

SURROGACY: THE EMERGING ALTERNATIVE TO STARTING A FAMILY



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PART 1

INTRODUCTION

There is no definition of “family” within the *Family Law Act*. Although the *Family Law Act* seems largely designed to deal with the “traditional family”, comprising a mother, a father and children, the reality in society is that the family comprises many different forms¹.

Surrogacy is an arrangement whereby a commissioning couple (“the intending parents”) enter into an arrangement with a woman (“the surrogate mother”) who will carry their child, and then surrender the child to the intending parents upon birth. There are two forms of surrogacy. The first is traditional surrogacy, whereby the surrogate mother undergoes donor insemination treatment using her own 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 intending parents where possible and in the case of an opposite sex couple) and fertilised using a sperm donation from one of the intending parents. The embryo is then implanted in the surrogate mother, and the child will not have her DNA.

Increasingly surrogacy is an option for creating a family being utilised by opposite sex couples where the woman is unable to conceive for medical reasons, and by gay male couples². Although adoption is another option for creating a family, anecdotally couples are turning to surrogacy in increasingly larger numbers given the length of time taken and uncertainty surrounding adoption.

Leaving aside any debate about moral or ethical issues, surrogacy is a reality within our society. In my own experience as a lawyer, couples who cannot have children of their own through conventional means (whether same sex couples, or opposite sex couples for medical reasons) and who utilise surrogacy as an option to start a family are not so concerned with any issues about morality or ethics. In Australia the laws, whether at a State/Territory or Commonwealth level, are not particularly advanced insofar as how they deal with surrogacy arrangements compared to say the laws in California.

Each of the States and Territories in Australia has its own legislation dealing with assisted reproductive technology and which have general provisions about surrogacy arrangements. For instance in New South Wales under the *Assisted Reproductive Technology Act 2007* commercial

¹ See reference to “new forms” of family in Aldridge & Keaton [2009] FamCAFC at paragraph 77.

² The author is not relying upon any data from the Australian Institute of Family Studies or elsewhere. Rather this is an observation based on the authors own experiences through volunteering at the Inner City Legal Centre at Kings Cross in Sydney, and in private practice.

surrogacy arrangements are prohibited³ and entering into any commercial surrogacy arrangement can render the parties involved liable to prosecution. Commercial surrogacy is an arrangement whereby the intending parents provide a monetary benefit to the surrogate mother for her services. Otherwise under the *Assisted Reproductive Technology Act 2007* surrogacy agreements are void⁴. There are similar provisions in legislation of the other States and Territories around Australia.

The position with surrogacy in general in Australia is that whilst commercial surrogacy is prohibited, altruistic surrogacy is not prohibited. However, agreements to enter into altruistic surrogacy arrangements are void, and therefore altruistic surrogacy arrangements cannot be enforced. The consequence is that any surrogacy arrangements entered into within Australia run the risk that upon the birth of the child, the surrogate mother may decide not to surrender the child and cannot be compelled to do so. The only possible remedy for the intending parents in such a situation is to apply to either the Family Court or Federal Magistrates Court for parenting orders that the child live with them⁵.

A Standing Committee of the Attorneys General of the States and Territories and the Commonwealth resolved that the States and Territories would all enact uniform legislation dealing with parentage and other issues arising out of surrogacy arrangements. The relevant legislation insofar as New South Wales is concerned is examined later in this paper.

Part 2

Who is a Parent? Family Law Act Provisions

For the intending parents, the primary legal issue is who is a parent. This issue is significant because of the provisions of s61C of the *Family Law Act*, which makes provision for who has parental responsibility of a child as follows:

Each parent has parental responsibility (subject to court orders)

(1) Each of the parents of a child who is not 18 has parental responsibility for the child.

³ Per s43 Assisted Reproductive Technology Act 2007

⁴ Per s45 Assisted Reproductive Technology Act 2007

⁵ See *Re: Evelyn* [1998] FamCA 2378 as an example of an altruistic surrogacy arrangement where the surrogate mother seized the child back from the intending parents, and of the subsequent Family Court litigation over the child.

Note 1: This section states the legal position that prevails in relation to parental responsibility to the extent to which it is not displaced by a parenting order made by the court. See subsection (3) of this section and subsection 61D(2) for the effect of a parenting order.

Note 2: This section does not establish a presumption to be applied by the court when making a parenting order. See section 61DA for the presumption that the court does apply when making a parenting order.

Note 3: Under section 63C, the parents of a child may make a parenting plan that deals with the allocation of parental responsibility for the child.

(2) Subsection (1) has effect despite any changes in the nature of the relationships of the child's parents. It is not affected, for example, by the parents becoming separated or by either or both of them marrying or re-marrying.

(3) Subsection (1) has effect subject to any order of a court for the time being in force (whether or not made under this Act and whether made before or after the commencement of this section).

Parents have parental responsibility, which is defined in section 61B of the *Family Law Act* as follows:-

Meaning of parental responsibility

*In this Part, **parental responsibility**, in relation to a child, means all the duties, powers, responsibilities and authority which, by law, parents have in relation to children.*

However, the *Family Law Act* does not have a definition of *parent*, rather 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 s60H of the *Family Law Act* which provides as follows:

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.

Pursuant to the provisions of ss60H(1)(a)–(c) & (2) *Family Law Act*, the presumption of parentage will apply to the surrogate mother and her married or de facto partner provided the following applies:

1. Both the woman and her married or de facto partner consented to the carrying out of the procedure;

2. The woman and her married or de facto partner were in that relationship at the time of conception⁶;
3. 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* provides that the following laws are prescribed laws for the purposes of s60H(2)(b) of the *Family Law Act*:

Artificial conception procedures: child of woman -- prescribed laws

For paragraph 60H (2) (b) of the Act, the laws mentioned in the following table are prescribed.

<i>Item</i>	<i>Law</i>
<i>1</i>	<i>Status of Children Act 1996 (NSW), section 14</i>
<i>1A</i>	<i>Status of Children Act 1974 (Vic), section 15 and 16</i>
<i>2</i>	<i>Status of Children Act 1978 (Qld), section 18AB</i>
<i>3</i>	<i>Artificial Conception Act 1985 (WA)</i>
<i>4</i>	<i>Family Relationships Act 1975 (SA), sections 10B and 10C</i>
<i>5</i>	<i>Status of Children Act 1974 (Tas), Part III</i>
<i>6</i>	<i>Parentage Act 2004 (ACT), subsections 11 (2) and (3)</i>
<i>7</i>	<i>Status of Children Act 1978 (NT), sections 5B, 5C and 5E</i>

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* it is her child whether or not the child is biologically a child of the woman.

The upshot of s60H is that in a surrogacy arrangement whereby one of the intending parents provides the sperm 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 appears to leave the intending parents without a presumption of parentage under the *Family Law Act* .

Commonly where surrogacy arrangements involve a gay male couple, by consent the intending parent who provided the sperm donation is named on the child's birth certificate as a parent of the child. The intending parent named on the birth certificate as the father will have a presumption of parentage under s69R of the *Family Law Act* which provides as follows:

⁶ Per *Keaton and Aldridge* [2009] FamCA 92 at paragraph 39.

Presumption of parentage arising from registration of birth

If a person's name is entered as a parent of a child in a 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.

Where the intending parent who provided the sperm donation is named on 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 s60H(1)(a)-(c), whereas s60H(1)(d) provides that if a person other than the woman and her married or de facto partner provided the genetic material for the child, then a child is not a child of that person. Effectively s60H(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. Conflicts between presumptions of parentage will be dealt with later in this paper.

Section 60HB deals with presumptions of parentage of children in surrogacy arrangements. It provides as follows:

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 Magistrates Rules*

For the purposes of s60HB, the prescribed laws it refers to are set out in regulation 12CAA of the Family Law Regulations as follows:

Children born under surrogacy arrangements -- prescribed laws

For subsection 60HB (1) of the Act, the laws mentioned in the following table are prescribed.

