either before she became pregnant or during the pregnancy.
- She returned the agreement to the agency but was not given a copy of it. She did not see the Surrogacy Agreement again until after the children were born.
- In October 2013 she visited the doctor. The doctor told her there was a risk that one of the twins had Down syndrome.

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[142] Affidavit of respondent sworn 22 February 2015.

- She understands the doctor she saw notified the Surrogacy Agency that one of the twins may have a disability. She was contacted by Joy from the Surrogacy Agency in October 2013 [6 months into the pregnancy]. Joy told her the parents had asked that she have an abortion of the disabled baby. She was not agreeable to doing that and said so.

- In December 2013 she went into labour and the twins were born at Vachira Phayaban Hospital in Bangkok on 23 December 2013. The second applicant asked her to register Pipah as "Pipah Li" when she registered her birth.

- Neither applicant asked to name Gammy, so she named him.

- The twins were born around 4 weeks premature. They both required medical treatment after their birth. She stayed at the hospital for some days and then went home, but visited the children often.

- On the first occasion the applicants visited the hospital she had to give permission for them to see the children. She told the doctors that the children had been born under a surrogacy agreement and after that the applicants were able to visit without her permission.

- She and her family were the only people who visited Gammy. Gammy was particularly unwell. He remained in hospital until around May 2014 when he was moved to a hospital closer to her home.

- She understands the applicants have suggested Gammy was moved from the hospital he was born in to live in her "village". Gammy remained in the Vachira Phayaban Hospital until he was around 7 months old, when he moved to the local hospital in Sriracha, which is closer to where she lives.

- After the children were born she was given a second Surrogacy Agreement to sign by the Surrogacy Agency. She signed this Surrogacy Agreement in January 2014.

- On 3 February 2014 she was asked by the Surrogacy Agency to go to the Australian Embassy and was told that she would be paid the sum of 70,000 Bhat when she went there. She understood she was signing documents necessary for Gammy to be given Australian citizenship. She did not understand that she was signing a document that enabled Pipah to travel out of Thailand. She did not receive any money when she attended the Australian Embassy on this day.

- When she attended at the Australian Embassy, she met with a woman who spoke Thai and had her sign the documents. She do not recall the woman asking her or telling her anything else about the process.

- The surrogacy arrangement provided for her to be paid the sum of 510,000 Bhat. To date, she has received a total of 430,000 Bhat. She is still owed 80,000 Bhat by the Surrogacy Agency.

- On 14 January 2015 and with the assistance of Hands Across the Water, she made an application for Gammy to be granted Australian Citizenship

by descent. On 16 January 2015 she was advised that Gammy had been granted Australian citizenship by descent.

- Gammy and Pipah's original birth certificates record her name as Kwanrudee MINJAROEN. This was her name at the time the children were born. When she married Nid, she changed her name to Pattaramon and took Nid's surname of CHANBUA.

- On 11 February 2014 (when Nid and she married), she arranged to change her name legally. This has now been registered as part of the children's birth registration.

- Shortly after the first stories appeared in the newspapers, she received a phone call from Joy from the Surrogacy Agency. She received a further payment of 10,000 Bhat. She was also contacted by the charity group, Hands Across the Water. She was asked if she required any assistance and she spoke to them about an operation Gammy needed but she could not afford. Hands Across the Water assisted her to arrange the treatment. She understands there is a fund set up by Hands Across the Water to provide for Gammy's medical needs as he gets older. She does not know the details of the fund and speaks to one of the charity's workers about the fund if there are any expenses she needs assistance with.

- She receives a payment of 15,000 Bhat per month from Hands Across the Water. These funds are deposited to her bank account and are used to meet Gammy's ongoing expenses, including his medical expenses. Hands Across the Water own the property in which her family live.

- She was not told anything about the applicants other than that they were a couple from Australia. She was not told that the first applicant had convictions in Australia for sexual offending. She found out about the first applicant's offending history in May, June or July 2014. This was after Gammy had come home to her care. She was told by a newspaper reporter.

- When she found out about the first applicant's history she was very worried for Pipah. She was missing her and wished her to come back to her care.

- She has had the first applicant's sexual offending history explained to her. She is worried about Pipah as she gets older. She does not know if anyone is going to be able to watch Pipah as she gets older and she is worried that Pipah will be at risk.

- The agency told her that the applicants had said that Gammy should be put in an orphanage. Antonio from the agency told her words to the effect of "thank you for taking care of Gammy". Joy told her that if she could not care for Gammy, then he could be put in an institution in Thailand. Joy later told her that if she did not want to care for Gammy, then the applicants would take him back to Australia and put him in an institution there. These conversations took place after the children were born.

- When she found out Gammy was disabled, she made a decision to keep him. He was not born when she decided to do so.

