

**SURROGACY ARRANGEMENTS : THE PATCHWORK
LEGAL LANDSCAPE**

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PART 1

Surrogacy is an arrangement whereby a single person or couple ("the intended parent(s)") enter into an agreement with a woman ("the surrogate mother") who will carry their child, and then surrender the child to the intended parents upon birth with the intention that the intended parents will raise the child as their own.

In terms of conception there are two forms of surrogacy. The first is traditional surrogacy, whereby the surrogate mother undergoes donor insemination and she provides the ovum. This form of surrogacy does not usually occur in IVF clinics in Australia, as a matter of policy. However, it may occur by way of a "home insemination procedure". The other 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 of 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. The child will not have the DNA of the surrogate mother in this form of surrogacy.

Surrogacy arrangements can be either altruistic or commercial, depending upon the laws of where the arrangement takes place, and of where the parties to the arrangement reside. Altruistic surrogacy does not involve the surrogate mother being paid a fee or reward for undertaking the role, beyond any legislatively sanctioned expenses of hers for which she can be reimbursed. Altruistic surrogacy arrangements are privately arranged. Commercial surrogacy arrangements involve the surrogate mother being paid a fee or reward for undertaking the role, in addition to being reimbursed any legislatively sanctioned expenses of hers. Anecdotally, most commercial surrogacy arrangements are arranged via an agency in places where it is not illegal.

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 couples¹. Although adoption is another option for creating a family, anecdotally couples are turning to surrogacy in increasingly larger numbers given the length of time and uncertainty surrounding adoption.

¹ This observation is based upon the authors experience in private practice, and as a volunteer at the Inner City Legal Centre in Kings Cross, Sydney, providing advice about surrogacy arrangements.

Surrogacy arrangements are not new. However, moral, ethical and legal issues concerning surrogacy have attracted much attention in both the media and legislature in recent years.

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 what is actually happening in society. Most of the States and Territories in Australia have its own legislation dealing with assisted reproductive technology and general provisions about surrogacy arrangements. The common provision amongst all of the States and Territories in Australia is that whilst commercial surrogacy arrangements within Australia are 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 altruistic 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 intended parents in such a situation is to apply to either the Family Court of Australia or the Federal Magistrates Court of Australia for parenting orders that the child live with them².

WHO IS A PARENT? *FAMILY LAW ACT* PROVISIONS

The primary legal issue in surrogacy arrangements is *who is a parent?* This issue is significant because of the provisions of s61C of the *Family Law Act* as to who has parental responsibility of a child, including each of the parents of a child³, and subject to any order of a court allocating parental responsibility⁴.

Parental responsibility means all the duties, powers, responsibilities and authority which, by law, parents have in relation to children⁵. Without parental responsibility a person is not able to make decisions concerning long term issues in relation to the care, welfare and development of a child.

Although the *Family Law Act* does not have a definition of *parent*, determining who is a parent of a child is done with reference to presumptions of parentage. Given all surrogacy

² See *Re: Evelyn [1998] FamCA 2378* as an example of an altruistic surrogacy arrangement where the surrogate mother ceased the back from the intended parents, and of the subsequent Family Court litigation over the child.

³ s61C(1) *Family Law Act*

⁴ s61C(3) *Family Law Act*

⁵ s61B *Family Law Act*

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.

Pursuant to the provisions of ss60H(1)(a)-(c) and (2) of the *Family Law Act*, the surrogate mother and her married or de facto partner will be presumed the parents of a child conceived through a surrogacy arrangement providing the following applies:-

1. Both the surrogate mother 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 de facto partner.

Regulation 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*:-

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

S60H(2) provides that if a prescribed law of the Commonwealth or of a State or 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 the child of the woman. The consequence of s60H 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 may not have their DNA. This alone would leave the intended parents without a presumption of parentage under the *Family Law Act*.

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

Commonly with surrogacy arrangements involving a gay male couple, by consent the intended parent who provided the sperm donation may be named on the child's birth certificate as a parent of the child. This gives rise to a presumption of parentage pursuant to s69R of the *Family Law Act*, which provides as follows:-

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.