<i>Item</i>	<i>Law</i>
1	<i>Status of Children Act 1974 (Vic), section 22</i>
2	<i>Surrogacy Act 2010 (Qld), section 22</i>
3	<i>Surrogacy Act 2008 (WA), section 21</i>
4	<i>Parentage Act 2004 (ACT), section 26</i>

The standing committee of the Attorneys Generals of the States and Territories and the Commonwealth examined the laws of all the States and Territories insofar as they applied to surrogacy arrangements. Although it was resolved that each of the States and Territories would enact uniform laws making provision for a mechanism, through the courts, to transfer parentage from the surrogate mother and her married or de facto partner to the intending parents, not all of the States and Territories have enacted such laws as yet. Currently those laws exist in Western Australia, the ACT and Victoria and Queensland. New South Wales has enacted the *Surrogacy Act 2010* which came into effect as of 1 March 2011. The specifics of these laws will be dealt with later in this paper.

Part 3

Case Law

In 2003 Justice Brown of the Family Court in Melbourne delivered a decision in the case of *Re Mark: an application relating to parental responsibilities*⁷. This is a case involving a gay male couple who entered into a commercial surrogacy arrangement with a woman from California. In California, commercial surrogacy is not only legal, commercial surrogacy agreements are enforceable. In this surrogacy arrangement, an ovum donation was provided by an anonymous female third person, and the sperm donation was provided by one of the gay male couple who are from Melbourne. The embryo was implanted in the surrogate mother, who was married. Upon the birth of the child, he was surrendered to the care of the gay male couple, the parties entered into a legal mechanism via the Californian Supreme Court to confer parental responsibility upon the gay male couple, and a birth certificate issued naming the parents as the sperm donor and the surrogate mother.

The gay male couple filed an Application for Consent Orders in the Family Court at Melbourne. They were named as the applicants, and the respondents were the surrogate mother and her husband.

⁷ [2003] Fam CA 822

The consent orders provided for the gay male couple to have parental responsibility of the child, and that he live with them.

Eventually Justice Brown made the parenting orders by consent, but by way of obiter she considered the issue of who is the child's parent. She reviewed previous case authorities including *B & J*⁸ and *re: Patrick*⁹.

Justice Brown concluded that by applying presumptions of parentage applicable in Australia, the surrogate mother and her husband would be presumed the parents of the child. This was by way of operation of s60H of the *Family Law Act*, as it then was. However, the sperm donor was noted on the birth certificate as the father of the child. Justice Brown then examined whether he would be presumed a parent for the purposes of s69R of the *Family Law Act*. She noted that s69R can deem a person a parent if they are named as a parent on a birth certificate issued from a prescribed overseas jurisdiction. At the time the case was determined, there were no prescribed overseas jurisdictions in the *Family Law Regulations* for the purposes of recognising birth certificates from overseas. Accordingly, she found that the sperm donor was not a parent for the purposes of s69R.

When examining other case authority Justice Brown found that in the absence of a definition of the word *parent* or a deeming provision as to the status of the sperm donor, she could apply the common law definition of parent, which is to be found in the Oxford Dictionary. She found that a parent is a person who has begotten or born a child.

Upon examining the facts of the case in *re Mark*, Justice Brown found that the sperm donor provided the sperm donation expressly for the purpose of conceiving a child which he would parent. She did not make any finding that the sperm donor in this case was a parent for a number of reasons. There was no contradicting party to the application and there may have been arguments contrary to the sperm donor being deemed a parent. Otherwise Justice Brown was mindful of the impact of finding a sperm donor to be a parent, including that men who have donated sperm to the IVF industry may find they are deemed parents and have parental responsibility and potential child maintenance liabilities.

The issue concerning the status of the sperm donor, who is not in a marriage or de facto relationship with the birth mother, has now been overcome with the amendments to s60H of the *Family Law Act* which came in to effect in November 2008. Specifically, s60H(1)(d) deems a sperm donor in the *re: Mark* scenario not to be a parent of the child.

⁸ [1996] Fam CA 124

⁹ [2002] Fam CA 193

The decision of Justice Watts of the Family Court of Australia in *re Michael: surrogacy arrangements*¹⁰ dealt with the application of presumptions of parentage for a child who is born into a surrogacy arrangement. Although the case involved an opposite sex couple who entered into a surrogacy arrangement with the mother of the intended mother, and an application to the Family Court for leave to adopt under s60G of the *Family Law Act*, the reasoning of this decision has application in cases involving gay male couples where the sperm donor in the surrogacy arrangement is named on the birth certificate as the father.

The decision in *re Michael: surrogacy arrangements* provided that the second limb of s60H(1)(b) of the *Family Law Act* incorporates presumptions of parentage under the *Status of Children Act (NSW)*, since the *Status of Children Act (NSW)* is a prescribed law for the purposes of s60H *Family Law Act*. Therefore, if a presumption of parentage arising out of an artificial conception procedure applies under s14¹¹ of the *Status of Children Act (NSW)*, and therefore under s60H of the *Family Law Act*, then by virtue of the provisions of s17¹² of the *Status of Children Act (NSW)* it will prevail over any presumption of parentage which may apply out of birth registration under s11¹³ of the *Status of Children Act (NSW)*, or s69R of the *Family Law Act*.

The facts of *re Michael: surrogacy arrangements* involved the intending parents entering into an arrangement with the intending mother's own mother to act as the surrogate mother. The surrogate mother underwent an IVF procedure whereby the intending father provided the sperm donation and an ovum donation came from a third person. The surrogate mother was in a de facto relationship.

After the birth of the child the surrogate mother surrendered the child to her daughter and son-in-law. The surrogate mother and the intended father (the sperm donor) were named as parents on the birth certificate.

By virtue of the operation of s60H of the *Family Law Act* the surrogate mother and her de facto partner were presumed parents of the child. However, the intending father/sperm donor being named on the birth certificate had a presumption of parentage under s69R of the *Family Law Act*. The presumption of parentage of the intending father/sperm donor was in conflict with the presumption of parentage applying to the surrogate mother's de facto partner. The presumption of parentage under

¹⁰ [2009] Fam CA 691

¹¹ S.14 *Status of Children Act (NSW)* makes provision for presumptions of parentage where the child was conceived by way of an artificial conception procedure. The presumptions operate in similar terms to that under s.60H *Family Law Act*.

¹² S.17 *Status of Children Act (NSW)* deals with conflicts between presumptions of parentage, and provides irrebuttable presumptions will prevail over rebuttable presumptions.

¹³ S.11 *Status of Children Act (NSW)* is in similar terms to s.69R *Family Law Act* making provision for a presumption of parentage arising out of birth registration.

s.60H(1) *Family Law Act* is irrebuttable, whereas the presumption of parentage under s.69R *Family Law Act* is rebuttable. Given that s17 of the *Status of Children Act (NSW)* is incorporated into the presumptions of parentage under s60H and provides 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/sperm donor.

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

This is the correct legal/technical position. However, what may be occurring in practice within the community may be different.

Part 4

State/Territory Laws – parentage transfer mechanism

Surrogacy legislation in the various States and Territories makes provision for a transfer of parentage mechanism, referred to as parentage orders, whereby the status of parent of the surrogate mother and her married or de facto partner are transferred to and conferred upon the intending parents. By virtue of S.60HB *Family Law Act*, once the parentage order is made, the intending parents then have a presumption of parentage in their favour.

What follows is a brief examination of the transfer of parentage provisions which currently exist in Australia.

