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# Family Law in Australia: Society Work and Surrogacy

## Part A: Essay questions

### 1. In what way is the dissenting view of L'Heureux-Dubé J in *Re Attorney-General of Canada v Mossop* (1993) 100 DLR 4th 658 relevant to the way family law and society work?

In *Re Attorney-General of Canada v Mossop*, Brian Mossop sought a bereavement leave to attend the funeral of his same-sex partner's father and was denied. The majority held that the Canadian Human Rights Act did not accord him a right to claim leave under the circumstances. However, in the dissenting opinion, Justice L'Heureux-Dubé argued that 'family status' should include sexual orientation. Critically, her argument that same-sex marriages should be included in the definition of a marriage due to the increase in non-traditional weddings has played a crucial role in the re-definition of family and matrimonial laws. Cory J and McLachlin supported this point of view and advocated for refining the regulations to include same-sex marriages.

### 2. Is the law on surrogacy in Victoria satisfactory? Discuss.

Victorian law states that a couple may engage the services of a surrogate to carry a pregnancy on their behalf. However, the Assisted Reproductive Treatment Act of the year 2008 has some regulations regarding surrogacy. Critically, the surrogate agreement is meant to ensure that a woman who carries the child agrees to relinquish all the rights to have the child as her own. In my opinion, the law presents a perfect opportunity for all individuals to become parents (Kerridge, Lowe & Stewart, 2009).

Further, the relationship between the potential parents and the surrogate is defined by the Act to prevent misunderstandings of the rights to the child. The fact that the law only regulates gestational surrogacy as opposed to traditional surrogacy leaves it ideal for most individuals (Kerridge, Lowe & Stewart, 2009). Importantly, it means that the surrogate mother does not have a genetic connection to the child; traditional surrogacy allows the surrogate to donate an egg, linking her genetically to the infant (Kerridge, Lowe & Stewart, 2009). The surrogacy law in Victoria is not satisfactory because the law disregards the surrogate. The surrogate does not contribute an egg and therefore makes the process of getting a child a transaction as opposed to the natural way of life. Surrogacy should give the surrogate a chance to claim the child, even though it is done for other people.

## Part B: Scenario

### Bumbles are Contemplating Separation

Legal separation or divorce in Australia is regulated under the Family Law Act of the year 1975. Critically, the law establishes a no-fault divorce settlement, which allows the court to disregard the reason for the marriage breakdown when issuing a ruling (Graycar, 2012). Furthermore, the regulation sets the only condition for divorce as a marriage breakdown and that there is no

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possibility of the couple ever getting back together. Some of the requirements for applying for divorce in Australian courts include the following; the individuals regard themselves as Australian citizens and have a home in the country, they are citizens by birth, descent or grant and finally, that the individuals have lived in the nation for the twelve months before applying (Graycar, 2012). A written notice at the time of separation is critical in proving to the court that divorce took place. Critically, the note might be in the form of a text message or a written letter, and it plays a critical role for the interested party during court proceedings.

Moreover, the couple must demonstrate to the court that they have lived apart for more than twelve months or a year. Under the conditions set by the Family Law Act in Australia, the Bumbles are eligible for a divorce settlement (Graycar, 2012). The couple has lived in separate rooms for more than a year, and their housemates can attest to that in court. The reason for divorce is immaterial under Australian law.

### **The Situation with Liddy after Separation**

Under Australian law, children should enjoy a meaningful relationship with both parents, even after divorce. However, the courts are tasked with the responsibility of ensuring that the child is protected from harm during the divorce settlement (Flood, 2010). It is critical to note that the Family Law Act of 1975 does not consider the gender of parents when allocating custody as the law is gender-neutral. Section 60CA of the Family Law Act states that Australian courts should ensure that the best interests of the child are protected during a custody hearing and decision making. Some critical aspects of the child's best interest include the protection of physical and emotional harm (Flood, 2010). In the Bumbles case, Spittoon has spanked Liddy with furry on several occasions, causing bodily harm to her, as reported by Dr. Retainer Jones. Australian courts are mandated with protection a child from physical and emotional damage, and therefore, it would be in the best interest of the child to have her custodian as her mother.

The case of *Goode V Goode* played a critical role in defining the best interests of a child in a divorce hearing. The case involved a couple with two children, aged two and eight years. Moreover, the husband claimed that his wife had taken the kids away from him, denying him his constitutional rights to spend time with the children (Rhoades, Graycar & Harrison, 2001). The wife claimed that the husband was physically abusive, and that was the main reason for denying him the custody of his children. A lower court judge allowed the wife to keep the care of the children and the father to spend time with them during weekends. An appeal to the case led the court to define essential sections of the Family Law Act of 1975, and the importance of the best interest of the child is protected (Flood, 2010).