Whereas the surrogate mother's married or de facto partner has a presumption of parentage by virtue of ss60H(1)(a)-(c) of the *Family Law Act*, s60H(1)(d) provides that if a person other than the woman's married or de facto partner provided the genetic material for the child, then the child is not a child of that person. Effectively, s60H(1)(d) precludes the sperm donor from being a parent of the child if he was not in a marriage or de facto relationship with the surrogate mother. However, if the sperm donor is named on the birth certificate as a parent of the child, then on the face of it this will give him a presumption of parentage pursuant to s69R of the *Family Law Act*. This scenario gives rise to a conflict in the presumptions of parentage between the surrogate mother's married or de facto partner, and the sperm donor who may be named on the birth certificate. Conflicts between presumptions of parentage will be dealt with later in this paper.

Presumptions of parentage of children of surrogacy arrangements are dealt with in s60HB of the *Family Law Act* which 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.

Most of the States and Territories of Australia have made prescribed laws for the purposes of s60HB of the *Family Law Act* and those prescribed laws are set out in s12CAA of the *Family Law Regulations* as follows:-

Item	Law
1	<i>Status of Children Act 1974</i> (Vic), section 22

Item	Law
2	<i>Surrogacy Act 2010</i> (Qld), section 22
3	<i>Surrogacy Act 2008</i> (WA), section 21
4	<i>Parentage Act 2004</i> (ACT), section 26
5	<i>Family Relationships Act 1975</i> (SA), section 10HB
6	<i>Surrogacy Act 2010</i> (NSW), section 12

The prescribed laws for the purposes of s60HB of the *Family Law Act* of the States and Territories make provision for a mechanism, through the State or Territory Civil Courts, to transfer parentage from the surrogate mother and her married or de facto partner, to the intended parents. Although the transfer of parentage mechanism, commonly by way of what is referred to as a "parentage order" is consistent amongst the States and Territories where such laws exist, the requirements before a parentage order can be made in each of the States and Territories varies, as is set out in the commentary accompanying this paper.

CASE LAW - CONFLICTS OF PRESUMPTIONS OF PARENTAGE

The decision in *Re: Michael: Surrogacy Arrangements*⁷ dealt with the application of presumptions of parentage for a child who was conceived in a surrogacy arrangement. The orders sought in this case were for leave to adopt under s60G of the *Family Law Act*.

The facts of *Re: Michael: Surrogacy Arrangements* involved the intended parents entering into an arrangement with the intended mother's own mother to act as a surrogate mother. The surrogate mother underwent an IVF procedure whereby the intended father provided the sperm donation and the ovum donation came from a third person. The surrogate mother was in a de facto relationship at the time of conception.

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

The decision in *Re: Michael: Surrogacy Arrangements* provided that the second limb of Section 60H(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 of the *Family Law Act*. Therefore, if a presumption of parentage arising out of an artificial conception procedure operates under s14 of the *Status of Children Act*

⁷ [2009] FamCA 691

(NSW)⁸ and therefore under s60H of the *Family Law Act*, then by virtue of the provisions of s17 of the *Status of Children Act (NSW)*⁹ it will prevail over any presumption of parentage which may apply out of birth registration under s11 of the *Status of Children Act (NSW)*¹⁰, or s69R of the *Family Law Act*.

By virtue of the operation of s60H of the *Family Law Act* the surrogate mother and her de facto partner in this case were presumed the parents of the child. However, the intended 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 intended father/sperm donor was in conflict of the presumption of parentage applying to the surrogate mother's de facto partner. The presumption of parentage under s60H(1) of the *Family Law Act* is irrebuttable, whereas the presumption of parentage under s69R of the *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 father/sperm donor.

The consequence for couples entering into surrogacy arrangements of the operation of the presumptions of parentage under s60H and s69R of the *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.

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

TRANSFER OF PARENTAGE MECHANISMS

Surrogacy legislation in the various States and Territories makes provision for a transfer of parentage mechanism, whereby the status of parent of the surrogate mother and her married or de facto partner are transferred to and conferred upon the intended parents. By virtue of

⁸ s14 of the *Status of Children Act (NSW)* make provision for presumptions of parentage for a child who was conceived by way of an artificial conception procedure. The presumptions operate in similar terms to that under s60H of the *Family Law Act*.

⁹ s17 of the *Status of Children Act (NSW)* deals with conflicts between presumptions of parentage, and provides the irrebuttable presumptions will prevail over rebuttable presumptions.