ACT law

The *Parentage Act 2004 (ACT)*, in division 2.5 of that Act, makes provision for parentage orders. The relevant sections, s23-26, provide as follows:

24 Application of div 2.5

This division applies to a child if—

- (a) the child was conceived as a result of a procedure carried out in the ACT; and*
- (b) neither birth parent of the child is a genetic parent of the child; and*
- (c) there is a substitute parent agreement, other than a commercial substitute parent agreement, under which 2 people (the **substitute parents**) have indicated their intention to apply for a parentage order about the child; and*

- (d) *at least 1 of the substitute parents is a genetic parent of the child; and*
- (e) *the substitute parents live in the ACT.*

25 Application for parentage order

- (1) *An application may be made to the Supreme Court for a parentage order about the child.*
- (2) *The application may be made by either or both of the substitute parents.*
- (3) *The application may only be made when the child is between the ages of 6 weeks and 6 months.*

26 Parentage order

- (1) *The Supreme Court must make a parentage order about the child if satisfied that—*
 - (a) *the making of the order is in the best interests of the child; and*
 - (b) *both birth parents freely, and with a full understanding of what is involved, agree to the making of the order.*
- (2) *However, the Supreme Court may dispense with the requirement under subsection (1) (b) in relation to a birth parent if satisfied that—*
 - (a) *the birth parent is dead or incapacitated; or*
 - (b) *the applicants cannot contact the birth parent after making reasonable inquiries.*
- (3) *In deciding whether to make a parentage order, the Supreme Court must take the following into consideration, if relevant:*
 - (a) *whether the child's home is, and was at the time of the application, with both substitute parents;*
 - (b) *whether both substitute parents are at least 18 years old;*
 - (c) *if only 1 of the child's substitute parents has applied for the order, and the other substitute parent is alive at the time of the application, whether—*
 - (i) *the other substitute parent freely, and with a full understanding of what is involved, agrees to the making of the order in favour of the applicant substitute parent; or*
 - (ii) *the applicant substitute parent cannot contact the other substitute parent to obtain his or her agreement under subparagraph (i);*
 - (d) *whether payment or reward (other than for expenses reasonably incurred) has been given or received by either of the child's substitute parents, or either of the child's birth parents, for or in consideration of—*
 - (i) *the making of the order; or*
 - (ii) *the agreement mentioned in subsection (1) (b); or*
 - (iii) *the handing over of the child to the substitute parents; or*
 - (iv) *the making of any arrangements with a view to the making of the order;*
 - (e) *whether both birth parents and both substitute parents have received appropriate counselling and assessment from an independent counselling service;*
 - (f) *if a birth parent is dead or incapacitated or cannot be contacted—any evidence before the court that the birth parent no longer intended or intends the substitute parents to obtain a parentage order about the child.*
- (4) *The Supreme Court may take into consideration anything else it considers relevant.*
- (5) *For subsection (3) (e), a counselling service is not **independent** if it is connected with—*
 - (a) *the doctor who carried out the procedure that resulted in the birth of the relevant child; or*
 - (b) *the institution where the procedure was carried out; or*
 - (c) *another entity involved in carrying out the procedure.*
- (6) *The Supreme Court must make a parentage order under subsection (1)—*
 - (a) *if both substitute parents apply for the order—in favour of both substitute parents; or*
 - (b) *if only 1 substitute parent applies for the order, and the other substitute parent is dead or incapacitated at the time of the application (unless the court is satisfied that, at the*

time of death or incapacitation, the deceased or incapacitated substitute parent no longer intended or intends to apply for a parentage order about the child)—in favour of both substitute parents; or

(c) if, in any other case, only 1 substitute parent applies for the order—in favour of the applicant substitute parent.

The jurisdictional requirements as set out in s24 of the *Parentage Act (ACT)* include:

1. The artificial conception procedure resulting in the conception of the child must have been carried out in the ACT;
2. Neither birth parent of the child provided any genetic material for the conception of the child;
3. There is an agreement between the parties, other than a commercial agreement, under which the intending parents have indicated their intention to apply for a parentage order about the child;
4. At least one of the intending parents is a genetic parent of the child (ie has provided the sperm donation or the ovum donation); and
5. The intending parents live in the ACT.

Western Australia law

Similar provisions for a transfer of parentage mechanism apply in Western Australia under the *Surrogacy Act (WA)*¹⁴ as follows:

19. Circumstances for seeking parentage order

(1) An application can be made under this Part for a parentage order only if—

(a) the arranged parents reside in Western Australia and at least one arranged parent has reached 25 years of age; and

(b) when the surrogacy arrangement was entered into or after that time but before the application is made —

(i) the arranged parents are an eligible couple; or

(ii) one of the arranged parents, or the arranged parent if there is only one, is an eligible person.

¹⁴ Sections 19 – 21 *Surrogacy Act*.

(2) *In subsection (1)(b) —*

eligible couple means 2 people of opposite sexes who are married to, or in a de facto relationship with, each other and who, as a couple —

(a) *are unable to conceive a child due to medical reasons not excluded by subsection (3); or*

(b) *although able to conceive a child, would be likely to conceive a child affected by a genetic abnormality or a disease;*

eligible person means a woman who —

(a) *is unable to conceive a child due to medical reasons not excluded by subsection (3); or*

(b) *although able to conceive a child, would be likely to conceive a child affected by a genetic abnormality or a disease; or*

(c) *although able to conceive a child, is unable for medical reasons to give birth to a child.*

(3) *The medical reasons for being unable to conceive a child that are referred to in the definitions of **eligible couple** and **eligible person** do not include —*

(a) *a reason arising from a person's age; or*

(b) *a reason prescribed for the purpose of the Human Reproductive Technology Act 1991 section 23(1)(d).*

20 . Applying for a parentage order

(1) *In the circumstances described in section 19, the arranged parents may, if the making of the order would not be prevented by section 16(1), apply in accordance with this section for a parentage order.*

(2) *The application can be lodged with the court only after a period of 28 days has elapsed since the day on which the child is born.*

(3) *The application cannot be lodged with the court more than 6 months after the day on which the child is born except with the leave of the court, which may be given in exceptional circumstances.*

(4) *If the child was born before the day fixed under section 2(b) as the day on which this section comes into operation, the application may, despite subsection (3), be lodged within one year after that day.*

(5) *Before the court considers the application, a certified copy of the child's birth certificate must, if it is available, have been lodged with the court.*

21 . Court may make parentage order

(1) *The court may, on an application made under section 20(1), make a parentage order.*

(2) *Before it makes a parentage order the court has to be satisfied that —*

(a) *the circumstances that section 19 requires for applying for a parentage order exist; and*

(b) *except to the extent that subsection (3) authorises the court to dispense with the requirement for a birth parent to have received the counselling, the child's birth parents and the arranged parents have received appropriate counselling about the effect of the proposed order; and*

(c) *except to the extent that subsection (3) authorises the court to dispense with the requirement for a birth parent to have received the advice, the child's birth parents and the arranged parents have received independent legal advice about the effect of the proposed order; and*

(d) *except to the extent that subsection (3) authorises the court to dispense with the requirement for a birth parent's consent, the child's birth parents freely consent to the making of the order; and*

(e) *except in circumstances identified in subsection (4), the child was, when the application for the order was lodged with the court, and is, when the court makes the proposed order, in the day to day care of the arranged parents; and*

(f) *except to the extent that subsection (3) authorises the court to dispense with the requirement for a birth parent to have agreed, the child's birth parents and the arranged parents have agreed in writing to an appropriate plan (the **approved plan**) in accordance with section 22; and*

(g) *it is in the best interests of the child for the court to make the proposed order.*

(3) *In circumstances identified in subsection (4) or if the court is satisfied that a birth parent is deceased or incapacitated or that the arranged parents have been unable to contact a birth parent despite having made reasonable efforts to do so, the court may dispense with —*

(a) *the requirement for the birth parent to have received counselling as described in subsection (2)(b); or*

(b) *the requirement for the birth parent to have received independent legal advice as described in subsection (2)(c); or*

(c) *the requirement for the birth parent to consent under subsection (2)(d) to the making of a parentage order; or*

(d) *the requirement for the birth parent to have agreed to an appropriate plan as described in subsection (2)(f).*

(4) *The circumstances this subsection identifies are that —*

(a) *the birth mother is not the child's genetic parent; and*

(b) *at least one arranged parent is the child's genetic parent.*

(5) *In subsection (4) —*

genetic parent *of a child means a person from whose egg or sperm the child is conceived.*

The jurisdictional requirements to access the transfer of parentage mechanism in WA include: -

1. The intending parents reside in WA and at least one is at least 25 years of age;
2. The intending parents are an opposite sex married or de facto couple who either cannot conceive a child for medical reasons, or can conceive a child but it is likely to be born with genetic defects.

