Surrogacy - The Alternative Option Available to Victorian Residents to Start a Family

Surrogacy is an arrangement whereby a single person or a couple ("the intended parent(s)")[1] enter into arrangement with a woman ("the surrogate mother") who would undergo an artificial conception procedure and carry their child. She then surrenders the child to him/her/them upon birth. If the intended parents are a couple, it could include an opposite sex or same sex couple. The genetic material for the child will most commonly come from either or both the intended parents, by way of a sperm and/or ovum donation, and otherwise a third person.[2]

There are two forms of surrogacy. The first is traditional surrogacy, whereby the surrogate mother undergoes donor insemination treatment where she provides the ovum. This form of surrogacy does not usually occur via IVF Clinics in Australia, as a matter of policy. The alternative form of surrogacy is gestational surrogacy whereby the ovum is harvested from a third person (or one of the intended parents where possible and in the case an opposite sex couple) and fertilised using a sperm donation from one of the intended parents. The embryo is then implanted in the surrogate mother, and the child will not have her DNA.

Surrogacy arrangements may be either altruistic or commercial. In altruistic arrangements, the surrogate mother is not paid a fee or reward for her services, whereas in commercial arrangements she is paid a fee or reward.

Increasingly, surrogacy is an option for creating families being utilised by opposite sex couples where the woman is unable to conceive for medical reasons, and by gay male couples. Although adoption is another option for creating a family, anecdotally couples are turning to surrogacy in increasing large numbers given the length of time and uncertainty surrounding adoption. Surrogacy is a reality within our society. Although a standing committee of the Attorneys General of the States and Territories and the Commonwealth resolved the States and Territories would all enact uniform legislation dealing with parentage and other issues arising out of surrogacy arrangements, the legislation that has thus far been enacted around Australia is far from uniform.

---

[1] Under the *Status of Children Act 1974 (Vic),* the expression used is "commissioning parents".

[2] Although for the purposes of state/territory based legislation, this is not a requirement in all places around Australia, but it is in Victoria.

In Victoria, surrogacy is predominantly dealt with in the *Status of Children Act 1974 (Vic)*, in conjunction with definitions contained in the *Assisted Reproductive Treatment Act 2008 (Vic).*

Who is a Parent? Family Law Act Provisions

For the intended parents, the primarily legal issue is who is a parent? This issue is significant because of the provisions of Section 61C of the *Family Law Act 1975 (*Cth), which makes provision for who has parental responsibility of a child, including each of the parents of a child, subject to any order of a Court.

The *Family Law Act 1975 (*Cth) does not have a definition of *parent*. Instead, it prescribes presumptions of parentage applying in various circumstances. Given all surrogacy arrangements will involve an artificial conception procedure, the issue of parentage is dealt with by Section 60H of the *Family Law Act 1975 (*Cth).

Pursuant to the provisions of Sections 60H(1)(a)-(c) and Section 60H(2) *Family Law Act 1975 (*Cth), the presumption of parentage will apply to the surrogate mother and her married or de facto partner provided the following applies:

i) Both the woman and her married or de facto partner consented to the carrying out of the procedure;
ii) The woman and her married or de facto partner were in a relationship at the time of conception[3];
iii) Under a prescribed law of the Commonwealth, or of a State or Territory the child is a child of the surrogate mother and her married or de facto partner.

Section 12CA of the *Family Law Regulations 1984* (Cth) provides that the following laws are prescribed laws for the purposes of Section 60H(2)(b) of the *Family Law Act 1975 (*Cth): -

Item	Law
1	*Status of Children Act 1996* (NSW), section 14
1A	*Status of Children Act 1974* (Vic), section 15 and 16
2	*Status of Children Act 1978* (Qld), section 23
3	*Artificial Conception Act 1985* (WA)
4	*Family Relationships Act 1975* (SA), sections 10B and 10C
5	*Status of Children Act 1974* (Tas), Part III
6	*Parentage Act 2004* (ACT), subsections 11 (2) and (3)
7	*Status of Children Act 1978* (NT), sections 5B, 5C and 5E

[3] Per Keaton & Aldridge [2009] FamCA 92 at paragraph 39.

