FAMILY COURT OF AUSTRALIA

MASON & MASON AND ANOR ***[2013] FamCA 424***

FAMILY LAW – STANDING – Overseas surrogacy arrangement - Where DNA parentage testing is accepted by Australian authorities as sufficient to establish citizenship by descent – Where the children have resided since birth with the applicant and respondent - Standing pursuant to s 65(c).

FAMILY LAW – CHILDREN – Where the applicant is the children's biological father – Whether the biological father is a parent of the children for the purposes of the *Family law Act 1975* (Cth) – Consideration of ss 60H and 60HB of the *Family Law Act 1975* (Cth) – Whether the effect of later specific provisions (60H and 60HB) prohibits reliance on earlier general provisions (general presumptions) – Where the application of the *generalia specialibus* rule of statutory construction operates so that the specific provision must be followed and the general provisions are displaced – Where s 60H and 60HB evinces an intention by Parliament that the parentage of children born as a result of artificial conception procedures or under surrogacy arrangements will be determined by reference to those provisions and not the general parentage provisions- HELD – Declaration of parentage is not permitted to be made

FAMILY LAW – CHILDREN – Parenting orders – Where neither the birth mother nor the biological mother seeks to have a role in the children's lives – Where the Family Consultant's evidence that it is in the best interests of the children to formalise the current parenting arrangements is accepted – HELD - It is in the children's best interests for the applicant and respondent to have equal shared parental responsibility and the children live with them

Adoption Act 2000 (NSW)
Family Law Act 1975 (Cth)
Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008
Family Law Regulations 1984 (Cth)
Status of Children Act 1996 (NSW)
Surrogacy Act 2010 (NSW)

Aldridge v Keaton (2009) 42 Fam LR 369
Associated Minerals Consolidated Ltd v Wyong Shire Council (1974) 4 ALR 353
Commissioner of Taxation v Hornibrook (2006) 156 FCR 313
Dudley and Anor & Chedi [2011] FamCA 502
Ellison and Anor & Karnchanit [2012] FamCA 602; (2013) 48 Fam LR 33
G v H (1994) 181 CLR 387
Sweeney v Fitzhardinge (1906) 4 CLR 716

DC Pearce RS Geddes, *Statutory Interpretation in Australia* (LexisNexis, Butterworths, 7th ed, 2011)

APPLICANT:	Mr A Mason
FIRST RESPONDENT:	Mr B Mason
SECOND RESPONDENT:	Ms Tisya
INDEPENDENT CHILDREN'S LAWYER:	Legal Aid NSW
FILE NUMBER:	SYC 918 of 2012
DATE DELIVERED:	7 June 2013
PLACE DELIVERED:	Sydney
PLACE HEARD:	Sydney
JUDGMENT OF:	Justice Ryan
HEARING DATES:	5 March 2012, 15 June 2012 & 31 August 2012

REPRESENTATION

SOLICITOR FOR THE APPLICANT:	Andrea Wilson & Associates
SOLICITOR FOR THE FIRST RESPONDENT:	Andrea Wilson & Associates
FOR THE SECOND RESPONDENT:	No appearance
SOLICITOR FOR THE INDEPENDENT CHILDREN'S LAWYER:	Legal Aid Commission NSW

ORDERS

(1) That Mr A Mason ("the applicant") and Mr B Mason ("the respondent") have equal shared parental responsibility for the children, E Mason and W Mason ("the children") both born on … 2011.

(2) That the children live with the applicant and respondent.

(3) Pursuant to s 65DA(2) and s 62B, the particulars of the obligations these orders create and the particulars of the consequences that may follow if a person contravenes these orders and details of who can assist parties adjust to and comply with an order are set out in the Fact Sheet attached hereto and these particulars are included in these orders.

(4) The application for a declaration as to parentage is stood out of the list.

IT IS NOTED that publication of this judgment by this Court under the pseudonym *Mason & Mason and Anor* has been approved by the Chief Justice pursuant to s 121(9)(g) of the *Family Law Act 1975* (Cth).

FAMILY COURT OF AUSTRALIA AT SYDNEY

FILE NUMBER: SYC 918 of 2012

Mr A Mason
Applicant

And

Mr B Mason
First Respondent

And

Ms Tisya
Second Respondent

REASONS FOR JUDGMENT

Introduction

1. This is an application by Mr A Mason ("the applicant") and Mr B Mason, his partner and the respondent, ("the respondent") for parenting orders and, in relation to the applicant, a declaration of parentage in relation to twins, E and W born in 2011.

