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MEDICO-LEGAL SOCIETY OF NSW INC.

SCIENTIFIC MEETING

WEDNESDAY, 22 MARCH 2017

AT 6.15 P.M.

THE TOPIC:

PUSHING THE LIMITS OF PARENTHOOD: LAW AND PRACTICE AROUND GAMETE DONATION AND SURROGACY

SPEAKERS: PROF MICHAEL CHAPMAN
MS JULIE HAMBLIN

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MS KEELY GRAHAM: Thank you for coming to this evening's Medico-Legal Society Scientific Meeting on "Pushing the Limits of Parenthood: Law and Practice Around Gamete Donation and Surrogacy".

The first speaker is Julie Hamblin. Julie is a consultant in the Health Group at HWL Ebsworth. She has more than 25 years' experience advising the public and private health sectors on health law, medical negligence, clinical risk, bioethics and public health. She currently serves on the NSW Clinical Ethics Advisory Panel and the Australian Research Integrity Committee, and has held a number of other government appointments in the health sector, including the Australian National Council on HIV/AIDS and Related Diseases and the board of the former Central Sydney Area Health Service. Julie has a particular interest and expertise in public health and HIV/AIDS in developing countries, having undertaken consultancy work with the United Nations Development Program and other UN and NGOs in more than 20 countries in the Asia Pacific Region, Africa and Eastern Europe. Julie also chairs the Board of Autism Spectrum Australia and is Deputy Chair of Plan International Australia. She is clearly well qualified to deliver this evening's talk. Welcome Julie.

MS JULIE HAMBLIN: Thank you Keely and good evening everyone.

I had prepared this talk on the expectation that Michael Chapman would have spoken first and would have given you a long description of clinical practice around gamete donation and surrogacy. However we are going to mix it up just by doing it in a different order and that will still work quite well.

What I am going to focus on tonight is a set of legal issues that I find endlessly fascinating. I have worked in the area of assisted reproduction now for 25 years or more. I have seen all the changes that have happened in that area during that time, and have monitored the way the law has tried to keep up with those changes. It is a wonderful case study of legal regulation struggling to deal with what is happening out there in the clinical world. It is not just in the clinics, but also with people making their own decisions about what they want to do in relation to their own reproduction.

There is an enormous amount of regulation. I do not have the time to go through it all, and it would be very boring if I did. What I will do is set out the framework of the way in which the law in New South Wales has chosen to try to regulate

the issues around gamete donation - that is the donation of both eggs and sperm - and surrogacy. New South Wales is a highly regulated State when it comes to assisted reproduction. New South Wales and Victoria are the two States that have specific legislation around assisted reproduction. The Victorian legislation is even more detailed and restrictive than that of New South Wales, but in New South Wales, we also have a lot of very detailed regulation that is set out in the Assisted Reproductive Technology Act (ART Act). We now also have a Surrogacy Act as well as a whole series of other pieces of legislation that are relevant.

The focus of the regulatory framework when it comes to gamete donation and surrogacy is to look at issues around getting consent; around how we recognise the legal parents of a child in these circumstances; managing the relationship between donors and recipients; and the most difficult issue of all - regulating payment. The other central pillar of the way in which the law in New South Wales has chosen to regulate gamete donation and surrogacy is that we now have enshrined in the law the principle of donor conceived children having a legal right to know the identity of their biological parents. That has been a really significant change since the ART Act came into effect in 2008. Despite all these regulations new practices are continuing to challenge the extent to which the law can regulate donation and surrogacy effectively. At the end of my presentation I am going to talk about some of the areas that in my view are the real pressure points where the law is really being challenged.

Looking briefly at the issues around consent, the ART Act uses the notion of gamete provider, that is the provider of the eggs and the provider of the sperm in relation to embryos. It enshrines very strongly the principle that gametes and embryos can only be used with the consent of the gamete providers.

The other significant change that came into effect in 2008 was that gamete providers are now allowed to make a written statement expressing their wishes in relation to the use of their gamete. In the context of gamete donation, it was formerly unlawful under the Anti-Discrimination Act to say “I only want my gametes to be used for people of a certain race” or “I do not want my gametes to be used by single women or by same sex couples”.

The legislation now recognises that gamete providers can make a statement expressing their wishes and those wishes have to be followed. The consent can also be withdrawn at any time up until when the gamete is used or an embryo is

formed from that gamete. The legislation also requires counselling as a mandatory condition for a valid consent.

Interestingly, in Victoria the legislation does not prohibit the revocation of consent once an embryo is formed. Hence there have been all sorts of difficulties there about embryos being formed and differences of opinion between the gamete providers as to how that embryo will subsequently be used.

