
Surrogacy within Family Law

The advancements in birth technology has irreversibly changed the discourse regarding families, for this reason the Australian Legal system must be responsive to these changes, in order to achieve just outcomes for family members and society

Through analysing the legal and non-legal responses surrounding birth technology such as IVF and Sperm donation, it becomes clear that the Justice system has been limited in its ability to provide just outcomes for individuals and society. Technological advancements in birth technology such as IVF and Sperm donation has raised questions in regards to paternity, and has led to legislation in an effort to respond to these changes. The Status of Children Act 1996 (NSW) created the notion of the 'Presumption of Paternity', which states that the sperm donor involved is relinquished of parental responsibilities and is handed to the partner of woman impregnated. This introduction of legislation has facilitated just outcomes for families and society, through ensuring better protection of children. This becomes clear through the *B v J* case (1996), in which a father refused to pay maintenance arguing the child was not his and the maintenance was the donor's responsibility. The court refuting this argument enacting the 'presumption of paternity clause' in the status of children act 1996 (NSW). However in cases where sperm donor involvement is desired, the limitations of the legal system become clear. In the case of *Re: Patrick* (2002), a sperm donor was restricted contact the child, who desired more interaction against the parent's wishes. This confirms S65AA of the Family Law Act 1975 - ensuring "the best interests of the child" and just outcomes for the family. In contrast an article published in the ABC outlines a case in which a 'High Court ruled a sperm donor, the legal father of his daughter'. In which a man agreed to donate to his friend under the belief that he would be involved in the child's life. The landmark case caused conflict between Commonwealth Family Law Act and NSW state law, and in ensuring the "best interests of the child", a just outcome was received as the high court ruled the donor the legal father. Therefore, it becomes clear that in relation to birth technology, the Australian legal system look out for the best interests of the families, however the lack of consistency in the law creates a major diminishment of justice in society.

Surrogacy

Recent reforms to surrogacy legislation have been extremely effective in ensuring just outcomes for society and family members in regards to Altruistic surrogacy, however has created inconsistencies in regards to legislation jurisdiction. The introduction of the Assisted Reproductive Technology Act 2007 (NSW) allowed for Altruistic surrogacy to be legalised, this form of surrogacy involves no profit or financial transaction in the process. This reform has been a result of the absence of adequate legislation, and in order to protect the "best interests of the child". This becomes clear when analysing the *Re: Evelyn* (1998) case; in which a child was removed from prospective parents in NSW and given to surrogate mother in SA. Granted that the Assisted reproductive technology act 2007 addressed issues regarding justice for family members and society, as the best interests of the child were ensured. The act did not address the inconsistencies in legislation jurisdiction, as although NSW has adequate legislation surrounding Surrogacy; Northern Territory has no laws pertaining Surrogacy. This in effect, reduces the effectiveness of the legal system and creates inequalities between states.

Non-legal mechanisms have responded to issues regarding surrogacy and have aided in providing just outcomes for family members and society. This becomes clear through analysing the effectiveness of the media in its exploration of overseas commercial surrogacy. This practice has increased in numbers as a result of the Surrogacy Act 2010 (NSW), which effectively banned commercial surrogacy. SBS's Insight episode, 'Baby Business' (2010), exposed the mistreatment and exploitation of overseas women and effectively protected vulnerable women and children from the practice. Furthermore, through involving NGO group 'Surrogacy Australia' that advocates for legalising the practice the media source is able to sustain a balanced discussion regarding the issue, whilst maintaining the best interests of the child and women involved. It becomes clear that although non-legal mechanisms are limited in their capacity to enforce the law, they have the ability to raise awareness towards the issue. This is evident through the SMH article 'Concern over complex laws on surrogacy', in which through raised awareness of the issue, the Australian immigration department were able to grant citizenship to 14 children born out of commercial surrogacy. Ensuring the best interests of the child and making certain they did not become "stateless orphans". Therefore it becomes clear that the Australian legislation to a limited extent is able to ensure just outcomes for family members and society in regards to the issue of Surrogacy. Therefore, it becomes clear the strong effectiveness of non-legal mechanisms such as the media in insighting change and exposing issues within the family law system.