2. The twins were conceived and born in India via a surrogacy arrangement. To this end, the applicant entered into a gestational surrogacy agreement on 17 January 2011 with Ms Tisya ("the birth mother"). She agreed to be his surrogate. In order to do so she contracted "… to conceive by way of placement of inseminating an anonymous donor's egg into the Intended Father's sperm into the uterus of Surrogate Mother through IVF process" (exhibit "H", Gestational Surrogacy Agreement dated 17 January 2011, Recital III).

3. In return, the applicant contracted to accept the child or twins and to be solely responsible for arranging "necessary legal and travel documentation for the new born Child". He accepted that the children would have the same rights of inheritance as other children born in India. The applicant agreed to pay the birth mother's expenses, including her medical expenses.

4. The contract provided that the total compensation Rs 2,25,000 (Rupees two Lakhs twenty five thousand) for a vaginal birth or Rs 2,60,000 (Rupees two Lakhs sixty thousand) if the mother had a caesarean delivery. It is not necessary to summarise the entire agreement but it should not pass without comment that the provisions which limit the birth mother's ability to manage her health during the pregnancy and make decisions about delivery of her babies, are troubling. It is also troubling that this 29 page document is written in English. It is signed by the applicant and, because she is illiterate in English and Hindi, the mother's attestation is her thumb print. There is nothing in the document which suggests that before the birth mother signed it that it was read and translated to her.

Service on the Birth Mother

5. Although it caused some inconvenience, at the Court's insistence, the Application for Consent Orders and other documents filed in these proceedings were translated and served on the birth mother. This resulted in two affidavits supposedly sworn by her which suggest that she consented to orders that the applicant and respondent have equal shared parental responsibility and that the children live with them. Again, the affidavits were written in English and bore her thumb print. There was no evidence that those documents were translated or that she understood their contents before she placed her thumb print. Eventually, an affidavit was received from Mr S, who is an advocate and notary public in India. He affirmed that he read the documents to the birth mother in Hindi and she acknowledged their content. Reference to the documents is to the birth mother's affidavit dated 27 January 2012 and an undated document which is exhibit "C". Including those documents received after the last hearing date, the applicant established service, notice of the hearings and that the birth mother has given her consent to the application.

6. An Independent Children's Lawyer ("ICL") was appointed to represent the children's interests. The ICL played an active part in the proceedings and provided thorough, well researched and considered submissions. It is submitted by the ICL that parenting orders should be made in favour of the applicant and respondent, as well as a declaration of parentage in favour of the respondent. For reasons that will be discussed, although it is accepted that orders and declarations along those lines are in the children's best interests, notwithstanding my decision in *Ellison & Anor & Karnchanit* [2012] FamCA 602, I now have reservations about the correctness of what was said in relation to the availability of the general parenting presumptions in relation to children born through a surrogacy arrangement.

Jurisdiction and Standing

7. The twins entered Australia in October 2011. They have acquired Australian citizenship by descent and each child holds an Australian passport. In this regard, DNA parentage testing undertaken by the applicant and the children in October 2011 was accepted by Australian authorities as sufficient to establish citizenship by descent. However, a grant of Australian citizenship by descent does not determine the children's parentage for the purposes of parenting orders under the *Family Law Act 1975* (Cth) ("the Act").

8. As far as India is concerned, unless Australia made the children her citizens, they would be stateless.

9. Section 4 of the Act defines the term "parent" as meaning "when used in Part VII in relation to a child who has been adopted, means an adoptive parent of the child". Similar inclusive definitions of the word "child" are found in s 4. The term "parent" is not otherwise defined and, as the definitions referred to have no application to these parties, it is necessary to consider the presumptions of parentage (there being no issue that the applicant cannot establish standing by the application of the law of India) to determine whether for the purpose of the Act he is a parent and is thus able to rely upon s 65C(a) in order to establish standing to seek the orders and declarations for which he has applied. Because the answer to that question is inextricably linked to a number of other matters, it will be addressed later. As will shortly be discussed, the applicant will establish that he is the children's biological father. In circumstances where the children have resided with the applicant and respondent from birth, there is no doubt that each of them is a person concerned with their care, welfare and development and pursuant to s 65C(c) has standing.