Section 60H(2) provides that if a prescribed law of the Commonwealth or a State or a Territory provides that a child is a child of a woman as a result of an artificial conception procedure, then for the purposes of the *Family Law Act 1975 (*Cth) it is her child whether or not the child is biologically a child of the woman. The upshot of Section 60H is that in a surrogacy arrangement whereby one of the intended parents provides the sperm or ovum donation, the surrogate mother and her married or de facto partner will be presumed the parents of the child, even though the child does not have their DNA. This would leave the intended parents without a presumption of a parentage under the *Family Law Act*.

Commonly where surrogacy arrangements involve a gay male couple, by consent the intended parent who provided the sperm donation is named on the child's birth certificate as a parent of the child. An intended parent named on the birth certificate as the father will have a presumption of parentage under Section 69R of the *Family Law Act 1975 (*Cth) which provides as follows: -

> *"If a person's name is entered as a parent of a child in the Register of Births or Parentage, information kept under a law of the Commonwealth or of a State, Territory or prescribed overseas jurisdiction, the person is presumed to be a parent of the child."*

Whe the intended parent who provided the sperm donation is named in the child's birth certificate, this gives rise to a conflict between presumptions of parentage. The surrogate mother's married or de facto partner has a presumption of parentage by virtue of Section 60H(1)(a) - (c), whereas Section 60H(1)(d) provides that if a person other than a woman and her married or de facto partner provided with genetic material for the child, then a child is not a child of that person. Effectively, Section 60H(1)(d) precludes a sperm donor as being a parent of the child if he was not in a marriage or de facto relationship with the surrogate mother.

Section 60HB of the *Family Law Act 1975 (*Cth) to paraphrase, provides that if a Court has made an Order under a prescribed law of a state or territory to the effect that the parentage of the child is transferred from the surrogate mother and her married or de facto partner to the intended parents, then the intended parents will be presumed the parents of the child. Section 60HB is not worded in such terms, however, this is the effect of that section.

For the purposes of Section 60HB, the prescribed laws it refers to are set out in regulation 12CAA of the *Family Law Regulations 1984* (Cth). These prescribed laws refer to State and Territory legislation which prescribe what is commonly known as "parentage orders". In

Victoria, the prescribed law is in Section 22 of the *Status of Children Act 1974* (Vic), which makes provision for what is known as a "substituted parentage order".

Relevant Case Law

The most recent decision dealing with who is a parent in surrogacy arrangements is *Re Michael: Surrogacy Arrangements*[4]. The facts of *Re Michael: Surrogacy Arrangements* involve the intended parents entering into an arrangement with the intended mother's own mother to act as the surrogate mother. The surrogate mother underwent an IVF procedure whereby the intended father provided the sperm donation and an ovum donation came from a third person. The surrogate mother was in a de facto relationship at the time of conception.

After the child was born, she was given to the care of the intended parents. The surrogate mother and the intended father (the sperm donor) were named as parents on the birth certificate.

In his decision, Justice Watts of the Family Court of Australia at Sydney dealt with the application of presumptions of parentage for a child born into a surrogacy arrangement. As this involved a New South Wales surrogacy arrangement, the relevant State legislation that applied was a *Status of Children Act* (NSW).

Justice Watts' decision provided that Section 60H(1)(b) of the *Family Law Act 1975 (*Cth) incorporates the presumptions of parentage under the *Status of Children Act* (NSW), since that legislation is a prescribed law of the purposes of Section 60H *Family Law Act 1975 (*Cth). Therefore, if a presumption of parentage arising out of an artificial conception procedure applies under Section 14[5] of the *Status of Children Act* (NSW), and therefore under Section 60H of the *Family Law Act 1975 (*Cth), then by virtue of the provision of Section 17[6] of the *Status of Children Act* (NSW) it will prevail over any presumption of parentage which may apply out of birth registration under Section 11[7] of the *Status of Children Act* (NSW) or Section 69R of the *Family Law Act 1975 (*Cth).

---

[4] [2009] FamCA 691.

[5] Section 14 of the *Status of Children Act* (NSW) makes provision for presumptions of parentage when the child was conceived by way of an artificial conception procedure. The presumptions operate in similar terms to that under Section 60H of the *Family Law Act 1975 (*Cth).