Care and protection of children

Another contemporary issue that arises when understanding laws surrounding family, is in regards to the care and protection of children. Children are vulnerable members of society and as such they deserve and are in greater need of higher levels of protection than adults. The inability of the legal system to create effective legislation highlights a major weakness in the justice system to provide just outcomes for family members and society. Despite the legislation Children and young persons act 1998 (NSW), which outlines the procedures in place to protect minors from Abuse and commission reports to the FACS (family and community services), the lack of accessibility reveals the inadequacies of these laws. The ABC article "vulnerable children getting lost in the system" emphasises the lack of effectiveness in providing justice and protection to children at risk of harm. With the report exposing that only "21% of 'high risk' children were in contact with a case worker" the remaining 79% becoming lost in the system. Outlining that although the system effectively identifies children at risk, diminishes its capability to protect children and society, through its lack of accessibility and practicality.

In contrast, the responsiveness of the Australian Legal mechanisms highlights the ability for the law to create coherent and consistent action in regards to the care and protection of children. This is emphasised through the The Children Legislation Amendment (Wood Inquiry Recommendations) Act 2009, in which comprehensive changes were made by justice Wood in an effort to 'build an integrated system that supports vulnerable children, young people, and their families' (NSW Gov). These changes were the result of the existing mechanisms and their inadequacies leading to deaths of children. As by 2007, more than 150 children who has previously been reported to Community Service died at the hands of their abusive parent or carer. The changes included a 'Five year action plan', which included raising reporting threshold from 'risk of harm' to 'risk of significant harm.' However, although numbers of children who have died has been reduced significantly (SMH 'Wood inquiry review'), the effectiveness of such amendments has been heavily debated, due to the lack of funding and heavy strain placed on

the system. With Yahoo news reporting in september 2012 a “50% increase in reports of child abuse”. This increased workload has meant that in “2014-15 only 28% of ROSTT reports were completed” and that “child protective staff (were) trying to meet the demand for their help.” This reveals that although the responsiveness of the legal mechanisms is effective in their ability to provide just outcomes to family members and society, the degree of such amendments is limited to the lack of resource efficiency and adequate funding.

According to a 2010 Community Service report, “286,437 reports were made of suspected child abuse and neglect.” High statistics are able to indicate that there is a lack of resource efficiency and accessibility in order to protect the rights of children, stated under the UN Conventions On The Rights Of The Child (CROC) as well as Children and Young Persons (Care and Protection) Act 1998, ensuring no child is subjected to child abuse nor neglect. However, evidence of ineffectiveness can be seen in the media article, “Secluded hills hid a family's darkest secret”. The article entailed the department’s lack of protection and recognition of children’s rights, involving 12 children under the age of 16 escorted by police and protection officers.

Non-legal mechanisms have strived to compensate for the limitations of the legislation and government facilities surrounding the care and protection of children. This can be concluded through the influence of non-government organisations such as AMA (Australian Medical Association), and their effectiveness in creating just outcomes for family members and society. A media campaign constructed by AMA in NSW has strived to remedy the inadequacies of the legal system, and has proved to become successful in the protecting children from domestic violence and abuse. The ‘Stop the clock’ campaign was launched in 2014 and was aimed at providing medical professionals and individuals within the community, tools and resources to take steps to prevent further abuse. The significance of the media campaign can be comprehended through its impact on children and society, highlighted within SBS article ‘the power of medicine’ in 2015. The article outlined the “40% decrease in reported child abuse - to the Department of child protection”, and identified the importance of empowering the victims and children, telling them that “it is not their fault”. It becomes clear through non-legal media campaigns such as ‘Stop the Clock’ have the capacity to provide just outcomes for family members and society who are impacted by the care and protection of children. Such conclusions can be drawn, due to the capacity of such programs in reducing the prevalence of domestic violence, providing remedies for victims and alleviating pressure on the government systems.