Clearly the transfer of parentage mechanism in WA excludes same sex couples.

Unlike the jurisdictional requirements in the ACT legislation, there is no requirement that the artificial conception procedure be carried out in WA, and presumably could extend to arrangements where the intending couple residing in WA enter into a surrogacy arrangement with a surrogate mother interstate or overseas.

Victoria law

Victoria has provisions in the *Status of Children Act 1974 (VIC)*¹⁵ for a transfer of parentage mechanism by way of parentage orders, similar to the provisions in WA and ACT legislation. The principal jurisdictional requirements are set out in s.20 as follows:

- 20 *Application for a substitute parentage order***
- (1) *The commissioning parents of a child born under a surrogacy arrangement may apply to the court for a substitute parentage order if—*
 - (a) *the child was conceived as a result of a procedure carried out in Victoria; and*
 - (b) *the commissioning parents live in Victoria at the time of making the application.*
 - (2) *An application for a substitute parentage order must be made—*
 - (a) *not less than 28 days, and not more than 6 months after the birth of the child; or*
 - (b) *at another time with leave of the court.*
 - (3) *Before the court hears the application, the commissioning parents must file a certified copy of the child's birth certificate (if available) with the court.*

Section 20 *Status of Children Act (VIC)* sets out the jurisdictional requirements that must exist before the transfer of parentage mechanism can be accessed, including: -

1. The child was conceived by way of an artificial conception procedure carried out in Victoria;
2. The intending parents live in Victoria at the time the Application is made for a parentage order.

¹⁵ Sections 20 – 26 *Status of Children Act 1974*

Additional jurisdictional requirements for the making of a parentage order include: -

1. If the surrogacy arrangement was commissioned by a registered Assisted Reproductive Technology service provider, that the Patient Review Panel approved the arrangement before it was entered into¹⁶.
2. The child was living with the intended parents at the time the Application for the Parentage order was made¹⁷.
3. The arrangement was an altruistic arrangement¹⁸.
4. The surrogate mother consents to the Parentage order¹⁹.
5. If the surrogate mother has a partner at the time the arrangement was entered into, whether the partner consents to the Parentage order²⁰

The transfer of parentage mechanism in Victoria does not exclude same sex couples, however by operation of s.23 *Status of Children Act (VIC)*, the jurisdictional requirements contained in s.20 apply to arrangements where the child was conceived via an IVF clinic. Section 23 provides: -

23 Additional requirements for surrogacy arrangements without assistance of registered ART provider

(1) *This section applies if—*

- (a) *a surrogacy arrangement was commissioned without the assistance of a registered ART provider; and*
- (b) *the surrogate mother became pregnant as a result of artificial insemination; and*
- (c) *the commissioning parents apply under section 20 for a substitute parentage order.*

(2) *In addition to the matters set out in section 22, the court must also be satisfied—*

- (a) *that the surrogate mother was at least 25 years of age before entering the arrangement; and*
- (b) *that the commissioning parents, the surrogate mother and, if her partner is a party to the surrogacy arrangement, her partner have—*
 - (i) *received counselling about the social and psychological implications of making the substitute parentage order, including counselling, if relevant, about any of the matters prescribed for the purposes of section 43(a) of the **Assisted Reproductive Treatment Act 2008**; and*
 - (ii) *received counselling about the implications of the relinquishment of the child and the relationship between the surrogate mother and the child once the substitute parentage order is made; and*

¹⁶ S.22(1)(b) *Status of Children Act (Vic)*

¹⁷ S.22(1)(c) *Status of Children Act (Vic)*

¹⁸ S.22(1)(d) *Status of Children Act (Vic)*

¹⁹ S.22(1)(e) *Status of Children Act (Vic)*

²⁰ S.22(2) *Status of Children Act (Vic)*

- (iii) *obtained information about the legal consequences of making the substitute parentage order.*
- (3) *For the purposes of subsection (2)(b), the person must receive counselling from a counsellor within the meaning of section 61(3) of the **Assisted Reproductive Treatment Act 2008**.*

The additional jurisdictional requirements where the child is not conceived via an IVF clinic²¹ are as follows: -

1. The surrogacy arrangement was not commissioned via an IVF clinic;
2. The surrogate mother is at least 25 years of age;
3. All parties to the arrangement received counselling about the social and psychological consequences of the arrangement, and of the legal consequences.

As the Victorian legislation only applies to surrogacy arrangements where the artificial conception procedure was carried out in Victoria, the transfer of parentage mechanism provided in this legislation will not capture arrangements involving a surrogate mother where the artificial conception procedure was carried out interstate or overseas.

There is no provision in the *Status of Children Act (Vic)* creating a criminal offence for Victorian residents entering into commercial surrogacy arrangements overseas.

Queensland Law

The *Surrogacy Act 2010 (QLD)* makes provision for parentage orders in ss.21 and 22 as follows: -

Application for a parentage order

(1) An application for a parentage order in relation to a child may be made—

- (a) not less than 28 days and not more than 6 months after the child's birth; or*
- (b) at a later time with the court's leave.*

(2) The court may grant leave under subsection (1)(b) only if it considers the making of the late application is justified because of exceptional circumstances and that it is for the wellbeing, and in the best interests, of the child to grant the leave.

(3) Subsections (4) and (5) apply if there are 2 intended parents under the surrogacy arrangement and the 2 intended parents were a couple when the surrogacy arrangement was made.

²¹ ie, a home donor insemination procedure.

(4) The application for the parentage order may be made only by the 2 intended parents jointly.

(5) However, if the 2 intended parents are no longer a couple or 1 of them has died, 1 of the intended parents may apply for a parentage order.

(6) If there is 1 intended parent under the surrogacy arrangement and the intended parent did not have a spouse when the surrogacy arrangement was made, the intended parent may apply for a parentage order.

(7) To the extent practicable, the documents mentioned in section 25 must be filed with the application.

22 Making a parentage order

(1) On an application under this part, the court may make a parentage order for the transfer of parentage of a child to the applicant, or joint applicants.

(2) The court may make the parentage order only if it is satisfied of all of the following matters—

(a) the proposed order will be for the wellbeing, and in the best interests, of the child;

(b) the child—

(i) has resided with the applicant, or joint applicants, for at least 28 consecutive days before the day the application was made; and

(ii) was residing with the applicant, or joint applicants, when the application was made; and

(iii) is residing with the applicant, or joint applicants, at the time of the hearing;

(c) the applicant, or joint applicants, were entitled to apply under section 21;

(d) there is evidence of a medical or social need for the surrogacy arrangement;

(e) the surrogacy arrangement—

(i) was made after—

(A) the birth mother and the birth mother's spouse (if any), jointly or separately; and

(B) the applicant, or joint applicants (jointly or separately);

obtained independent legal advice about the surrogacy arrangement and its implications; and

(ii) was made after each of the birth mother, the birth mother's spouse (if any) and the applicant, or joint applicants, obtained counselling from an appropriately qualified counsellor about the surrogacy arrangement and its social and psychological implications; and

(iii) was made with the consent of the birth mother, the birth mother's spouse (if any) and the applicant, or

joint applicants; and

(iv) was made before the child was conceived; and

(v) is in writing and signed by the birth mother, the birth mother's spouse (if any) and the applicant, or joint applicants; and

(vi) is not a commercial surrogacy arrangement;

(f) the birth mother and the birth mother's spouse (if any) were at least 25 years when the surrogacy arrangement was made;

(g) the applicant, or each of the joint applicants—

(i) was at least 25 years when the surrogacy arrangement was made; and

(ii) is resident in Queensland;

(h) the birth mother, the birth mother's spouse (if any), another birth parent (if any) and the applicant, or joint applicants, consent to the making of the parentage order at the time of the hearing;

(i) a surrogacy guidance report under section 32 supports the making of the proposed order.