There are limits on the way in which you can use gametes and embryos for donation. The most important one and the one that has caused and continues to cause enormous difficulties in practice is the limit on donor gametes being used if the treatment is likely to result in offspring being born to more than five women. Previously under the NH&MRC guidelines which apply in other States of Australia, the rule was ten women. In Victoria, the limit is ten. New South Wales has chosen five as the limit and that limit has been interpreted as applying worldwide. If you have a situation, which we have now, where gametes are being brought in from a number of overseas suppliers or are being obtained from overseas donors, the sheer logistical task of monitoring the number of women who have given birth to children using gametes from a particular donor is becoming more and more difficult. That is an issue that in my view is going to be one of the pressure points in the future.

There are time limits on the use of gametes. There is a requirement that if they are not used within five years, the clinics have to take reasonable steps to try and locate the donor and to establish whether the donor is still alive. That fits in with the provisions around post mortem use. That has also been quite contentious because the legislation does permit the use of gametes once the donor has died, but only if specific consent has been obtained in advance. There have been cases where a woman or a couple have had one child using a particular donor and that donor dies. They perhaps have not obtained consent in advance to continue to use that sperm, even though they want to have further children who would be full genetic siblings of the child that they have already. The legislation has tried to find a balance between permitting post mortem use in some circumstances but also putting some constraints on it.

The other very significant development that happened with the legislation in 2008 was the establishment of the central ART register which is administered by the Department of Health. It is the repository of information about every child

who is born as a result of the donation of gametes or a donated embryo. It also now includes information in relation to surrogacy arrangements. There is an obligation on the ART providers, the clinics, once they know that a child has been born from the use of donated gametes, to provide the information to the central register. The legislation also has a very elaborate set of provisions setting out who - and when and in what circumstances - can apply to have access to the information contained on the register.

The main impetus behind the register was to ensure that donor conceived children are able to find out the identity of their biological parents when they turn 18 years of age. However there are also provisions that permit recipients to obtain non-identifying information about the donors and conversely donors can also find out whether children have been born from their donation. Another interesting provision is that donor conceived children are able to find out non-identifying information about whether there are any genetic half-siblings in existence. That is also information that is being held in the register.

It is still early days and we do not know how the register is going to work. As the register was only set up in 2008, there are not yet any children who have turned 18 since the establishment of the register. That in itself demonstrates the sort of time frames that that are being dealt with in terms of trying to look ahead and work out what the implication of these sorts of laws might be. Interestingly, from the point of view of the clinics, the requirement in the legislation is that all records have to be held by IVF clinics for 50 years which is an exception to the normal record retention practices in other medical contexts.

The two most problematic and contentious issues, I believe, are those about payment and about parentage.

Firstly the prohibition on payment for donated gametes is well established. It exists in the Human Tissue Act in relation to tissue generally. There is also Commonwealth legislation that makes it an offence to give or receive payment for eggs, sperm and embryos. Both pieces of legislation have an exception for reasonable expenses. However there is no interpretation or definition given of what constitutes reasonable expenses. Further the practice varies vastly between different countries, different states and different clinics as to what constitutes reasonable expenses. Although the principle of not being allowed to be paid and that all donations should be altruistic, is very clearly established in the legislation, in practice it does

cause difficulties as people are pushing the boundaries more and more of what amounts to reasonable expenses.

The other important point to note here, particularly when you consider all the recent controversy about Australians travelling overseas to use overseas donors, or entering into surrogacy arrangements overseas, is a provision in the Crimes Act about conduct overseas in some circumstances constituting a criminal offence in New South Wales if it would be an offence in New South Wales. Liability depends on establishing a geographical connection with New South Wales. The wording in the section is that the conduct has to have an effect in New South Wales.

I have certainly argued that if you go overseas and pay an overseas surrogate in circumstances that would be unlawful in New South Wales, or you pay a donor overseas in circumstances that would be unlawful in New South Wales, and you bring the child back to New South Wales, then that is conduct that has an effect here and therefore could be caught by s10C of the Crimes Act. There is a lot of discussion about this but as far as I am aware it has not yet been tested in the Courts. However with the degree of activity happening overseas in this area, it is probably only a matter of time.

Secondly there is the vexed issue of who are the legal parents. As I understand it, this is the question that comes up most often within the clinics. Donors are concerned that donor conceived children might be able to claim against their estate or they might be liable for child maintenance and whatever else might happen. Their concern is to have clarity that if they do donate there will not be legal consequences of parentage as a result.

To try and address that concern, s 14 of the Status of Children Act was passed some years ago. It sets out a series of presumptions that are stated in the legislation to be irrebuttable about who will or will not be the legal parents in circumstances where a child is conceived using an artificial conception procedure. The intention of the presumptions is clear. It is that the woman who becomes pregnant and who bears the child is presumed to be the legal mother of the child and her partner, male or female, if he or she consented to the procedure, is presumed also to be a parent of the child. In a conventional donation situation that is the outcome that is intended. There is also a presumption against paternity for the egg and sperm donors.