### **What Doctor Retainer Should do about Liddy's Bruising**

The use of physical force against children is illegal in Australia. Critically, all disciplinary actions applied to the body of a minor to inflict pain are unlawful and should be reported by all individuals in authority (Ainsworth, 2002). The Children and Young People Safety Act 2017 makes mandatory to report cases of child abuse. Critically, doctors are mandated by the law to report all cases of suspected child abuse or neglect. Therefore, Dr. Retainer should report the matter to the nearest authorities as the bruises Liddy has are a sign of child abuse (Ainsworth, 2002).

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Furthermore, after the report is made, Liddy will be considered to be at risk because of the physical damage she has sustained from her father on several occasions. Doctors should examine the medical history of the patient and report any suspicion of the abuse (Ainsworth, 2002). The time and location of injury are immaterial when reporting to the relevant authorities. Different states in Australia have separate legislation mandating individuals in various professions to report cases of child abuse (Dewar, 2010). However, all states mandate doctors to report incidences of suspected child abuse to relevant authorities to ensure the protection of children to physical and mental abuse from their parents and caregivers. Dr. Retainer should report the incidence through child helpline.

### **Liddy's Future Medication**

Various significant laws that govern children's rights in Australia, critically, all individuals below the age of eighteen years are considered minors under Australian law (Bird, 2011). Consent in medical procedures is governed by both state and national laws in the country. However, the rules are guided by the maturity of the child and the ability to comprehend the medical procedure and the effects of refusing the process on their health. In most states in the nation, children can give their consent to medical procedures at the age of 16 years (Bird, 2011).

Parents consent to treatment for children below the ages of sixteen if they are satisfied that the medication is in the best interest of the child. The test to determine the ability of a child to consent to medical treatment in South Australia has been modified to include the following requirements. First, the medical practitioner should be satisfied that the child understands the consequences of the decision; secondly, that the opinion of the medical practitioner is supported by written notice from a different doctor in the same field. Liddy and her parents reside in Kew, which is in Melbourne, southern Australia. The Human Rights and Equal Opportunity Act of 1986 regulates the consent of children (Bird, 2011). Critically, Liddy, cannot make decisions regarding her treatment as she has not demonstrated sufficient knowledge of the repercussions the decision would have on her health and life. Furthermore, she has not attained the minimum age of sixteen years allowed by Australian laws to decide on medical procedures (Bird, 2011).

### **Rights and Obligations in Same-sex Relationships: Gretel and Broomhilda**

Australia legalized same-sex marriages since the year 2017. Critically, the Marriage Amendment Act of 2017, allowed individuals of the same sex to marry and live together legally. Consequently, the first same-sex wedding was witnessed in Australia on the 15th of December in the year 2017. Furthermore, a de facto relationship recognition of same-sex marriages accords equal rights and responsibilities to individuals married under the same law (Richters et al., 2014). Therefore, it is critical to note that such an individual's rights and obligations are similar to those of conventional couples. Gretel and Broomhilda registered their relationship under the Relationships Act of the year 2008 (Dempsey, 2013). Critically, the act was enacted to register and give rights to relationships in Australia. However, the catch is that the law applies to a select group of couples whose relationship broke down before March 1st in the year 2010. The Act accords both Gretel and Broomhilda equal rights to shared property as married couples under the Family Law Act of the year 1975 (Dempsey, 2013).

### **Australian Surrogacy Laws: Gretel, Broomhilda, and Valery**

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Current laws allow altruistic surrogacy. Additionally, this means that individuals are permitted to reach surrogate arrangements as long as they do not involve compensation (Klein, 2011). The Assisted Reproductive Treatment Act facilitates surrogate arrangements through an accredited medical institution. Furthermore, the surrogate is expected to relinquish her right to the child and cannot claim the offspring as her own after the procedure (de Visser et al., 2014). Monetary compensation of the whole process is illegal, and couples should make arrangements based on friendships and a genuine need to help (Klein, 2011). Also, doctors must confirm that the couple is medically incapable of bearing a couple through natural means. It is critical to note that surrogacy in Australia exempts genetic connections of the surrogate with the child. Gretel and Broomhilda secured a proxy by the name Valery. Furthermore, the process was done using the correct procedure at the Lotus Fertility Clinic in Richmond. Therefore, Valery renounced her rights to the child before the process and cannot claim the child under Australian law.