¹⁰ s11 of the *Status of Children Act (NSW)* is in similar terms to s69R of the *Family Law Act* making provision for a presumption of parentage arising out of birth registration.

s60HB of the *Family Law Act*, once a parentage order is made, the intended parents then have a presumption of parentage in their favour.

The transfer of parentage mechanism in each of the States and Territories where such laws exist is only available in altruistic surrogacy arrangements. Otherwise, in each of the States and Territories it is a criminal offence for parties to enter into a commercial surrogacy arrangement within each of those places. However, in each of the States and Territories provision is made for the surrogate mother being permitted to be reimbursed prescribed costs associated with the pregnancy. The prescribed costs that the surrogate mother is entitled to receive vary between each State and Territory where surrogacy legislation exists. If the surrogate mother receives a fee or reward for undertaking the role which goes beyond the prescribed costs she is entitled to receive in the State or Territory where the surrogacy arrangement took place, then a criminal offence may have been committed. One wonders what evidence may be available to the Director of Public Prosecutions in the various States and Territories of such surrogacy criminality, and otherwise of how it is to be policed.

Obtaining a parentage order under the surrogacy legislation of the various States and Territories will involve an application to a State/Territory civil court, most commonly the Supreme Court. Generally, proceedings will be commenced by way of Notice of Motion naming the intended parents as the plaintiffs, and the surrogate mother and her married or de facto partner as the defendants. The plaintiffs will need to file affidavit material in support addressing the requirements of the relevant State or Territory legislation for obtaining a parentage order. In addition, a common requirement is the provision of a report from a qualified person¹¹ addressing matters set out in the relevant State or Territory legislation. This will most commonly include that all parties to the arrangement understand the social and psychological implications of making a parentage order, amongst other factors.

As is demonstrated in the accompanying tables setting out the requirements in each State or Territory before a parentage order can be obtained, there are variations in each place.

Comparisons Between Victorian and Queensland Legislation

The *Surrogacy Act 2010 (Qld)* and *The Status of Children Act 1974 (Vic)* both make provision for a parentage order mechanism, although in Victoria the *Assisted Reproductive Treatment Act 2008 (Vic)* and *Assisted Reproductive Treatment Regulations 2008 (Vic)* also sets out some requirements before IVF treatment will be authorised in a surrogacy

¹¹ Usually a clinical psychologist with experience in writing family reports

arrangement via an IVF clinic. They have the following requirements in common before a parentage order can be obtained: -

- A parentage order can only be made in an altruistic arrangement.
- The application for a parentage order is to be made between when the child is 28 days of age and 6 months of age.
- The parentage order must be in the best interests of the child.
- The surrogate mother consents to the parentage order, however in Queensland the consent must be of all of the parties (in reality, this is the same thing, just expressed differently).
- The child was living with the intended parents at the time the application was made, although in Queensland that requirement includes residing with the intended parents for at least 28 days before the Application was made.
- All of the parties have received counselling about the social and psychological implications of the surrogacy arrangement, and independent legal advice, although in Victoria the counselling and legal advice requirements where an IVF clinic is used appear under the *Assisted Reproductive Treatment Act 2008 (Vic)*, whereas for home insemination procedures the requirement is contained in the *Status of Children Act 1974 (Vic)*.
- The surrogate mother must be at least 25 years of age.

However, the legislation in Queensland and Victoria in order to obtain a parentage order differ in the following respects: -

- In Queensland the Application for the parentage order may only be made by the two intended parents jointly, unless they are no longer a couple or one of them has died, whereas the Victorian legislation is silent on this point.
- In Queensland there must be evidence of a medical or social need for the surrogacy arrangement (meaning where the intended parents comprise an opposite sex couple, or a lesbian couple, the women are unable to conceive for medical reasons; or the intended parents are a gay male couple), whereas this requirement does not exist in Victoria. However, in Victoria in order to be eligible for IVF treatment to be authorised by an IVF clinic in a surrogacy arrangement, the woman or women of the intended parents must satisfy a Patient Review Panel within the clinic that they are unable to conceive for medical reasons, or that a pregnancy would place their health

at risk.¹² However, in Victoria if the artificial conception procedure involves a home insemination procedure, then the medical need on the part of the intended parents does not appear to be a requirement in order to be eligible for a parentage order.