10. Proceedings may be instituted under the Act in relation to a child only if, on the day the application is filed, one of the factors listed in s 69E(1) is established. The proceedings were commenced after the applicant and respondent returned to Australia with the children. The provisions of s 69E(1)(a) and (d) are established.

11. It follows that the applicant has established the necessary conditions to the institution of proceedings.

12. Notwithstanding that Australia has granted the children citizenship by descent because the applicant is their biological parent, even if it is established in these proceedings that he is the children's biological father, it does not automatically follow that Federal and State laws recognise him as their parent.

13. Pursuant to orders, DNA Labs undertook parentage testing procedures and provided a report dated 23 August 2012 which established that there is a 99.8 per cent degree of medical certainty that the applicant is the children's father.

Those reports were undertaken and adopted by a scientist attached to DNA Labs. After he gave evidence the reports were admitted into evidence (exhibit "I").

14. The applicant is the children's biological father.

Parentage, presumptions and declarations of parentage

15. Spread across different divisions in Part VII there are a number of provisions that deal with parentage, presumptions and declarations of parentage. Those in Division 1 subdivision D operate to irrebuttably deem a child for the purposes of the Act, in the circumstances there identified, the child of designated people. Those in Division 12 subdivision D create rebuttable presumptions for the purpose of the Act. Notably by s 69U it is acknowledged that two or more presumptions under that subdivision may apply, in which case (excluding s 69S(1)) it is for the Court to determine which presumption should prevail. Then in Division 12 subdivision E, the Court is empowered to issue a declaration of parentage that is conclusive for the purposes of all laws of the Commonwealth. In essence there is a scheme which operates so that, for the purpose of the Act or federal law, children may variously be deemed, presumed or declared the child of a person. The effect of s 12 of the *Status of Children Act 1996* (NSW) ("Children's Act") is that declaration of parentage made under the Act will be recognised by the State.

16. In the context of a maintenance case concerned with inferences that may be drawn from a failure to comply with a parentage testing order (then s 66W(5) now s 69Z), the High Court in *G v H* (1994) 181 CLR 387 discussed parenting presumptions and declarations of parentage (then Div 7 now Div 12) made under the Act. Their Honours Deane, Dawson and Gaudron JJ [400] said:

> … Moreover, while a determination of parentage for the purposes of Family Law Act proceedings is obviously a serious matter for both the child and the putative parent, **such a determination cannot properly be regarded as a declaration of paternity in the traditional sense**… (my emphasis)

17. Their Honours continued [400]:

> As earlier indicated, there are several presumptions in Div. 7 of Pt VII which are "rebuttable by proof on a balance of probabilities". Those presumptions proceed on a basis which is diametrically opposed to the notion that, in maintenance proceedings, the biological fact of parentage involves an important or grave allegation to which due regard must be had before a finding is made in that regard. Rather, **the presumptions operate in the interests of the child** and provide the basis for the imposition of parental duties and responsibilities unless and until proof to the contrary is forthcoming… (footnotes omitted) (my emphasis)

18. In *G v H* Brennan and McHugh JJ said at [391]:

> We do not suggest that paternity is not a serious issue. It is serious because paternity carries with it both significant privileges and grave responsibilities, only some of which relate to monetary obligations. The attribution of paternity may be seen by a child's mother to be no more than the means of procuring a maintenance order during the child's infancy, but a finding that a particular man is the child's father might well be of the **greatest significance to the child in establishing his or her lifetime identity**… (my emphasis)

Sections 60H and 60HB

19. Before consideration is given to the general presumptions of parentage, it is necessary to address those that specifically refer to children born as a result of artificial conception procedures (s 60H) and children born under surrogacy arrangements (s 60HB). Section 60H concerns children born as a result of artificial conception procedures and deems a child to be the child of a woman or man in certain situations.

20. Section 60H provides:

> **CHILDREN BORN AS A RESULT OF ARTIFICIAL CONCEPTION PROCEDURES**
>
> (1) If:
>
> (a) a child is born to a woman as a result of the carrying out of an artificial conception procedure while the woman was married to, or a de facto partner of, another person (the other intended parent); and
>
> (b) either:
>
> (i) the woman and the other intended parent consented to the carrying out of the procedure, and any other person who provided genetic material used in the procedure consented to the use of the material in an artificial conception procedure; or
>
> (ii) under a prescribed law of the Commonwealth or of a State or Territory, the child is a child of the woman and of the other intended parent;
>
> then, whether or not the child is biologically a child of the woman and of the other intended parent, for the purposes of this Act:
>
> (c) the child is the child of the woman and of the other intended parent; and

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

(2) If:

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

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

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

(3) If:

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

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

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

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

(6) In this section:

this Act includes:

(a) the standard Rules of Court; and

(b) the related Federal Magistrates Rules.