[6] Section 17 of the *Status of Children Act* (NSW) deals with the conflicts between presumptions of parentage, and provides that irrebuttable presumptions will prevail over rebuttable presumptions.

[7] Section 11 of the *Status of Children Act* (NSW) is in similar terms to Section 69R of the *Family Law Act 1975 (*Cth) making provision for a presumption of parentage arising out of birth registration.

By virtue of the operation of Section 60H of the *Family Law Act 1975 (*Cth), the surrogate mother and her de facto partner were presumed parents of the child. However, the intended father/sperm donor being named on the birth certificate had a presumption of parentage under Section 69R of the *Family Law Act 1975 (*Cth). The presumption of parentage of the intended father/sperm donor was in conflict with the presumption applying to the surrogate mother's de facto partner. The presumption of parentage under Section 60H(1) of the *Family Law Act 1975 (*Cth) is irrebuttable, whereas the presumption of parentage under Section 69R of the *Family Law Act 1975 (*Cth) is rebuttable. Given that Section 17 of the *Status of Children Act* (NSW) is incorporated into the presumptions of parentage under Section 60H of the *Family Law Act 1975 (*Cth) providing that irrebuttable presumptions of parentage will prevail over rebuttable presumptions of parentage, the presumption of parentage of the surrogate mother's de facto partner prevailed over that of the intended father/sperm donor.

The consequence of couples entering into surrogacy arrangements of the operation of the presumptions of parentage under Section 60H and Section 69R of the *Family Law Act 1975 (*Cth), and in relation to the decision in *Re Michael: Surrogacy Arrangements,* is that being named on a birth certificate as a parent will be insufficient to give a person a presumption of parentage and will not enable that person to exercise parental responsibility over the child.

Law in Victoria: Transfer of Parentage Mechanism

In Victoria, commercial surrogacy arrangements which take place within Victoria are illegal and a criminal offence.[8] However, it appears that the criminal offence is of the surrogate mother receiving a fee or reward beyond her prescribed costs, and not of the intended parents entering into a commercial arrangement with her.[9]

There is nothing in the *Assisted Reproductive Treatment Act* (Vic), or the *Status of Children Act 1974* (Vic), which makes it a criminal offence for Victorian residents to enter into commercial surrogacy arrangements overseas. Indeed, anecdotally this is the most common form of surrogacy arrangement entered into by Victorian residents.

Section 20 of the *Status of Children Act 1974* (Vic) makes provision for a mechanism to obtain a "substituted parentage order". A substituted parentage order takes the status of parent from the surrogate mother and her marriage or de facto partner, and confers it upon the intended parents. There are a number of requirements that need to be satisfied before a substituted parentage order can be obtained, namely:-

[8] Per Section 44 of the *Assisted Reproductive Treatment Act* (Vic)
[9] The surrogate mother's prescribed costs are dealt with in Regulation 10 of the *Assisted Reproductive Treatment and Regulations* and are somewhat limited.

1. The child was conceived as a result of an artificial conception procedure carried out in Victoria[10];
2. The commissioning parents live in Victoria at the time of making the application[11];
3. The application for the substituted parentage order must be made not less than 28 days and not more than six months after the birth of the child, or at another time with the leave of the court[12];
4. A copy of the child's birth certificate is filed in court[13];
5. The court must be satisfied that the making of a substituted parentage order is in the best interests of the child[14];
6. If the surrogacy arrangement was commissioned with the assistance of a registered IVF clinic, then that clinic's Patient Review Panel approved the surrogacy arrangement before it was entered into[15];
7. The child was living with the intended parents at the time the application was made[16];
8. That the surrogate mother and her partner have not received any material benefit or advantage from the surrogacy arrangement - in other words, that it is an altruistic arrangement[17];
9. The surrogate mother consents to the making of the order[18];
10. If the surrogate mother's partner is a party to the surrogacy arrangement, then whether the partner consents to the making of the order[19].