- If Pipah returned to live with her she would be cared for by her, along with her other children.

251. The respondent does not deny that in entering into the agreement she understood that she would hand over the children when they were born and have no further contact with them. When she was asked to abort Gammy she refused to do so and before he was born, decided to keep Gammy with her. She has since cared for Gammy with the assistance of the Hands Across the Water charity and her grandmother.

252. She agrees she consented to the applicants taking Pipah to Australia. However, she has now learned of the first applicant's criminal history and is concerned for Pipah's wellbeing. It is in this context she seeks to have Pipah returned. A significant point in this regard is that Gammy has remained with her since birth.

11.3 Conclusion on parental responsibility and where Pipah will live

253. Any decision on parental responsibility will hinge on the nature and level of risk that the first applicant will pose to Pipah and any decision in relation to that will need to take into account the evidence identified above.

12 Changing of Pipah's name

12.1 Human rights issues arising

254. As submitted above, Article 7 and Article 8 of the Convention outline rights in relation to a name and to preservation of identity which includes name and family relations.

255. A child's name is central to its identity. As summarised by Dion in *Name, Identity, Self*[143]:

> Taken all together, the several lines of research reviewed above strongly suggest the existence of psychological connections among names, identity, and self.[143]
>
> The contention that names are linked to identity is hardly a new idea, even for psychologists. For some years now, psychologists have been proposing that the name given a person influences the identity she/he develops. In a classic treatise on the psychology of ego-involvement, Muzafer Sherif and Hadley Cantril (1947) stated a very similar hypothesis and considered some of its psychological implications. For example, they suggested that during infancy, the child "learns ... its name and around this name . . . gathers many characteristics that define. . . psychological identity" (Sherif & Cantril, 1947, p.

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[143] K Dion, Name, Identity, Self (1983) 31(4) *Names,* 255.

199). These authors also reported a number of interesting observations testifying to the apparent importance individuals and societies attach to names (see, for example, pp. 352- 356). In a similar vein, the personality theorist Gordon Allport (1961) contended that one's name is the focal point upon which self-identity is organized over the course of an individual's life. More recently, in the context of a psychological theory of uniqueness, C. R. Snyder and Howard Fromkin (1980) proposed that names, along with commodities as well as attitudes and beliefs, are "uniqueness attributes" through which individuals may differentiate themselves from other persons.[144]

12.2 Factors to be taken into account

256. Both the Family Court of Australia and this Court[145] have considered the issue of the change of a child's surname in the context of separation and divorce, neither appear to have considered it in the context of surrogacy. While there had been some uncertainty about the application of the best interest principle. It is now settled law that:

> If the paramountcy principle was not decisive, it was certainly relevant and needed to be given careful consideration.[146]

257. The courts have nominated a number of factors to be taken into consideration in deciding whether to change the surname of a child. In *Flanagan* after noting that the most significant feature that appears from those cases is that they turn on their individual facts[147] the court summarised the relevant cases.[148] It follows from these decisions that there are 12 factors to be taken into account. The relevant factors, modified to take into account the current circumstances can be summarised as follows:

258. The welfare of the child is the paramount consideration.

a. The short and long term effects of:

i. any change in the Pipah's surname, and

ii. leaving her name as it is.

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[144] K Dion, Name, Identity, Self (1983) Volume 31, Issue 4 *Names*, 245- 246. While this research may be a little dated, the paper has been cited on numerous occasions, most recently in 2014 Y Luo, Y Shi, H Cai, M Wu, H Song, 'Liking for name predicts happiness: A behavioral genetic analysis, Personality and Individual Differences', (2014) *Journal of Experimental Social Psychology* Volume 69, Pages 156-161, http://www.sciencedirect.com/science/article/pii/S0191886914003092 (Viewed 30 September 2015) and 2015 in T Keller and J Franzak 'When Names and Schools Collide: Critically Analyzing Depictions of Culturally and Linguistically Diverse Children Negotiating Their Names in Picture Books' (2015), *Children's Literature in Education*, p 1 http://link.springer.com/article/10.1007%2Fs10583-015-9260-4# (viewed 30 September 2015).

[145] *B and D* [2004] FCWA 153, *U and E* [2005] FCWA 21, *Stack and Searle* [2015] FCWA 44.

[146] *Flanagan v Handcock* [2000] FamCA 150 at [42].

[147] *Flanagan v Handcock* [2000] FamCA 150 at [35].

[148] *Flanagan v Handcock* [2000] FamCA 150 at [36] – [38].

b. Any embarrassment likely to be experienced by Pipah if her name is different from that of the parent with whom she lives.

c. Any confusion of identity which may arise for Pipah if her name is changed or is not changed.

d. The effect which any change in surname may have on the relationship between Pipah and her parents.

e. The contact that the parents have had and are likely to have in the future with Pipah.

f. The degree of identification that Pipah now has with each parent.

g. The degree of identification which Pipah has and will have with the other children in her parent's families.