21. Pursuant to reg 12C of the Family Law Regulations 1984 (Cth) for the purpose of s 60H(1)(b)(ii), the Children's Act is prescribed. In relation to s 60HB(2), s 14 of the Children's Act is prescribed (reg 12CA). There are no laws prescribed in relation to s 60H(3).

22. The words "artificial conception procedure" are defined in s 4 as including:

(a) artificial insemination; and

(b) the implantation of an embryo in a woman.

23. This inclusive definition of "artificial conception procedure" does not contain the word "parent" but instead deems certain children born as a result of artificial conception procedures to be a child of a man or a woman for the

purposes of the Act. The man or woman need not necessarily be biologically related to the child.

24. Section 60HB provides:

> **CHILDREN BORN UNDER SURROGACY ARRANGEMENTS**
>
> (1) If a court has made an order under a prescribed law of a State or Territory to the effect that:
>
> (a) a child is the child of one or more persons; or
>
> (b) each of one or more persons is a parent of a child;
>
> then, for the purposes of this Act, the child is the child of each of those persons.
>
> (2) In this section:
>
> ***this Act*** includes:
>
> (a) the standard Rules of Court; and
>
> (b) the related Federal Circuit Court Rules.

25. For the purpose of s 60HB(1), by reg 12CAA of the Family Law Regulations 1984 (Cth), s 12 of the *Surrogacy Act 2010* (NSW) ("Surrogacy Act") is prescribed. In relation to an application for a parenting order under that Act, the provisions apply to children born before and after that Act commenced.

26. It would seem, that in relation to children born by a surrogacy arrangement, the scheme of the Children's Act and Surrogacy Act is that presumptions of parentage are dealt with by the former Act and the transfer of parentage from persons presumed to be parents to persons who are not presumed to be parents is dealt with by the Surrogacy Act (or where it applies the *Adoption Act 2000* (NSW)). None of the presumptions contained in the Children's Act operates so as to make the applicant the children's father. Thus, for the purpose of State law, he could potentially only become the children's father by adoption, pursuant to a parentage order made by the Supreme Court of NSW under the Surrogacy Act or a declaration of parentage made by a federal court which was recognised pursuant to s 12 of the Children's Act.

27. Sections 60H and 60HB were inserted into the Act as part of the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act* 2008 which in relation to these provisions commenced operation on 21 November 2008.

Those amendments post-date the general provisions that deal with parentage, presumptions and declaration of parentage.

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

29. 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) 4 CLR 716).

30. 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 (*Commissioner of Taxation v Hornibrook* (2006) 156 FCR 313).

31. 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.

32. 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.

33. The application of these principles to s 60H and s 60HB was not discussed in this hearing. It follows, that without the benefit of argument, a cautious approach to the issue is necessary. However, it is my preliminary view that for the purposes of the Act, the 2008 amendments evince an intention by Parliament that the parentage of children born as a result of artificial conception procedures or under surrogacy arrangements will be determined by reference to those provisions and not the general parentage provisions. This interpretation achieves, on a state by state (and territory) basis, a uniform system for the determination of parentage.

34. 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. Thus, on reflection, I am inclined to respectfully agree with Watts J in *Dudley and Anor & Chedi* [2011] FamCA 502, where at [29] his Honour determined that ultimately state law will govern the determination of parentage [of children born under surrogacy arrangements] and that state law will be recognised by federal law.

35. This is only to the extent that the laws of a state or territory are prescribed laws for that provision.

36. Although there is evidence which may tend to indicate that this was a commercial rather than altruistic surrogacy arrangement, the evidence is not so clear that a finding in relation to the nature of the agreement needs to be made. If that is an issue, it is one more appropriately dealt with by the Supreme Court should an application for a parentage order or adoption be made.

37. Although as presently advised I do not consider that I am permitted to make a declaration of parentage, it is appropriate to leave that door open so as to enable the applicant to make further submissions on the point. Of course, he is not obliged to do so.