The jurisdictional requirements before a Parentage order can be obtained in Queensland are summarised as follows: -

1. The Application for the Parentage order must be made when the child is between the ages of 6 weeks and 6 months, unless otherwise with the leave of the Court²².
2. The Application for the Parentage order may only be made if there are 2 intend parents if it is a joint Application²³, however if the intended parents are no longer a couple or one has died then the Application can be made by one party²⁴.
3. The child was living with the intended parents for at least 28 days before the Application was made, the child was living with the intended parents when the Application was made and as at the time of the hearing²⁵.
4. There is evidence of a medical or social need for the surrogacy arrangement²⁶. This means the intended parent(s) are either a single man, a gay male couple, a single woman who cannot

²² S.22(1) *Surrogacy Act (Qld)*

²³ S.22(4) *Surrogacy Act (Qld)*

²⁴ S.22(5) *Surrogacy Act (Qld)*

²⁵ S.22(2)(b) *Surrogacy Act (Qld)*

²⁶ S.22(2)(d) *Surrogacy Act (Qld)*

conceive for medical reasons, or an opposite sex couple where the woman cannot conceive for medical reasons²⁷.

5. All of the parties obtained independent legal advice about the surrogacy arrangement and its implications, and counselling from an appropriately qualified counsellor about the surrogacy arrangement and its social and psychological implications²⁸.
6. The surrogacy arrangement was with the consent of all parties²⁹.
7. The arrangement was entered into before the child was conceived³⁰.
8. The arrangement was in writing and signed by all parties³¹.
9. The arrangement is an altruistic arrangement³².
10. The birth mother and her spouse were at least 25 years old when the arrangement was entered into³³.
11. The intended parents were at least 25 years old when the arrangement was entered into, and are Queensland residents³⁴.
12. All parties consent to the Parentage order³⁵.
13. A “Surrogacy Guidance Report” supports the making of a Parentage order³⁶.

s.32 *Surrogacy Act (Qld)* deals with the content of the Surrogacy Guidance Report as follows: -

32 Surrogacy guidance report

A surrogacy guidance report must be prepared by an independent and appropriately qualified counsellor and state the following matters—

(a) the reasons the counsellor is an independent and appropriately qualified counsellor;

*(b) that, for the application, the counsellor interviewed the birth mother, the birth mother’s spouse (if any), another birth parent (if any) and the applicant, or joint applicants, (the **relevant persons**);*

(c) the date or dates of the interviews;

(d) the counsellor’s opinion formed as a result of the interviews relevant to the application for a parentage order including, for example, about the following matters—

²⁷ S.14 *Surrogacy Act (Qld)*

²⁸ S.22(2)(e)(i)&(ii) *Surrogacy Act (Qld)*

²⁹ S.22(2)(e)(iii) *Surrogacy Act (Qld)*

³⁰ S.22(2)(e)(iv) *Surrogacy Act (Qld)*

³¹ S.22(2)(e)(v) *Surrogacy Act (Qld)*

³² S.22(2)(e)(vi) *Surrogacy Act (Qld)*

³³ S.22(2)(f) *Surrogacy Act (Qld)*

³⁴ S.22(2)(g) *Surrogacy Act (Qld)*

³⁵ S.22(2)(h) *Surrogacy Act (Qld)*

³⁶ S.22(2)(i) *Surrogacy Act (Qld)*

- (i) each relevant person's understanding of—
- (ii)
 - (A) the social and psychological implications of the making of a parentage order on the child and relevant persons;
 - (B) openness and honesty about the child's birth parentage being for the wellbeing, and in the best interests, of the child;
- (ii) the care arrangements that the applicant, or joint applicants, have proposed for the child;
- (iii) whether the making of a parentage order would be for the wellbeing, and in the best interests, of the child.

s.25 *Surrogacy Act (Qld)* deals with what documents are to be produced to Court upon applying for a Parentage Order, whereas ss.26 – 31 *Surrogacy Act (Qld)* deals with what Affidavit material is required, and what each Affidavit needs to address.

Summary of ACT, WA, QLD and VIC laws

Upon an examination of the jurisdictional requirements of the legislation outlined above, it is clear there are variations between those States and Territories which have passed laws dealing with surrogacy.

It is expected that the remaining States and Territories will enact similar laws making provision for the transfer of parentage in surrogacy arrangements.

New South Wales Law

A more detailed examination will be made of the New South Wales legislation, the *Surrogacy Act 2010 (NSW)*, which was proclaimed to take effect as of 1 March 2011. The following is an examination of the provisions of the *Surrogacy Act 2010 (NSW)* and of the mechanics of applying for a parentage order.

Section 4 *Surrogacy Act* defines a *parentage order* as follows: -

parentage order means an order made by the Court under this Act for the transfer of the parentage of a child.

Court is defined: -

Court means the Supreme Court of New South Wales.

The power to make a parentage order is contained in s.12 as follows: -

12 Parentage order

(1) The Court may, on application under this Part, make a parentage order in relation to a child of a surrogacy arrangement.

(2) The purpose of a parentage order is to transfer the parentage of a child of a surrogacy arrangement.

Proceedings for a parentage order in New South Wales are to be commenced in the Supreme Court of New South Wales in the Equity Division. This will be commenced by way of a Notice of Motion with Affidavit material in support. The Plaintiffs will be the intending parents, and the Respondents will be the surrogate mother and her partner (if she is partnered).

The Affidavit material in support of the Notice of Motion, which ought to be sworn by each Plaintiff, will need to address jurisdictional and other requirements set out in the legislation before a parentage order can be made. This will include: -

1. An application for a parentage order can be made for an arrangement entered into before or after the legislation commenced³⁷, where arrangements entered into before the commencement of the legislation are referred to as a *pre-commencement surrogacy arrangement*;
2. The application must be made when the child is aged between 6 weeks and 6 months, but in the case of a pre-commencement surrogacy arrangement, not more than 2 years from the commencement of the legislation³⁸;
3. The application must be supported by an *independent counsellor's report*³⁹. *Independent counsellor* is defined in S.17(7) Surrogacy Act as follows: -

³⁷ S.15 Surrogacy Act (NSW).

³⁸ S.16 Surrogacy Act (NSW).

³⁹ S.17 Surrogacy Act (NSW).

(7) For the purposes of this section, an **independent counsellor** is a qualified counsellor who:

(a) is not the counsellor who counselled the birth mother, the birth mother's partner (if any) or an intended parent about the surrogacy arrangement, to meet a precondition to the making of a parentage order, and

(b) is not, and is not connected with, a medical practitioner who carried out a procedure that resulted in the conception or birth of the child.

It is recommended that a clinical psychologist with experience in family reports be appointed in the same manner as a single expert in contested parenting cases in the family law jurisdictions. This will involve the intending parents' lawyer writing to the surrogate mother and her partner seeking their consent to appoint a proposed expert jointly, but it will need to be on the basis the intending parents incur the entire costs. After the expert has been agreed upon, then a joint letter of instructions will need to be prepared and counter-signed by all parties, or their legal representatives. The letter will need to set out what the report must address, as set out in s.17 *Surrogacy Act* as follows: -

Independent counsellor's report

(2) *The report must contain the independent counsellor's opinion as to whether the proposed parentage order is in the best interests of the child and the reasons for that opinion.*

(3) *The report is to include the counsellor's assessment of the following matters:*

(a) *each affected party's understanding of the social and psychological implications of the making of a parentage order (both in relation to the child and the affected parties),*

(b) *each affected party's understanding of the principle that openness and honesty about a child's birth parentage is in the best interests of the child,*

(c) *the care arrangements proposed by the applicant or applicants in relation to the child,*

(d) *any contact arrangements proposed in relation to the child and his or her birth parent or parents or biological parent or parents,*

(e) *the parenting capacity of the applicant or applicants,*

(f) *whether any consent given by the birth parent or parents to the parentage order is informed consent, freely and voluntarily given,*

(g) *the wishes of the child, if the counsellor is of the opinion that the child is of sufficient maturity to express his or her wishes.*

(4) *The report may address any other relevant matters.*

(5) *The report must:*

(a) *indicate the persons who were interviewed for the purposes of the report, and the date or dates on which the interviews were conducted, and*

(b) *set out the basis on which the person making the report claims to be an independent counsellor.*

The independent counsellor's report should be obtained before the application for the parentage order is made, and ought to be annexed to an Affidavit sworn by the independent counsellor, together with the written instructions to the independent counsellor.