- In Queensland the intended parents must be at least 25 years of age, whereas this requirement does not exist in Victoria.
- The Queensland legislation requires the Court to consider a “Surrogacy Guidance Report” (similar to a family report in family law proceedings), whereas this requirement does not exist in Victoria. However, if the IVF treatment in a surrogacy arrangement occurs via an IVF clinic, then a Patient Review Tribunal must authorise the treatment.

In both Queensland and Victoria altruistic surrogacy arrangements are legal, but not enforceable.

In both Queensland and Victoria the surrogate mother is not permitted to receive any material benefit or advantage for entering into the surrogacy arrangement. In Victoria it is a criminal offence for the surrogate mother to receive a material benefit or advantage from the arrangement,¹³ however the criminal offence seems only to extend to her and not the intended parents. In both Queensland and Victoria it is a criminal offence to enter into a commercial surrogacy arrangement locally, although in Victoria the criminal offence applies only to the surrogate mother,¹⁴ whereas in Queensland the criminality applies to anyone entering into a surrogacy arrangement.¹⁵ The criminality of Queensland residents entering into commercial arrangements extends to overseas arrangements,¹⁶ but not so for Victorian residents.

Under both Queensland and Victorian legislation a surrogate mother is entitled to be reimbursed her costs of the pregnancy.¹⁷ Regulation 10 *Assisted Reproductive Treatment Regulations 2008 (Vic)* provides for the costs the surrogate mother is entitled to be reimbursed in Victoria as follows: -

10 Prescribed costs actually incurred that may be reimbursed to the surrogate mother

For the purposes of section 44(2) of the Act, the following costs are prescribed—

¹² S.40 *Assisted Reproductive Treatment Act 2008 (Vic)*

¹³ S.44(1) *Assisted Reproductive Treatment Act 2008 (Vic)*

¹⁴ S.44(1) *Assisted Reproductive Treatment Act 2008 (Vic)*

¹⁵ S.56 *Surrogacy Act 2010 (Qld)*

¹⁶ S.54 *Surrogacy Act 2010 (Qld)*

¹⁷ In Victoria, by s.44(2) *Assisted Reproductive Treatment Act 2008 (Vic)*, and in Queensland by s.57 *Surrogacy Act 2010 (Qld)* by prohibiting any payment to the surrogate mother other than reimbursement of the surrogate mother’s surrogacy costs.

- (a) any reasonable medical expenses associated with the pregnancy or birth that are not recoverable under Medicare, health insurance or another scheme;
- (b) any legal advice obtained for the purposes of section 43(c) of the Act;
- (c) travel costs related to the pregnancy or birth.

Whereas s.11 *Surrogacy Act 2010 (Qld)* defines the surrogate mothers costs she is entitled to be reimbursed as follows: -

11 Meaning of birth mother's surrogacy costs

(1) 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) the birth mother and the birth mother's spouse (if any) being a party to a surrogacy arrangement or proceedings in relation to a parentage order.

(2) Without limiting subsection (1), the following amounts are a birth mother's surrogacy costs—

(a) a reasonable medical cost for the birth mother associated with any of the matters mentioned in subsection (1);

*Example of a reasonable medical cost for paragraph (a)—
a cost incurred before conception if the birth mother consults a medical practitioner to find out if she is capable of carrying a pregnancy before undergoing a fertilisation procedure*

(b) a reasonable cost, including a reasonable medical cost, for a child born as a result of the surrogacy arrangement;

(c) a premium payable for health, disability or life insurance that would not have been obtained by the birth mother if the surrogacy arrangement had not been entered into;

(d) a reasonable cost of counselling associated with any of the matters mentioned in subsection (1), including—

(i) the cost of counselling obtained by the birth mother or the birth mother's spouse (if any) before or after entering into the surrogacy arrangement; or

(ii) the cost relating to the preparation of a surrogacy guidance report under section 32;

(e) a reasonable legal cost for the birth mother and the birth mother's spouse (if any) relating to the surrogacy arrangement and the transfer of parentage;

(f) the value of the birth mother's actual lost earnings because of leave taken—

(i) for a period of not more than 2 months during which a birth happened or was expected to happen;

or

(ii) for any other period during the pregnancy when the birth mother was unable to work on medical grounds;

(g) another reasonable cost associated with the surrogacy arrangement or the making of the order transferring parentage.