Should parenting orders be made?

38. Orders concerning parental responsibility, with whom a child will live and arrangements for spending time with his or her parents, as well as other people interested in the child's welfare, are parenting orders (s 64B). They arise in proceedings conducted under Pt VII of the Act. Unless a court makes an order which changes the statutory presumption of joint parental responsibility, s 61C(1) provides that until a child turns eighteen, each of the child's parents has parental responsibility for the child. 'Parental responsibility' is defined in s 61B as: "… all of the duties, powers, responsibilities and authority, which by law, parents have in relation to children". Section 61DA requires that when making a parenting order in relation to a child, "the court must apply a presumption that it is in the best interests of the child for the child's parents to have equal shared parental responsibility for the child". Essentially, the

presumption relates to parental decision-making and does not determine where or with whom a child will live. By virtue of s 61DA(2), the presumption does not apply where there exist reasonable grounds to conclude that a parent, or a person who lives with a parent of the child, has engaged in family violence or child abuse. The presumption is rebutted where a court is satisfied it would conflict with the child's best interests (s 61DA(4)). Thus, if the Court determines the presumption does not apply or is rebutted, it must decide the appropriate parental responsibility arrangements.

39. Section 60B sets out the objects of Pt VII and the principles, which underline those objects. In deciding whether to make a particular parenting order, including an order concerning parental responsibility, s 60CA and s 65AA ensure that the child's best interests are the paramount consideration. Section 60B is important as it provides the context within which the relevant s 60CC factors are to be examined and ultimately weighed. The importance of s 60B factors varies from case to case but as a general approach, examined from the child's perspective, points the way to an optimal outcome. Where there are no countervailing factors, the s 60B principles may be decisive. Section 60B is set out below.

> 1. The objects of this Part are to ensure that the best interests of children are met by:
>
> (a) ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child; and
>
> (b) protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence; and
>
> (c) ensuring that children receive adequate and proper parenting to help them achieve their full potential; and
>
> (d) ensuring that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.
>
> 2. The principles underlying these objects are that (except when it is or would be contrary to a child's best interests):
>
> (a) children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and
>
> (b) children have a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other

people significant to their care, welfare and development (such as grandparents and other relatives); and

(c) parents jointly share duties and responsibilities concerning the care, welfare and development of their children; and

(d) parents should agree about the future parenting of their children; and

(e) children have a right to enjoy their culture (including the right to enjoy that culture with other people who share that culture).

3. For the purposes of subparagraph (2)(e), an Aboriginal child's or Torres Strait Islander child's right to enjoy his or her Aboriginal or Torres Strait Islander culture includes the right:

(a) to maintain a connection with that culture; and

(b) to have the support, opportunity and encouragement necessary:

(i) to explore the full extent of that culture, consistent with the child's age and developmental level and the child's views; and

(ii) to develop a positive appreciation of that culture.

40. In deciding the arrangements that will promote the best interests of a particular child, the Court must consider the various matters set out in s 60CC. Section 60CC contains two primary considerations. The first is the benefit to the child of having a meaningful relationship with both of the child's parents (s 60CC(2)(a)). The second is the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence (s 60CC(2)(b)).

41. To the extent they are relevant to the particular case, the Court must consider thirteen additional considerations set out in s 60CC(3). Paragraph (m) permits the Court to take into account "any other fact or circumstance that the court thinks is relevant". This ensures that the infinite variety of children's circumstances can be addressed. The Court must also consider the extent to which each parent has fulfilled his or her parental responsibilities, and has facilitated the other parent in fulfilling his or her parental responsibilities (s 60CC(4)). In deciding the appropriate parenting order, the Court must, to the extent possible and consistent with the child's best interests, ensure its orders are consistent with any family violence order and do not expose a person to an unacceptable risk of family violence (s 60CG).

42. If the Court is satisfied parents are to have equal shared parental responsibility, it must consider the practicability (s 65DAA(5)) of the child spending equal or

substantial and significant time with his or her parents (ss 65DAA(1)(b) and (2)(d)) and whether doing so would be in the best interests of the child (ss 65DAA(1)(a) and (2)(c)). The notion of equal time requires no explanation and is decided first. If equal time is not ordered, substantial and significant time must be considered. This concept is defined in ss 65DAA(3) and (4).