4. The Court can only make the parentage order if the pre-conditions to the making of a parentage order, set out in Part 3 Division 4 of the legislation, are met⁴⁰. However, the Court has the discretion to nevertheless make the parentage order if the pre-conditions to the making of the order have not been met, and it is of the view exceptional circumstances justify the making of the parentage order.
5. The best interests of the child are the paramount consideration when considering making a parentage order⁴¹.
6. The surrogacy arrangement must be altruistic and cannot be a commercial arrangement⁴².
7. The surrogacy arrangement must be a *pre-conception surrogacy arrangement*⁴³, which is defined in s.5 *Surrogacy Act* as: -

*an arrangement under which a woman agrees to become or to try to become pregnant with a child, and that the parentage of the child born as a result of the pregnancy is to be transferred to another person or persons (a **pre-conception surrogacy arrangement**)*

8. The surrogacy arrangement must include either 2 intended parents who at the time of entering the arrangement are a couple, or a single person⁴⁴.
9. The child must be under the age of 18 years, and the child's wishes must be considered if the child is of sufficient maturity to express a wish⁴⁵, although this will in reality only apply to the

⁴⁰ S.18 Surrogacy Act (NSW).

⁴¹ S.22 Surrogacy Act (NSW).

⁴² S.23 Surrogacy Act (NSW).

⁴³ S.24 Surrogacy Act (NSW).

⁴⁴ S.25 Surrogacy Act (NSW).

pre-commencement surrogacy arrangements given the requirement for arrangements entered into after the commencement of the Act to seek a parentage order between the ages of 6 weeks and 6 months of the child's life.

10. The surrogate mother must have been at least 25 years of age when she entered into the surrogacy arrangement⁴⁶.
11. The intended parents must be at least 18 years of age⁴⁷.
12. If an intended parent is under 25 years of age, the Court must be satisfied the intended parent is of sufficient maturity to understand the social and psychological implications of the making of a parentage order⁴⁸. Presumably this is to be addressed in the independent counsellor's report.
13. The intended parents must demonstrate a medical or social need for the surrogacy arrangement⁴⁹. This means that if the intended parents are an opposite sex couple, then the woman is unable to conceive for medical reasons (and medical evidence of this would need to be adduced), or that there is only one intended parent being either a man or a woman who cannot conceive, or the intended parents are a gay couple, or a lesbian couple where both women are unable to conceive.
14. All of the parties to the arrangement, including the surrogate mother and her married or de facto partner, and the intended parents, must consent to the parentage order⁵⁰.
15. The Applicants must be resident in New South Wales⁵¹.
16. The child must be living with the Applicants at the time of the Application for the Parentage Order⁵².
17. The surrogacy arrangement must be in writing in the form of an agreement, signed by the surrogate mother and her married or de facto partner, and the intended parents⁵³, unless the arrangement was entered into prior to the commencement of the Act. The agreement ought to

⁴⁵ S.26 Surrogacy Act (NSW).

⁴⁶ S.27 Surrogacy Act (NSW).

⁴⁷ S.28 Surrogacy Act (NSW).

⁴⁸ S.29 Surrogacy Act (NSW).

⁴⁹ S.30 Surrogacy Act (NSW).

⁵⁰ S.31 Surrogacy Act (NSW).

⁵¹ S.32 Surrogacy Act (NSW).

⁵² S.33 Surrogacy Act (NSW).

⁵³ S.34 Surrogacy Act (NSW).

be annexed to the intended parents' Affidavits, and a lawyer should undertake the task of drafting it and having it signed prior to conception.

18. The parties must all have received counselling before entering into the arrangement from a qualified counsellor about the surrogacy arrangement and its social and psychological implications⁵⁴, unless the arrangement was entered into prior to the commencement of the Act. The surrogate mother and her partner must also have received further counselling after the birth of the child and before the making of a parentage order⁵⁵. It is recommended the parties all obtain a letter from the qualified counsellor to confirm they had received counselling about the required matters, and the letter ought to be annexed to the Applicants' affidavit material. It would be a good idea for practitioners to make the counselling appointment for the parties, and provide the counsellor with a letter instructing as to the legislative requirements the counselling is to address. This counsellor cannot be the same person who prepares the independent counsellor's report⁵⁶.
19. The parties must all have obtained independent legal advice about the surrogacy arrangement and its implications before entering into the arrangement⁵⁷. If acting for the intended parents, it would be a good idea to refer the surrogate mother and her partner to a practitioner with knowledge in this area for advice, and seek that the lawyer for the surrogate mother and her partner prepare a letter confirming in general terms that advice was given to those parties in accordance with the legislative requirements. Payment of the surrogate mother's legal costs associated with seeking legal advice or in connection with the parentage order by the intended parents does not render the arrangement a commercial surrogacy arrangement, as this payment forms part of the surrogate mother's reasonable costs which the intended parents are permitted to pay⁵⁸.
20. The birth of the child must have been registered⁵⁹. A copy of the child's birth certificate ought to be annexed to the Applicant's affidavit.

After the parentage order is made, the child is to have his or her name changed as in the parentage order and approved by the Court⁶⁰. Part 4A of the *Births Deaths and Marriages Act (NSW)* provides

⁵⁴ S.35 Surrogacy Act (NSW).

⁵⁵ S.35 Surrogacy Act (NSW).

⁵⁶ S17(7) Surrogacy Act (NSW).

⁵⁷ S.36 Surrogacy Act (NSW).

⁵⁸ S.7(4) Surrogacy Act (NSW).

⁵⁹ S.38 Surrogacy Act (NSW).

⁶⁰ S.42 Surrogacy Act (NSW).

for the registration of a parentage order. After the parentage order is registered a new birth certificate is issued showing the child's new name and parentage details.

What does a 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 & Anor v SJW & Anor*⁶¹. 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;*
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 New South Wales might look as follows: -

1. *That pursuant to Section 12(1) of the Surrogacy Act (NSW) 2010 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 (NSW) 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 Part 4A of the Births Deaths and Marriages Registration Act 1995 (NSW) 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] New South Wales birth certificate*

⁶¹ [2010] QDC 439

registration number [number stated] registered in [place] on [when].

Criminality of Entering into Commercial Surrogacy Arrangements

Once the *Surrogacy Act 2010 (NSW)* is proclaimed to take effect, which is understood to occur on 1 March 2011, it will become a criminal offence for any NSW resident to enter into a commercial surrogacy arrangement, whether within Australia or overseas. The offence, punishable by a fine of up to \$110,000.00 or up to two years imprisonment, is contained in s.8 *Surrogacy Act (NSW)* as follows:

-

8 Commercial surrogacy arrangements prohibited

A person must not enter into, or offer to enter into, a commercial surrogacy arrangement.

Maximum penalty: 2,500 penalty units, in the case of a corporation, or 1,000 penalty units or imprisonment for 2 years (or both), in any other case.