Examples of other reasonable costs for paragraph (g)—

- *travel and accommodation costs for a birth mother who lives interstate and travels to Queensland to undertake a fertility treatment, to consult with an obstetrician or to give birth*
- *travel and accommodation costs associated with a birth mother's attendance at a court hearing about an application for a parentage order if the birth mother does not live near the court*

(3) In this section—

legal cost *includes fees for obtaining legal advice and legal representation, court fees, and registry fees associated with registration of a birth and transfer of parentage.*

medical cost *means a medical cost to the extent that it is not recoverable under Medicare or any health insurance or other scheme.*

It would appear that altruistic surrogate mothers from Queensland are more generously reimbursed than their counterparts in Victoria. But then, Victorian residents are not committing a criminal offence if they enter into a commercial arrangement overseas.

How to Make a Non-Commercial Surrogacy Arrangement

The surrogacy legislation that does exist in the various states and territories does not tell us how to make an altruistic surrogacy arrangement. We have to use our imagination.

Various state and territory legislation prohibits advertising surrogacy “services”. However, anecdotally intended parents find surrogates through websites and interested support groups out there in society.

Despite differing requirements to obtain parentage orders in the states and territories that have surrogacy legislation, it is recommended that prior to any artificial conception procedure being performed on the surrogate mother that all parties seek counselling into the social and psychological implications of entering into the surrogacy arrangement, and seek independent legal advice. It is also recommended that a written surrogacy agreement be prepared and entered into by all parties, even though unenforceable, making provision as follows: -

1. Confirming that the parties have all had counselling and independent legal advice;
2. Where the genetic material for the child will come from;
3. That the surrogate mother will undergo an artificial conception procedure, and specify what type;
4. That the surrogate mother will surrender the child to the intended parents upon the birth of the child;
5. That the intended parents will apply to a Court for a parentage order and that all of the parties will consent to the parentage order being made;

6. That the surrogate mother will be entitled to be reimbursed her expenses associated with the pregnancy and set out in general terms (but not as to quantum) what are those expenses – this should be in accordance with the provision made in the relevant state or territory legislation;
7. Any other matters required under the relevant state or territory legislation in order to be eligible for a parentage order.

Acting for clients in an altruistic surrogacy arrangement will have two general components to the matter. The first will be the pre-conception matters requiring attention, including the legal advice, counselling, and negotiating/settling the surrogacy agreement in accordance with local legislation. The artificial conception procedure then occurs, and then after the birth of the child the second component occurs, which is all of the work associated with obtaining a parentage order. After the parentage order is obtained, it is then registered with the Registrar of Births Deaths and Marriages in the state or territory where the intended parents reside, and a new birth certificate will issue for the child.

Issues for the Surrogacy Agreement

- ***The Child's Right to Know about the Method of Conception and the Identity of the Surrogate***

There is no right under any of the current state or territory legislation to have the identity of the surrogate mother disclosed. Under state/territory legislation there is provision for the identity of a sperm or ovum donor to be made available. For instance, in Victoria Part 7 of the *Assisted Reproductive Treatment Act 2008 (Vic)* makes provision for the establishment of a Voluntary Register to record the names and details of parties to artificial conception procedures, and the release of whatever details each party consents to being released. However, being on that Register is voluntary and the party on the Register has a discretion as to what information about them is released. Presumably this will not be an issue where the sperm/ovum donor is one or both of the intended parents. However, there is no provision here for the release of information about a surrogate mother as of right. If she were to be named on the Victorian Voluntary Register as a party to an artificial conception procedure, then the release of her identity and details is within her discretion.

Although a Surrogacy Agreement may make provision for the release of information about the surrogate mother, it is voluntary and not enforceable.

- ***Protection of the Estate and Assets of the Donor***

Donor as Intended Parent – Altruistic Arrangements

Where a sperm or ovum donor is an intended parent in an altruistic surrogacy arrangement, and a parentage order is obtained under a prescribed state/territory law, then s.60HB *Family Law Act* deems the donor in these circumstances to be a parent. A surrogate mother has no cause of action to bring any claim against the assets or estate of the donor. The child of the donor in these circumstances is within a category of persons entitled to bring a family provisions claim against the estate of the donor in the event no or no adequate provision is made for the child in the donor's will, and the donor has passed away.