In circumstances where the surrogacy arrangement was entered into without the assistance of a registered IVF clinic, then the following additional requirements apply:-

1. That the surrogate mother was at least 25 years old before entering into the arrangement[20];
2. That the intended parents, the surrogate mother and her partner have received counselling about the social and psychological implications of making the substituted parentage order, and counselling about the implication of the relinquishment of the child on the relationship between the surrogate mother and the child once the

[10] Per Section 20(1)(a) of the *Status of Children Act 1974* (Vic)
[11] Per Section 20(1)(b) of the *Status of Children Act 1974* (Vic)
[12] Per Section 20(2) of the *Status of Children Act 1974* (Vic)
[13] Per Section 20(3) of the *Status of Children Act 1974* (Vic)
[14] Per Section 22(1)(a) of the *Status of Children Act 1974* (Vic)
[15] Per Section 22(1)(b) of the *Status of Children Act 1974* (Vic)
[16] Per Section 22(1)(c) of the *Status of Children Act 1974* (Vic)
[17] Per Section 22(1)(d) of the *Status of Children Act 1974* (Vic)
[18] Per Section 22(1)(e) of the *Status of Children Act 1974* (Vic)
[19] Per Section 22(3) of the *Status of Children Act 1974* (Vic)
[20] Per Section 23(2)(a) of the *Status of Children Act 1974* (Vic)

substituted parentage order is made, and obtaining information about the legal consequences of the making of the substituted parentage order[21].

Consent to the substituted parentage order is not required if the surrogate mother cannot be located after making reasonable enquiries, if she is deceased, or if on the evidence she is likely to be in such a physical or mental condition as to be incapable of properly considering whether to give consent[22].

The surrogate mother's partner's consent can also be dispensed with in the same circumstances as that of the surrogate mother[23].

The application for a substituted parentage order can be made either to the Supreme Court or to the County Court[24]. However, the County Court may transfer the matter to the Supreme Court if it considers, in all the circumstances of the case, that the matter should be dealt with by the Supreme Court[25].

If proceedings are commenced in the Supreme Court for a substituted parentage order, then it is to be commenced by way of Notice of Motion naming the intended parents as plaintiffs and the surrogate mother and her marriage or de facto partner as the defendants. In support of the Notice of Motion there should be affidavit material filed by the intended parents addressing the matters dealt with in Sections 20-24 of the *Status of Children Act 1974* (Vic).

What does a substituted parentage order look like?

In the Children's Court of Queensland in September 2010 the first surrogacy case involving a parentage order was determined in the case of *BLH & HM v SJW & MW*[26]. The orders made in that case were as follows:-

> *1. That pursuant to section 22(1) of the Surrogacy Act (Qld) 2010 parentage of CWH born 11 May 2010 be transferred from SJW and MW to BLH and MH;*
>
> *2. That SJW and MW relinquish to BLH and MH custody and guardianship of CWH and that the presumptions of parentage pursuant to the provisions of the Status of Children Act 1978 (Qld) which are applicable and declarable until this order is made be declared inapplicable;*

[21] Per Section 23(2)(b) of the *Status of Children Act 1974* (Vic)
[22] Per Section 24(1) of the *Status of Children Act 1974* (Vic)
[23] Per Section 24(2) of the *Status of Children Act 1974* (Vic)
[24] Per Section 18(1) of the *Status of Children Act 1974* (Vic)
[25] Per Section 18(2) of the *Status of Children Act 1974* (Vic)
[26] [2010] QDC 439

> *3. That BLH and MH become permanently responsible for the custody and guardianship of CWH;*
>
> *4. That pursuant to section 41D of the Births, Deaths and Marriages Registration Act (Qld) 2003, that the applicants and the Registrar of Births, Deaths and Marriages take all steps to register this parentage order and hence register the transfer of parentage of CWH's Queensland birth certificate registration number [number stated] registered in Brisbane on 21 May 2010;*

The equivalent orders in Victoria might look like as follows:-

1. That pursuant to Section 20 of the *Status of Children Act 1974* (Vic) the parentage of [child] born [date of birth] be transferred from [surrogate mother and partner] to [intended parents];
2. That [surrogate mother and partner] relinquish to [intended parents] parental responsibility of [child] and that [child] live with [intended parents] and that the presumptions of parentage pursuant to the provisions of the *Status of Children Act 1974* (Vic) which are applicable and declarable until this order is made be declared inapplicable;
3. That [intended parents] have parental responsibility for [child] and that [child] live with them;
4. That pursuant to Section 19A of the *Births Deaths and Marriages Act 1996* (Vic) the applicants and Registrar of Births Deaths and Marriages do all acts and things to register this parentage order and register the transfer of parentage of [child's] Victorian birth certificate registration number [number stated] registered in [place] on [when].