43. Where neither concept delivers an outcome that promotes the child's best interests, the issue is at large and to be determined in accordance with the child's best interests (*Goode & Goode* (2006) FLC 93-286).

44. By virtue of s 60CA, the Court will determine the weight to be given to the various factors, be they primary or additional considerations or considerations as identified as issues arising in the particular case but not specifically referred to in the Act. Ultimately, the weight attached to each factor is a matter of discretion.

45. In cases in which parents are parties, those objects, principles and factors which refer to parents must be considered insofar as they apply to the child's parents. Those which apply to all parties apply to parents and non-parents alike. Those which refer to other specific categories of people, for example, grandparents, apply specifically. However, by virtue of s 60CC(3)(m) the Court may decide that s 60CC(3) factors which refer solely to parents, for example, s 60CC(3)(c) ought to be considered having regard to other important people in the child's life. Another example might be that reliant on s 60CC(3)(m) the Court considers the benefit to the child of having a meaningful relationship with a person, such as the applicant, who has been significantly involved in the child's life. This makes the various factors inclusive not exclusive.

46. However, there is no general presumption that orders be made in favour of parents and s 65C does not prescribe a hierarchy of applicants (*Aldridge v Keaton* (2009) 42 Fam LR 369 at [83]). In *Aldridge v Keaton* [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 factor in deciding a parenting application, there is no presumption in favour of a biological parent. Rather each case must be decided on its facts with the welfare of the child being the paramount consideration.

47. At [77-79], their Honours in *Aldridge v Keaton* said:

> [77] … 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.
>
> [78] Children who have been brought up in these new forms of family may be children who fall within s 60H. There will also be children

> who, while not conceived with the consent of the co-parent (or as described in the legislation the "other intended parent"), have effectively been treated as a child of the relationship of a same-sex couple. Such children may be the biological child of one parent born, before the same-sex relationship commenced, but whose substantial parenting experience has been from each of the same-sex "parents". 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.
>
> [79] 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 Pt VII to determine whether making (or not making) a parenting order would be in the child's best interests.

48. Section 61DA of the Act refers only to a presumption of equal shared parental responsibility between "parents" and not between a parent and persons interested in the children's welfare. Thus, s 61DA and s 65DAA do not apply and the parenting orders application must be determined solely in accordance with the best interests of the children (s 60CA and s 65AA).

49. The children's biological mother, with whom they share half their genetic identity, is unknown and will remain so unless in India there is a significant change in the law.

50. As was mentioned earlier, the children's birth mother has been involved in the proceedings to the extent that she has executed documents, filed affidavits and given her consent for the Court to make parenting orders as proposed by the applicant and respondent. The birth mother is 30 years of age and divorced. She is not in a de facto relationship. Although she provided an address on her affidavits, correspondence by the ICL to that address were returned. The applicant and respondent hope that they will be able to remain in contact with the children's birth mother but the difficulty involved in securing her participation in these proceedings tends to suggest that this is likely to be a triumph of hope over experience.

51. The birth mother's evidence is that the children were born by caesarean section. Immediately after their birth she surrendered the children to the surrogacy agency and it is her understanding they were moved to Delhi Newborn Centre. This is where the applicant and respondent met the children for the first time.

52. Four days after the children were born the birth mother was discharged from hospital. That day, she saw the children with the applicant and respondent and it is her opinion that they will give the children a good life in Australia. She

confirmed that on that occasion the applicant and respondent provided her with an email and street address in Australia and it is accepted that they are open to the idea that the children's birth mother has contact with them in the future. They have her photograph and the children will at least know what she looks like. However, the birth mother has not initiated contact with the applicant and respondent and it would seem unlikely that she will. The applicant fulfilled his financial obligations to the birth mother contained in the surrogacy agreement.

53. The gravamen of the birth mother's evidence when read in the context of the surrogacy agreement is that she agreed to act as surrogate for the applicant and thereafter that he and the respondent would raise the children. Throughout the proceedings she has remained firm that parenting orders should be made in their favour which she understands will mean that she will not have parental responsibility under the Act for the children.

54. In short, the preponderance of evidence establishes that neither the birth mother nor biological mother seeks to have a role in the children's lives.

55. The applicant and respondent gave evidence. They presented as intelligent, thoughtful people committed to each other and the children. Their evidence is accepted.