Donor as Intended Parent – Commercial Arrangement

Where a sperm or ovum donor is an intended parent in an overseas commercial surrogacy arrangement, they are not eligible to obtain a parentage order under any prescribed law for the purposes of s.60HB *Family Law Act*. As such they can never be deemed parents, and the best the intended parents can achieve is a parenting order under the *Family Law Act* conferring parental responsibility upon them. As the donor in these circumstances is not a parent, then strictly the child born as a result of the commercial surrogacy arrangement and surrendered into their care is not within a category of persons entitled to bring a family provisions claim in the event no or no adequate provision has been made for the child in the donor's will. It is recommended in commercial surrogacy arrangements that the intended parents make a will making provision for their child.

Donor Not as an Intended Parent

Regardless of whether an altruistic or commercial surrogacy arrangement has been entered into, where the donor is not in a marriage or de facto relationship with the surrogate mother, s.60H(1)(d) *Family Law Act* makes it clear the child is not a child of the donor. As such the child is then not within a category of persons who can bring a family provisions claim against the estate of the donor. Otherwise the donor has no financial obligation to the child for child support, as persons liable to pay child support are parents of a child¹⁸, and s.5 *Child Support (Assessment) Act* defines *parent* in cases where the child was conceived by an artificial conception procedure as a person deemed a parent for the purposes of s.60H *Family Law Act*.

A Surrogacy Agreement may make provision for the child or surrogate mother not to bring any claim against the donor's assets or estate, but the Surrogacy Agreement is unenforceable.

¹⁸ S.3 *Child Support (Assessment) Act*

In any event a Surrogacy Agreement will not prevent anyone from making a claim against a donor's assets or estate, however such a claim will be without any basis or merit.

The Position with Non-Commercial Surrogacy Arrangements in Jurisdictions Without Legislation

In those states and territories without surrogacy legislation, namely Tasmania and the Northern Territory, altruistic surrogacy arrangements are not illegal, nor are they enforceable. As no surrogacy legislation currently exists in these places, the transfer of parentage mechanism is not available to residents of those places who are intended parents. The only mechanism currently available to intended parents is to apply for parenting orders conferring parental responsibility to them under the *Family Law Act*, in either the Family Court or Federal Magistrates Court. If subsequently surrogacy legislation is enacted in those places, then it is recommended that advice be sought as to eligibility to obtain a parentage order in relation to an arrangement entered into prior to the enactment of the legislation.

WHAT DOES A PARENTAGE ORDER LOOK LIKE?

In the Children's Court of Queensland in 2010, the first surrogacy case involving a parentage order was determined in the case of *BLH & Anor v SJW & Anor*¹⁹. The Orders made in that case were as follows:-

1. *That pursuant to s22(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 s41D 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.*

¹⁹ [2010] QDC 439

In altruistic surrogacy cases where a parentage order is being sought in any of the other States or Territories similar orders may be made with modifications to naming the relevant legislation.

CRIMINALITY OF ENTERING INTO COMMERCIAL SURROGACY ARRANGEMENTS

Under relevant legislation in Queensland, New South Wales, and the Australia Capital Territory²⁰, it is a criminal offence not only for entering into commercial arrangements within each of those jurisdictions, but also for the residents of those jurisdictions to enter into commercial surrogacy arrangements overseas. It is not a criminal offence for Victorian residents to enter into commercial surrogacy arrangements overseas, nor for residents of South Australia or Western Australia.

Again, one wonders what evidence the Director of Public Prosecutions of the various States and Territories will rely upon in order to prosecute parties entering into illegal overseas commercial surrogacy arrangements, and otherwise how is it going to be policed.

OVERSEAS COMMERCIAL SURROGACY ARRANGEMENTS

Can a Child of a Commercial Surrogacy Arrangement be Recognised in Australia?

The current State and Territory laws providing for a transfer of parentage mechanism in altruistic surrogacy arrangements do not apply to overseas commercial surrogacy arrangements.

Anecdotally, through my own practice and formerly as a volunteer at the Inner City Legal Centre at Kings Cross, Sydney, by far the most common surrogacy arrangements dealt with involve overseas commercial arrangements.