Commercial Surrogacy is defined in s.9 *Surrogacy Act* as follows: -

9 Commercial surrogacy arrangement—meaning

- (1) *For the purposes of this Act, a surrogacy arrangement is a **commercial surrogacy arrangement** if the arrangement involves the provision of a fee, reward or other material benefit or advantage to a person for the person or another person:*
 - (a) *agreeing to enter into or entering into the surrogacy arrangement, or*
 - (b) *giving up a child of the surrogacy arrangement to be raised by the intended parent or intended parents, or*
 - (c) *consenting to the making of a parentage order in relation to a child of the surrogacy arrangement.*
- (2) *However, a surrogacy arrangement is not a commercial surrogacy arrangement if the only fee, reward or other material benefit or advantage provided for is the reimbursement of a birth mother's surrogacy costs.*

The surrogate mother is entitled to be reimbursed her reasonable costs associated with the pregnancy and birth. This is dealt with in s.7 *Surrogacy Act* as follows: -

7 Birth mother's surrogacy costs—meaning

- (1) *For the purposes of this Act, a **birth mother's surrogacy costs** are the birth mother's reasonable costs associated with any of the following matters:*
 - (a) *becoming or trying to become pregnant,*
 - (b) *a pregnancy or a birth,*
 - (c) *entering into and giving effect to a surrogacy arrangement.*

- (2) *The reasonable costs associated with becoming or trying to become pregnant include any reasonable medical, travel or accommodation costs associated with becoming or trying to become pregnant.*
- (3) *The reasonable costs associated with a pregnancy or birth include the following:*
- (a) *any reasonable medical costs associated with the pregnancy or birth (both pre-natal and post-natal),*
 - (b) *any reasonable travel or accommodation costs associated with the pregnancy or birth,*
 - (c) *any premium paid for health, disability or life insurance that would not have been obtained by the birth mother, had the surrogacy arrangement not been entered into,*
 - (d) *any reasonable costs, including reasonable medical costs, incurred in respect of a child (being the child of the surrogacy arrangement),*
 - (e) *the cost of reimbursing the birth mother for a loss of earnings as a result of unpaid leave taken by her, but only for the following periods:*
 - (i) *a period of not more than 2 months during which the birth happened or was expected to happen,*
 - (ii) *any other period during the pregnancy when the birth mother was unable to work on medical grounds related to pregnancy or birth.*
- (4) *The reasonable costs associated with entering into and giving effect to a surrogacy arrangement include the following:*
- (a) *the reasonable costs associated with the birth mother and the birth mother's partner (if any) receiving counselling in relation to the surrogacy arrangement (whether before or after entry into the arrangement),*
 - (b) *the reasonable costs associated with the birth mother and the birth mother's partner (if any) receiving legal advice in relation to the surrogacy arrangement or a parentage order relating to the surrogacy arrangement,*
 - (c) *the reasonable costs associated with the birth mother and the birth mother's partner (if any) being a party to proceedings in relation to such a parentage order, including reasonable travel and accommodation costs.*
- (5) *A cost is reasonable only if:*
- (a) *the cost is actually incurred, and*
 - (b) *the amount of the cost can be verified by receipts or other documentation.*
- (6) *In this section:*
- medical costs*** *does not include any costs that are recoverable under Medicare or any health insurance or other scheme.*

Whilst altruistic surrogacy arrangements are not illegal, they are not enforceable⁶². A situation may arise where a surrogate mother refuses to relinquish the child to the intended parents, or as in *Re Evelyn* seizes the child back. The only remedy available to the intended parents in such a scenario would be to apply to one of the Family Law Jurisdictions for parenting orders conferring parental responsibility upon them, and that the child live with them.

Part 5

⁶² S.6 Surrogacy Act (NSW).

Overseas Surrogacy Arrangements

The current state and territory laws providing for the transfer of parentage mechanism in surrogacy arrangements do not apply to overseas surrogacy arrangements, except in WA and New South Wales involving altruistic surrogacy arrangements only.

In my experience through volunteering at the Inner City Legal Centre in Sydney and in my own practice, commercial overseas surrogacy arrangements are more common than altruistic surrogacy arrangements occurring within Australia. One of the reasons, I suspect, is that there would probably not be many woman in Australia who would be prepared to undertake the role of carrying a child to be surrendered upon birth, and not receive any reward. No doubt there are other moral, ethical and personal views contributing to this.

A few overseas jurisdictions allow commercial surrogacy including India, Thailand, Russia, Canada and California. In my experience with gay male couples and opposite sex couples, entering into an overseas commercial surrogacy arrangement is far more common.

One of the problems with commercial overseas surrogacy arrangements will include where the arrangement takes place and what laws are in place within those jurisdictions to deal with surrogacy arrangements. For instance, in California not only are commercial surrogacy arrangements legal, contracts for commercial surrogacy arrangements are legally enforceable. I know of a business in Los Angeles named “Growing Generations” which provides a one stop shop service for couples seeking to enter into commercial surrogacy arrangements. The business has its own lawyers who will prepare a contract between the intending parents and Growing Generations to provide the service. The service sources the surrogate mother and a contract is entered into between the intending parents and the surrogate mother. There is a counselling service in the business which will screen the surrogate mother and ensure her suitability for the role, and provide her with counselling after the birth and surrender of the child. The business also has its own IVF clinic providing the IVF treatment. After the birth of the child the parties, including the intending parents, the surrogate mother and her married or de facto partner, enter into a mechanism whereby a court order is obtained conferring the equivalent of parental responsibility under the *Family Law Act* upon the intending parents. A birth certificate issues naming both intending parents as the parents of the child, even if it is a same sex couple.

Taking the example of an overseas surrogacy arrangement entered into in California, which was the subject of *re Mark*, a number of questions arise. Can the order obtained in the Supreme Court of

California be registered in the Family Court or Federal Magistrates Court of Australia and have effect here as an ‘overseas child order’? Section 4 of the *Family Law Act* provides a definition of ‘overseas child order’ as follows:

"overseas child order" means:

(a) *an order made by a court of a prescribed overseas jurisdiction that:*

(i) *however it is expressed, has the effect of determining the person or persons with whom a child who is under 18 is to live, or that provides for a person or persons to have custody of a child who is under 18; or*

(ii) *however it is expressed, has the effect of providing for a person or persons to spend time with a child who is under 18; or*

(iii) *however it is expressed, has the effect of providing for contact between a child who is under 18 and another person or persons, or that provides for a person or persons to have access to a child who is under 18; or*

(iv) *varies or discharges an order of the kind referred to in subparagraph (i), (ii) or (iii), including an order of that kind made under this Act; or*

(b) *an order made for the purposes of the Convention referred to in section 111B by a judicial or administrative authority of a convention country (within the meaning of the regulations made for the purposes of that section).*

The definition of ‘overseas child order’ does not include any order, however described, conferring parental responsibility. Therefore any order obtained in the Supreme Court of California conferring the equivalent of parental responsibility upon the intending parents will not have any effect in Australia if registered in the Family Court or Federal Magistrates Court of Australia.

The “*prescribed overseas jurisdiction*” referred to in the definition of “*overseas child order*” is dealt with in regulation 14 of the *Family Law Regulations (Cth)* as follows: -

Meaning of prescribed overseas jurisdiction

*For the purposes of the definition of **prescribed overseas jurisdiction** in subsection 4 (1) of the Act:*

(a) *each country or part of a country, set out in column 2 of an item in Schedule 1A is declared to be a prescribed overseas jurisdiction for the purposes of:*

(i) *subsection 4 (1) of the Act, in relation to the definition of **overseas child order** ; and*

(ii) *sections 70M and 70N of the Act; and*

(b) each country, or part of a country, set out in Schedule 2 as a reciprocating jurisdiction is declared to be a prescribed overseas jurisdiction for the purposes of:

(i) subsection 4 (1) of the Act, in relation to the definition of **overseas maintenance agreement** ; and

(ii) paragraph 89 (b) of the Act.

Column 2 of Schedule 1A of the *Family Law Regulations (Cth)* only lists the various States of the United States of America as a prescribed overseas jurisdiction for the purpose of registering an “overseas child order”.

What about the birth certificate issuing in California naming both the gay male couple, the intending parents, as parents of the child. Does the presumption of parentage under s69R of the *Family Law Act* apply to this?