56. The applicant and respondent decided in about 2010 to have children with the assistance of a surrogate mother. They agreed that the respondent would complete the insemination process and that they would jointly parent the children. Theirs is an established relationship formalised by a civil partnership ceremony held in the United Kingdom in 2007. Their relationship was registered in Australia on 19 January 2011 and they changed their names to a joint hyphenated name the same month.

57. Both have professional backgrounds. The applicant now cares for the children fulltime and the respondent supports the family. He took some time off work after the children were born and staggered his return to fulltime work.

58. At the Court's initiative, a family report was prepared. Relevantly, this involved interviews with the applicant and respondent and observations of them with the children. The family consultant's evidence is uncontroverted and accepted.

59. The family consultant described the applicant as a 39 year old who:

> … presented as quietly generous and caring. He said that he wants to have the security of Family Law Orders so that he and his partner have some certainty. He also said that it is a "point of pride" for him to be completely open and honest about his family unit in the eyes of the law. He said that he hopes that his and [the respondent's] own experience of being different will help them to understand tolerance and openness more which would benefit the children. (family consultant's report dated 6 June 2012, par 10)

60. He has had some health issues which have been managed well and into which the applicant is insightful. Although being primary carer of the twins has had its stresses, his evidence demonstrated his undoubted commitment to giving these children all the opportunities in life that are within his gift.

61. The respondent is six years younger. I agree with the family consultant's assessment that he is "sensitive, articulate and somewhat more outgoing than his partner". He too has had health issues which have been managed well. The family consultant reported that:

> … He said that his current workplace is very supportive of his family commitments. [The respondent] said that he tries to relieve the parenting burden on [the applicant] "as soon as I walk in the door from work", and particularly on weekends when he does the overnight feeds. He describes his commitment to the family as a "balancing act" between full time work and parenting. (family consultant's report dated 6 June 2012, par 17)

62. The respondent agreed with the information provided by the applicant that they:

> … intend having an approach of "total honesty" with the children throughout their childhoods. He said that [the applicant] is "very good at doing reading"; and they feel informed about issues that might arise for the twins including issues around adoption, surrogacy and culture. [The respondent] said that they know several families in the same situation. He said that he wants the twins to develop a strong sense of resilience and strength of character to help them face any difficulties they may encounter because of their situation. (family consultant's report dated 6 June 2012, par 18)

63. In relation to the children, the family consultant saw that they have quite different personalities and that they are competently managed and lovingly engaged with the applicant and respondent. Her observations are consistent with their evidence about the children's different personality styles and development. In relation to her observations, the family consultant reported:

> The parents were observed to demonstrate a high level of emotional responsiveness to the babies. They both responded quickly to vocalizations and any sign of "whingeing" from either baby in a positive way, often taking action to successfully distract them. (family consultant's report dated 6 June 2012, par 24)

64. It is her opinion that the children and the applicant and respondent show strong signs of a growing healthy attachment to both adults who demonstrated a high level of emotional availability and parental reflective capacity. She said:

> 25. … These factors are the primary factors which suggest good outcomes for these babies in terms of their emotional and

psychological development. The emotional availability of the parents and their responsiveness to their infant children may prove to be one of the strongest indicators for positive self esteem. The parents are warm and open, without significant psychological issues and they are able to acknowledge and separate their own issues from those of their children's. [The applicant and the respondent's] capacity to reflect on their babies' experiences and their ability to ponder the road ahead for them and take into account their future needs are indicators of a strong reflective capacity in parents, a significant positive factor in parenting. The other factor that [the children] will benefit from is their parent's healthy, intact relationship and the positive role model of their conflict resolution. [The applicant] and [the respondent] are assessed as having a strong commitment to the long term welfare of [the children].

26. The babies have an ongoing and intense evolving attachment to their fathers. If there was to be a change of circumstances such as them being raised in another household, the impact on the babies and their burgeoning attachment to their fathers would be profound. If [the applicant] and [the respondent] were to separate, the children would face the same issues faced by children whose parents separate worldwide.