Although the transfer of parentage mechanism is not available in commercial surrogacy arrangements, the only remedy available to intended parents in such arrangements in order to acquire parental responsibility is to obtain a parenting order under the provisions of the *Family Law Act*. The parenting order ought to make provision for the intended parents to have equal shared parental responsibility of the child, and that the child live with them. The

²⁰ S.56 *Surrogacy Act 2010 (Qld)*; s.8 *Surrogacy Act 2010 (NSW)*; s.41 *Parentage Act 2004 (ACT)*

parties to the order ought to be the intended parents as applicants, and the surrogate mother and her married or de facto partner as respondents.

Procedurally it is recommended that an application for a parenting order in an overseas commercial surrogacy arrangement be commenced by way of an Initiating Application with affidavit material in support of the intended parents. The affidavit material ought to set out in detail the historical facts giving rise to the surrogacy arrangement, and otherwise any relevant s60CC factors.

In practice, whether intended parents in overseas commercial surrogacy arrangements pursue parenting orders may depend upon where the commercial surrogacy arrangement took place, and whether the intended parents are an opposite sex or same sex couple. For instance, for both same sex and opposite sex couples who enter into a commercial surrogacy arrangement in California, where commercial surrogacy arrangements are not only legal but they are legally enforceable, the intended parents will be issued with a birth certificate naming them both as parents of the child regardless of whether they are a same sex or opposite sex couple. In India, where the intended parents are an opposite sex couple, they will be issued a birth certificate naming them both as parents. However, in India where the intended parents are a same sex couple, the sperm donor will be named on the birth certificate as a parent. In Thailand, a birth certificate will be issued naming the surrogate mother as a parent.

It is unlikely that most laypeople within Australian society would understand the intricacies of s60H of the *Family Law Act*. With this in mind it has been observed that where couples have entered in a commercial overseas surrogacy arrangement and have been issued a birth certificate naming both of them as parents, most do not bother following up and seeking parenting orders conferring parental responsibility upon them. It is only in places where commercial arrangements have taken place where one or both of the intended parents have been omitted from the birth certificate that we are seeing applications being made to the Family Court of Australia or the Federal Magistrates Court of Australia for parenting orders conferring parental responsibility upon the intended parents.

One recent example of an application for a parenting order to confer parental responsibility was in the case of *Dudley and Anor & Chedi*²¹. In this case an opposite sex couple from Queensland entered into a commercial surrogacy arrangement with a Thai woman. The application for parenting orders related to two children who were artificially conceived using

²¹ [2011] FamCA 502

the intended father's sperm donation with donated eggs from a Thai woman other than the surrogate mother. After the children were born they were taken into the care of the intended parents. The application for parenting orders was made with the consent of the surrogate mother.

In this case the Court noted that the surrogacy arrangement was entered into at a time when the now repealed *Surrogate Parenthood Act 1988 (QLD)* made it a criminal offence for Queensland residents to enter into commercial surrogacy arrangements, whether within Queensland or extra-territorially. Subsequently Queensland had passed the *Surrogacy Act 2010 (QLD)* which has legalised altruistic surrogacy arrangements in Queensland whilst maintaining the illegality of commercial surrogacy arrangements, whether taken place within Queensland or extra-territorially. At paragraph 37 of the decision the Court noted as a general policy question whether or not the requested parenting orders should be made, "... which could be perceived in some sense to sanction acts which were illegal in Queensland at the relevant time and which were against public policy...". At the paragraph 38 of the decision the Court stated that the paramount consideration about the orders sought is the best interests of the children. At paragraph 41 of the decision the Court decided that it was in the best interests that the intended parents have equal shared responsibility for the children. However, at paragraph 44 of the decision the Court stated that it would direct the Registrar to send a copy of the Reasons for Judgement to the office of the Director of Public Prosecutions for consideration of whether a prosecution should be instituted against the applicants.

It is difficult to reconcile the Court's finding that it is in the best interests of the children in this case to make the orders sought granting equal shared parental responsibility to the intended parents, whilst at the same time referring these people to the Director of Public Prosecutions for consideration of prosecution. How a criminal prosecution of people seeking to become parents is going to promote the best interests of the child is difficult to understand. If the intended parents in this case had been Victorian, South Australian or Western Australian residents, where it is not a criminal offence for their residents to enter into overseas commercial surrogacy arrangements, then the issue of criminality would not have arisen.