Those presumptions are there and they are clear. They are there to achieve the outcome that recipients of donations

generally want. However they achieved the opposite outcome from what is intended in a surrogacy relationship until we had the Surrogacy Act. That was a serious concern, because you had these irrebuttable presumptions against parenthood that were the opposite of what people were wanting in a surrogacy arrangement.

If we only had the Status of Children Act, the situation would be reasonably clear. However, there is an added layer of complexity here because the Family Court has said that its presumptions, which are a series of different presumptions in the Family Law Act, are the ones that apply in the Family Court. The Family Court has said it, and it alone, in cases that are brought to it, is able to determine who the parent is for the purpose of orders relevant under the Family Law Act such as child access, maintenance, child support, etc.

A decision in 2013 in *Groth v Banks* sent ripples of concern through the IVF community because the judge in that particular case held that the statutory presumptions in State legislation were not binding on the Family Court because that was State law and the Family Law Act was Commonwealth law. Accordingly on constitutional grounds she refused to recognise the State presumptions. She then noted that there was a biological connection between the donor and the child, and that the Family Court can determine who it thinks is the parent of the child. In this particular case because the recipient was a single woman, the judge then went on to say: "And it is in the interests of the children to have two parents, and the Family Law Act anticipates that children will have two parents, therefore, I make a declaration that the sperm donor in this case is going to be the legal parent."

It is an unusual case on its facts. It was a known donor who had previously been in a relationship in the mother, but they had separated whilst remaining friends. He had agreed to be the sperm donor for his former girlfriend and they had undergone treatment with him listed as a donor. Although an unusual donor situation, it was a donor situation nonetheless. What it means is that it has thrown up a huge measure of uncertainty in this area and my view is that it is only a matter of time before there is another test case.

I will now talk about surrogacy and then will finish with some comments about where I believe we are heading in this area.

Commercial surrogacy is prohibited in New South Wales. Non-commercial surrogacy arrangements are not unlawful but are

not legally enforceable except in relation to expenses. There is now a provision in the Surrogacy Act for parties to apply to a Supreme Court for a parentage order. Importantly, surrogacy arrangements are now included in the requirements for information to go to the central register. The same principles about children born to the surrogacy arrangements being able to find out the identity of the other parties to that arrangement are also there.

What does the future hold? I am going to do a little bit of crystal ball gazing. That said my first point does not need a crystal ball to arrive at, because it is already happening. It is clearly the case that the market for gamete donation and surrogacy is going to become increasingly global. There are now egg donors who come from Nepal, Cyprus, Ukraine, and South Africa being used by Australian women. There are cases where Australian women fly to those countries in order to have their treatment. There are cases where the donors come here. There are cases where the eggs are retrieved in one country, then taken to a third country, to which the women fly for their treatment after which they return to Australia.

There is globalisation on a large scale. You have all read about the number of different countries where people are going now for surrogacy arrangements. Clearly, we are looking at a global market, not a State market. What follows from that is that State and National laws in Australia are going to be less and less able to regulate donation and surrogacy effectively.

It further follows, I believe, that not all donor conceived children will have the opportunity to make contact with their biological parents and that is not because the clinics here are not following the law. In my experience, the clinics are being very meticulous about making sure they gather all the information about the donors, wherever they are in the world, and they send it to the central register. However the reality is that if you are a donor conceived child, and in 18 years you have the name and address of someone in Kiev or Nicosia, the practical reality of being able to track that person down and locate them is fairly obvious. I believe therefore, from an ethical point of view, the principle that underpins that regulatory framework of allowing donor conceived children to have access to the identity of their donors is really under threat.

I have already mentioned the uncertainty about issues around legal parentage and the challenges that is posing. I believe the approach of the Family Court of insisting that there are only two biological parents is something that is quite

problematic in the donation context. You very often have same sex couples where you have multiple adults intended to be parents of a child. We had to advise recently about a polyamorous relationship where there were a number of people of differing sexes and sexual identities who were all co-habiting and all regarded themselves as partners of each other. Two of them wanted to undergo IVF. Who are the partners? How do you get all that to work in that context? Those variations, I believe, are just going to continue.

There will inevitably be a test case on the payment of reasonable expenses. Some of the American egg banks are charging $20,000 for egg donation and they justify that on the basis that it is reasonable expenses associated with the cost of retrieving the eggs, doing all the testing, the storage and transportation. Twenty thousand dollars seems an awful lot of money to me. I do believe that either the law is going to have to be changed or there will be a test case that will force some practices in that area to change.

Finally, and perhaps controversially, I do believe, whether you like it or not, that the pressure to permit some form of commercial surrogacy in Australia will mount. It is a complex argument and may be one that you can talk about amongst yourselves. I believe when you see what is happening in Cambodia at the moment and the difficulties that are being caused, you will appreciate that the people who are going to be suffering are the children unless we have some better way of regulating surrogacy in this area.

Thank you