12.3 Application of the factors in this case

259. The following appear to be the relevant facts in this matter:

a. The name on Pipah's birth certificate and passport is Pipah Li Minjaroen.
b. The names 'Pipah' and 'Li' were recorded at the request of the applicants.
c. Minjaroen was the respondent's name at the time of the registration of Pipah's birth.
d. Minjaroen is also Gammy's surname.
e. The respondent's surname is now Chanbua.
f. The applicants seek to remove Minjaroen and insert Farnell.
g. It appears from the evidence the second applicant uses her family name and does not use her married name.

260. Removing Minjaroen will remove that connection with Gammy and to a lesser extent, the respondent. Not changing Pipah's name will mean that she will have the same name as at least one member of her family if she lives in Thailand.

261. Adding Farnell will identify her with her biological father and half-siblings. It will also mean she has the same name as some of the occupants of her household if she remains in Australia. It is not likely to create any greater connection with the second respondent who currently has day to day care of Pipah and if she remained in Australia would continue to be her primary carer.

262. A further factor to be considered in the current context is the negative association with the first applicant's name given his criminal history and the notoriety of his involvement in Gammy being left in Thailand. As the first applicant attests, the negative media attention this case and the matter generally has received and continues to receive has had a detrimental impact on his business. Changing Pipah's name to Farnell will reduce the ability for her to disassociate with the negative perceptions and avoid media and other scrutiny.

263. In those circumstances, and given the significance of her relationship with her twin, the impact a change of name will have on her relationship with Gammy would carry significant weight. Given the different names in either of her parent's houses and her young age, the other factors above are of lesser significance. It is likely that Pipah's best interest will be served by not changing her name.

Date: 4 November 2015

for Penelope Giles

Counsel for the Australian Human Rights Commission

Schedule 1

Surrogacy Maters – Best Practice Principles

a. An Independent Children's Lawyer is appointed to represent the child's interests.
b. Affidavit evidence of the applicant(s) and the birth mother comprising:
    i. their personal circumstances, in particular the circumstances at the time the procedure took place;
    ii. their circumstances leading up to the surrogacy agreement and of the procedure itself;
    iii. the circumstances after the birth of the child and subsequent arrangements for the care of the child.
c. Independent evidence regarding the identification of the child including:
    i. the surrogacy contract/agreement entered into between the persons seeking the parenting orders and the clinic and/or surrogate mother;
    ii. a certified copy of the child's birth certificate, and, if not in English, a translation accompanied by an affidavit of the person making the translation verifying that it is a correct translation and setting out the translator's full name, address and qualifications;
    iii. parentage testing in accordance with the Regulations to ascertain whether that the child is the biological child of the person/s seeking the parenting orders;
    iv. evidence of Australian citizenship of the child if citizenship has been granted.
d. Independent evidence with respect to the surrogate birth mother. This may be obtained by a family consultant or an independent lawyer, including:
    i. confirmation that legal advice and counselling were provided to the surrogate mother prior to entering into the surrogacy arrangement;
    ii. confirmation that the surrogacy arrangement was entered into before the child was conceived;
    iii. confirmation that the surrogacy arrangement was made with the informed consent of the surrogate mother;
    iv. evidence after the birth of the child of the surrogate mother's views about the orders sought and what relationship, if any, she proposes with the child;
    v. if the child has been granted a visa to enter Australia, evidence of participation by the surrogate mother in an interview with immigration officials prior to the grant of the visa, and the views expressed by her during this interview.
e. The preparation of a Family Report which addresses:
    i. the nature of the child's relationship with the persons seeking parenting orders;
    ii. the effect on the child of changing their circumstances;
    iii. an assessment of the persons seeking the parenting orders capacity and commitment to the long-term welfare of the child;

iv. the persons seeking the parenting orders' capacity to promote the child's connection to their country of birth's culture including but not limited to their birth mother;
v. advice in relation to issues which may arise concerning the child's identity and how those issues are best managed;
vi. the views of the birth mother, in particular her consent to the proposed parenting orders, and other matters with respect to the birth mother referred to above.

f. Other evidence including:
i. evidence of the legal regime in the overseas jurisdiction in which the procedure took place with respect to surrogacy arrangements;
ii. evidence of the legal regime in the overseas jurisdiction in which the procedure took place with respect to the rights of the birth mother, and if applicable, of her husband or de facto partner.[149]

[149] *Ellison v Karnchanit* [2012] FamCA 602 at [133]-[139].