Applying the decision in *re Michael: surrogacy arrangements*, and the operation of the presumptions of parentage under s60H of the *Family Law Act*, despite the birth registration details the presumption of parentage under s60H applying to the surrogate mother and her married or de facto partner prevail over that under s69R to the intending parents.

The solution for the intending parents in this scenario is to apply to the Family Court or Federal Magistrates Court of Australia for a parenting order conferring parental responsibility upon them and providing that the child live with them. It is the same scenario that presented as in the case of *re Mark*.

Applying for the parenting order where there is an overseas surrogacy arrangement presents its own logistical problems. Who are the necessary parties to the application? The *Family Law Rules* provide in rule 6.02(2), as to the necessary parties to any application, as follows:

Necessary parties

(1) A person whose rights may be directly affected by an issue in a case, and whose participation as a party is necessary for the court to determine all issues in dispute in the case, must be included as a party to the case.

Example

If a party seeks an order of a kind mentioned in section 90AE or 90AF of the Act, a third party who will be bound by the order must be joined as a respondent to the case.

(2) *If an application is made for a parenting order, the following must be parties to the case:*

(a) *the parents of the child;*

(b) *any other person in whose favour a parenting order is currently in force in relation to the child;*

(c) *any other person with whom the child lives and who is responsible for the care, welfare and development of the child;*

(d) *if a State child order is currently in place in relation to the child — the prescribed child welfare authority.*

(3) *If a person mentioned in subrule (2) is not an applicant in a case involving the child, that person must be joined as a respondent to the application.*

Note The court may dispense with compliance with a rule (see rule 1.12).

Under sub rule 2 where a parenting order is sought the parties must include the parents of the child, any other person whose favour a previous parenting order has been made or any person with whom the child lives and who is responsible for the care, welfare and development of the child.

Where an overseas surrogacy arrangement is concerned, the parties to the parenting application will of necessity include the intending parents, the surrogate mother and her married or de facto partner.

If the parenting order is made by consent, then it is recommended the intending parents file an initiating application with an affidavit of both intending parents in support detailing the factual history leading to the surrogacy arrangement, the conception and subsequent birth of the child, and the surrender of the child. Any written surrogacy agreements or communications concerning the arrangements should be annexed to the affidavit material. The application will then need to be served upon the surrogate mother and or her married or de facto partner. In most cases the orders will be made by consent and the surrogate mother and her married or de facto partner will need to sign the consent orders.

If the surrogacy arrangement occurred in a country where the first language is not English, such as India or Thailand, then consideration will need to be given as to whether the surrogate mother and her married or de facto partner speak English. If not, then the consent orders, the initiating application and affidavit material in support will need to be translated into the relevant language.

My advice to parties entering into overseas surrogacy arrangements is to ensure that the surrogate mother and her married or de facto partner are well aware of the necessity to follow through with the legal mechanism through an Australian Court, to seek their cooperation, and to have parenting orders prepared in advance for them to sign shortly after the birth and surrender of the child.

There will also need to be consideration as to service of the application and affidavit in support upon the surrogate mother and her married or de facto partner after it is filed in the Australian Court.

If the surrogate mother and her married or de facto partner cannot be located after filing the application or if they do not cooperate, then consideration may need to be given to an application for dispensation of service or substituted service, and then proceeding with the application as though it is either contested, or undefended.

Apart from the issue of obtaining a parenting order conferring parental responsibility upon the intending parents, they will also need to consider applying for citizenship by descent for the child, and having an Australian passport issue for the child. In order to obtain this in India, for instance, there will need to be evidence that one of the intending parents is the 'biological parent'⁶³. This will involve the party providing the sperm donation undergoing DNA testing to establish the biological link to the child and that he provided the DNA for the child. The parties will also either need to obtain a court order in India declaring the intending parents to be parents of the child (if that mechanism actually exists) or alternatively a written advice from a family law expert in India advising that the intending parents are considered the parents of the child under Indian law. In these arrangements the intending parents will need to obtain legal advice from the place where the child is born as to their status under the local law.

In my experience, parties entering into surrogacy arrangements in India often deal with an agent who will source the surrogate mother, make arrangements for her IVF treatment at an IVF clinic, make arrangements for her counselling, arrange a lawyer to provide the necessary legal advice, and make the travel and accommodation arrangements for the intending parents.

Some overseas places will issue a birth certificate naming both intending parents to a surrogacy arrangement, where they are an opposite sex couple, as the child's parents. The birth certificate does not say the child was conceived by an artificial conception procedure, that it was a surrogacy arrangement, or who provided the genetic material for the child. Although in these cases the intending parents are strictly speaking not parents by operation of the various provisions of the *Family*

⁶³ This usage of the word parent does not involve the application of the presumptions of parentage under the Family Law Act

Law Act, anecdotally I understand that intending parents both named on the birth certificate do not follow up and obtain parenting orders conferring parental responsibility upon them because no-one would know they are strictly speaking not parents.

Care should be taken to advise New South Wales residents that if they enter into an overseas commercial arrangement after the commencement of the *Surrogacy Act (NSW)*, they are committing an offence and may be prosecuted. However, any commercial arrangements entered into prior to the commencement of the *Surrogacy Act (NSW)* will not be captured by the criminality provisions.

Part 6

Law Reform

Although the enactment of uniform legislation in the States and Territories around Australia dealing with altruistic surrogacy arrangements is a welcome advance, there is still more work to do. There are jurisdictional variations between the current laws of the ACT, WA, Victoria, Queensland and New South Wales but essentially the transfer of parentage mechanism is largely uniform.

It is with respect to overseas surrogacy arrangements where intending parents cannot take advantage of State and Territory laws making provision for the transfer of parentage mechanism where law reform is warranted. In those cases the intending parents would need to apply to the Family Court or Federal Magistrates Court of Australia for a parenting order conferring parental responsibility upon them. This does not give the intending parents the status of *parent* for the purposes of the *Family Law Act* and all of the rights and privileges that parents enjoy under other areas of law.

The other issue is the criminality of entering into commercial arrangements, whether within Australia or overseas, which in my view ought to be repealed. Given the best interests of the child principle is applied in parenting cases in the family law jurisdictions and in transfer of parentage proceedings in surrogacy cases, how does prosecuting people for seeking to start a family promote a child's best interests or benefit society? If parents were to be prosecuted for having a child through a commercial surrogacy arrangement and a Court imposed a term of imprisonment as it may under the New South Wales legislation, then what arrangements are to be made for the care of the child? Is it anticipated the child go into foster care?

Why is seeking to enter into a commercial arrangement to start a family seen as something worthy of prosecution, and why does it capture acts committed extra-territorially? The only other acts

committed extra-territorially by New South Wales residents that constitute criminal offences include child sex offences and terrorist acts. There is apparently a view that women acting as surrogate mothers, particularly in Third World countries, are being exploited. In my experience of people having entered into commercial surrogacy arrangements in places where it is available, the surrogate mothers undergo extensive screening before entering into the arrangement, and counselling after the birth of the child, and the monetary benefit they receive, although small by western standards, can bring about significant positive change to their families' lives, such as being able to educate their children.

In my view the criminality of entering into commercial surrogacy arrangements will not act as a deterrent as people will find a way of not being detected. In my view law reform should remove the criminality provisions with respect to entering into commercial arrangements, legalise commercial surrogacy arrangements within Australia, and regulate it.

One possible solution to the deficiency in the laws dealing with overseas surrogacy arrangements might be if the transfer of parentage laws concerning surrogacy arrangements were dealt with at a Federal level in the *Family Law Act*. This would require the States and Territories conferring upon the Commonwealth the power to make laws with respect to children conceived by way of an artificial conception procedure in surrogacy arrangements. The laws could provide for, at a Commonwealth level, the mechanism for the transfer of parentage from the surrogate mother and her married or de facto partner to the intending parents, whether the arrangements occurred within the one state or territory, interstate, or involving an overseas arrangement.