### **Commercial Surrogacy: Gretel, Broomhilda, and Aditi Doshi**

Giving monetary compensation for surrogacy is illegal in all Australian states. Furthermore, it is unlawful to make international surrogacy arrangements for all Australian citizens. Critically, this is because Australia is part of both the Hague Convention of the Protection of Children and the United Nations Convention on Children Rights (Millbank, 2015). Both Gretel and Broomhilda seek to arrange with Aditi Doshi from India, who promises to have a child for them in return for monetary compensation for her efforts (Salter, 2014). Commercial surrogacy is outlawed in most Australian states, and the couple could face jail time or harsh monetary fines for their energy. Some of the regulations in the area of commercial surrogacy across Australia include the following; the Parentage Act 2004 imposes a maximum penalty of one-year jail time or a hundred units in the Australian Capital Territory (Millbank, 2015). In New South Wales, the 2010 Surrogacy Act imposes a fine of 2500 units and a maximum of two years prison time for commercial surrogacy. Therefore, the couple should not go forward with the process of getting a baby from India.

### **Randy Ramble's Proposed Legislation**

The Australian parliament and judicial systems are independent bodies. Further, the court has original jurisdiction in some issues, and the parliament cannot interfere in such matters (Wynes, 1976). Similarly, parliament has original jurisdiction in some topics, such as the formulation of laws, and the courts may not interfere. However, parliament may confer additional powers to courts regarding requirements that challenge the constitution or raise constitutional questions and may require interpretation (Wynes, 1976). Randy Ramble's case raises several matters of legal importance, and the high court will be tasked with the analysis of the law. Critically, an amendment of the Marriage Act of the year 1961 to allow people to marry robots will be determined by the high court in light of recent technological advancements. The decision of whether or not to accept the draft legislation will be made by members of the judicial bench, with keen consideration of laws and other vital issues.

### **References**

1. Ainsworth, F. (2002). Mandatory reporting of child abuse and neglect: Does it make a difference?. *Child & Family Social Work*, 7(1), 57-63.
2. Bird, S. (2011). Consent to medical treatment: the mature minor. *Medicus*, 51(9), 54.

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3. Canada (Attorney General) v. Mossop, 1993 S.C.R.1 554 (1993).
  4. Dempsey, D. (2013). Same-sex parented families in Australia. Melbourne: Australian Institute of Family Studies.
  5. Dewar, J. (2010). Can the Centre Hold-Reflections on Two Decades of Family Law Reform in Australia. *Child & Fam. LQ*, 22, 377.
  6. de Visser, R. O., Badcock, P. B., Simpson, J. M., Grulich, A. E., Smith, A. M., Richters, J., & Rissel, C. (2014). Attitudes toward sex and relationships: the Second Australian Study of Health and Relationships. *Sexual health*, 11(5), 397-405.
  7. Goode v. Goode, 396 S.E.2d 430 (W. Va. 1990).
  8. Graycar, R. (2012). Family law reform in Australia or frozen chooks revisited again? *Theoretical Inquiries in Law*, 13(1), 241-269.
  9. Flood, M. (2010). "Fathers' rights" and the defense of paternal authority in Australia. *Violence against women*, 16(3), 328-347.
  10. Klein, R. (2011). Surrogacy in Australia: New legal developments. *Bioethics Research Notes*, 23(2), 23.
  11. Kerridge, I., Lowe, M., & Stewart, C. (2009). *Ethics and law for the health professions* (p. 225). Sydney: Federation Press.
  12. Millbank, J. (2015). Rethinking "commercial" surrogacy in Australia. *Journal of bioethical inquiry*, 12(3), 477-490.
  13. Richters, J., Altman, D., Badcock, P. B., Smith, A. M., de Visser, R. O., Grulich, A. E., ... & Simpson, J. M. (2014). Sexual identity, sexual attraction, and sexual experience: The Second Australian Study of Health and Relationships. *Sexual Health*, 11(5), 451-460.
  14. Rhoades, H., Graycar, R., & Harrison, M. (2001). The family law reform act 1995: The first three years. *Australian Family Lawyer: The Journal of the Family Law Section of the Law Council of Australia*, 15(1), 1-8.
  15. Salter, M. (2014). Getting Haged: The impact of international law on child abduction by protective mothers. *Alternative Law Journal*, 39(1), 19-23.
  16. Wynes, W. A. (1976). *Legislative, Executive, and Judicial Powers in Australia* (p. 15). Law Book Company.