Overseas surrogacy arrangements

As the *Status of Children Act 1974* (Vic) only extends the substituted parentage order mechanism to altruistic surrogacy arrangements, what is the position with overseas commercial surrogacy arrangements entered into by Victorian residents?

Is it interesting to note that in Queensland, New South Wales, the Australia Capital Territory, and Western Australia, it is now a criminal offence for residents of those states/territories to enter into overseas commercial surrogacy arrangements. Victorian residents can take comfort in the knowledge that it is not a criminal offence for them to enter into overseas commercial surrogacy arrangements.

The same presumptions of parentage apply where overseas commercial surrogacy arrangements have been entered into. That is, the surrogate mother and her married or de facto partner will be presumed the parents of the child. In order for the intended parents in such commercial surrogacy arrangements to be able to exercise parental responsibility, they will need to obtain a parenting order from the Family Court of Australia or Federal Magistrates Court, conferring parental responsibility upon them.

The parenting order can be obtained with the consent of all parties. Procedurally, it is recommended that a draft parenting order be prepared in advance of the birth and surrender of the child, and that the intended parents have it in electronic form. Then upon the birth of the child the intended parents can insert the name and date of birth of the child to the orders, which will provide that the intended parents have equal shared parental responsibility, and that the child live with them. The order can then be signed by the intended parents and the surrogate mother and her partner shortly after the birth of the child. This step is recommended purely as a matter of logistics. Alternatively, the orders to be made by consent can be subsequently sent to the surrogate mother and her partner for them to sign. However, which course is adopted will depend upon where the surrogacy arrangement takes place. For instance, if it is via a commercial agency in India then it is recommended having the orders prepared in advance for the surrogate mother and her partner to sign as there may be difficulties locating them after the surrogacy arrangement has been concluded. Thought will also need to be given to whether the surrogate mother and her partner speak English. If not, then the consent orders will need to be translated into their language.

Although the parenting orders by consent could technically be filed together with an Application for Consent Orders, the Application for Consent Orders form is really designed for cases where separated couples have agreed upon post-separation parenting arrangements, and does not sit neatly with a surrogacy arrangement. The alternative, which is recommended, is to file an Initiating Application with affidavit material in support from the intended parents. The affidavit material would need to address the details about entering into the surrogacy arrangement through to conception and the surrender of the child. The affidavit material will also need to address the relevant Section 60CC factors.

Law Reform

Although various of the states and territories have enacted legislation making provision for a transfer of parentage mechanism in altruistic arrangements, there are variations as to jurisdictional requirements in each place.

Altruistic surrogacy arrangements occur privately, whereas overseas commercial arrangements are most commonly arranged through an agency, providing careful screening of the potential surrogate mothers, counseling, and arranging for the IVF treatment and legal/immigration matters. Although the current state of law seems to treat commercial arrangements as some sort of taboo, it is actually the altruistic arrangements which have the greater potential to go wrong. For instance, in an altruistic arrangement what if the surrogate mother refuses to surrender the child? She cannot be compelled. If she had undergone careful screening, as in a commercial arrangement, then she may not have undertaken the task in the first place.

It seems that by virtue of the volume of Australian residents entering into overseas commercial surrogacy arrangements, society is still ahead of where the law currently stands.

It would be preferable if the laws across the states and territories were uniform. One possible means of achieving this is if the states and territories conferred upon the Commonwealth the power to make laws with respect to surrogacy arrangements as some of the states and territories did with de facto property matters. Then perhaps the transfer of parentage mechanism could be dealt with under Commonwealth legislation, and in either the Family Court of Federal Magistrates Court.

The criminalizing of some Australian residents entering into overseas commercial surrogacy arrangements ought to be forthwith repealed in those places where it is a criminal offence. By virtue of the sheer numbers of Australian residents seeking to enter into overseas commercial surrogacy arrangements, it would appear that at least some segments of society do not have a moral or ethical issue with commercial surrogacy arrangements. In order to address any potential moral or ethical issues concerning commercial surrogacy arrangements it is recommended that those arrangements be legalized for occurring within Australia, but carefully regulated.