27. [The children] face other issues ahead, however well-armed with positive parent-child relationships. These issues include: cultural issues from being genetically half Indian, identity issues from having no or very limited contact with their donor mother and their surrogate mother, and any possible stigmatization the family might experience from the children being raised by homosexual fathers. The extent to which these issues become significant in the children's lives is unknown at this point in time. The protective factors against these issues giving rise to significant emotional difficulties include the children's positive relationships with their parents, the individual coping capacity and psychological functioning of each parent, and the parents' explicit desire to be open and live in proximity to a cohort of families with a similar makeup to theirs. All families face periods of stress, and these positive factors bode well for this family in being able to cope with adversity. Parents of babies and infants worry about sleep, feeding milestones and childcare. Parents of school age children worry about their choice of school, their children's teachers and progress and their children's developing friendships. Parents of teenage children worry about education, drugs and lifestyle factors, and about the friendships of their children. It is expected that the [applicant and respondent's] family will also have to grapple with these issues as the children grow. (family consultant's report dated 6 June 2012)

65. The family consultant said that it is possible that the children, at various developmental phases, will take issue with the applicant and respondent's sexuality. It is her evidence that:

> … This may occur around the time of adolescence when children typically distance themselves from their primary carers combined with strong hormonal and physical changes and along side a reworking of their own emerging sexual identities. The children, as adolescents, may well stigma from other young people. Adolescents do not usually like to stand out as different from their peers. It is expected, however, that on this issue as well, an open, flexible parental approach in a family with strong child-parent relationships will serve the children well. The quality of the child-parent relationships rather than the sexuality of their parents is likely to predict outcomes for [the children]. (family consultant's report dated 6 June 2012, par 28)

66. In addition, the family consultant said that the children may benefit from spending time in Australia amongst Indian families, for example, through Indian festivals and celebrations. She said:

> … The diversity of Indian culture means the different experience according to religious background, and this may be an issue the children will want to explore at some point. Again, the cohort of families that the parents have developed may provide significant support around this issue. (family consultant's report dated 6 June 2012, par 29)

67. As to the children being born from a surrogacy arrangement by mothers they are unlikely to know, the family consultant said that at some point in the children's lives, they may have "an intense, emotional identity crisis about this aspect of their lives". She went on to say:

> 31. … Borrowed from the discourse about adoption, the twins may potentially face a more complicated task of making sense of their place in the world because they have grown up in a family whose parents faces do not look like theirs and without experiencing their "mother", and her culture. There may be times in [the children's] lives when they will be pre-occupied with this task. They may seek contact with their mothers at significant life cycle transitions. It is also possible that it may never be an issue for the twins.
>
> 32. The adoption discourse suggests that, of those who make enquiries about their adoption and have difficulties when adjusting to the news, these emotional difficulties are often a result of pre-existing psychological vulnerabilities and where there were already troubled family dynamics within the adoptive family. [The applicant] and [the respondent's] declaration at this point of openness may be a protective factor for the twins alongside the development of secure

and healthy parent-child relationships. In addition to this, the parents have actively sought out other families in similar positions, and if these friendship groups can be continued, there may be some benefit to the twins in connecting to other children in the same position.

33. Another argument proffered in the discourse on parentage is that a child's genetic identity forms part of a child's history. There may be medical advantages in the children knowing their parentage. The donor mother and [the birth mother] and their families will, apparently, be unlikely and/or unable to seek out [the children]. There may be significant class issues separating the families which may well be apparent to the children as they explore their Indian backgrounds further. The twins may realize that their mothers and any half siblings experienced life very differently to them. Again, this is an issue that the parents can assist the children to understand and deal with. (family consultant's report dated 6 June 2012)

68. As to the ultimate issue, the family consultant strongly recommended that the applicant and respondent be awarded equal shared parental responsibility and that the children reside with them. She was as certain and comfortable as one can be about predicting the future that the children "will thrive" in the care of the applicant and respondent. In short, she gave a glowing report about them which brims with optimism for their and the children's future together.

69. Her opinion accords with my own assessment. I am strongly satisfied that the applicant and respondent are astute to the challenges that lie ahead and as well equipped as anybody could be to meet them.

70. The ICL supported orders in favour of the applicant and respondent with the written submissions providing a strong analysis of why this is so patently in the best interests of these children.

71. I am strongly satisfied that final (interim orders having previously been made) parenting orders as sought are in the children's best interests.

72. For these reasons, orders will be made as set out at the commencement of this judgment.

I certify that the preceding seventy two (72) paragraphs are a true copy of the reasons for judgment of the Honourable Justice Ryan delivered on 7 June 2013.

Associate:

Date: 7 June 2013