LAW REFORM

Although there was an intention is to enact uniform legislation in the States and Territories around Australia to deal with altruistic surrogacy arrangements, clearly there are variations

between the jurisdictional requirements in the legislation of each of the States and Territories for obtaining parentage orders.

With respect to overseas surrogacy arrangements, intended parents cannot take advantage of State or Territory laws making provision for a transfer of parentage mechanism. Yet overseas commercial surrogacy arrangements anecdotally appear to be the most common form of surrogacy arrangement entered into by Australian residents. It appears the law in Australia treats commercial surrogacy arrangements as some kind of taboo, yet it does not appear that society necessarily shares that view.

The criminality of Australian residents entering into overseas commercial surrogacy arrangements does not serve any useful purpose. Consistent with the notion that in criminal law the theory of deterrence is without merit, the criminality of residents of some places in Australia of entering into overseas commercial arrangements will not deter all people determined to start a family. Anecdotally some couples are smart enough to realise that if they enter into an overseas commercial surrogacy arrangement in say a place like India, where they will be issued with a birth certificate naming them both as parents, and the birth certificate will not actually say that the child was conceived in a surrogacy arrangement, then this will be good enough evidence for them to establish their parentage without having to apply to a family law jurisdiction for parenting orders conferring parental responsibility upon them. They will also realise the risk of prosecution will be low or negligible. Otherwise, who will be policing such criminal commercial surrogacy, and what evidence will be available for any prosecution?

It is submitted that our legislature should accept the reality within society that commercial surrogacy is viewed as a real alternative option for couples to start a family who are unable to do so by conventional means for whatever reason. It is recommended that the various States and Territories repeal the criminality of entering into these overseas commercial surrogacy arrangements. In order to achieve uniformity with respect to laws creating a transfer of parentage mechanism, it is recommended that the States and Territories all confer upon the Commonwealth the power to make laws with respect to surrogacy so that it is dealt with at a Commonwealth level. It is also recommended that the transfer of parentage mechanism be available to both altruistic and commercial surrogacy arrangements, and that otherwise commercial surrogacy be legalised within Australia and carefully regulated.

PART 2

REQUIREMENTS TO OBTAIN PARENTAGE ORDERS

QUEENSLAND - *SURROGACY ACT 2010* (QLD)

- Application is made not less than twenty eight days and not more than six months after the child's birth or otherwise with the Court's leave²²
- The application may only be made by the two intended parents jointly, unless they are no longer a couple or one of them has died²³
- The proposed order will be for the well being and in the best interest of the child²⁴
- The child has resided with the applicants for at least twenty eight consecutive days before the day the application was made, whilst residing with the applicants when the application was made, and is residing with the applicants at the time of the hearing²⁵
- There is evidence of the medical or social need for the surrogacy arrangement²⁶
- The surrogacy arrangement was made after all parties obtained independent legal advice about the surrogacy arrangement and its implications²⁷
- All parties obtained counselling from a counsellor about the surrogacy arrangement and its social and psychological implications²⁸
- The application is made with the consent of all parties²⁹
- The surrogacy arrangement was made before the child was conceived and is in writing signed by all parties and is not a commercial arrangement³⁰
- The birth mother and her spouse were at least twenty five years of age when the surrogacy arrangement was made³¹
- The applicants were at least twenty five years of age when the surrogacy arrangement was made and are resident in Queensland³²
- A surrogacy guidance report supports the making of the order³³

²² s21(1) *Surrogacy Act 2010*

²³ ss21(4) and (5) *Surrogacy Act 2010*

²⁴ s22(2)(a) *Surrogacy Act 2010*

²⁵ s22(2)(b) *Surrogacy Act 2010*

²⁶ s22(2)(d) *Surrogacy Act 2010* - s14 *Surrogacy Act 2010* provides a medical need where a woman or two women who happen to be intended parents are not able to conceive for medical reasons, or it involves a male gay couple

²⁷ s22(2)(e) *Surrogacy Act 2010*

²⁸ s22(2)(e)(ii) *Surrogacy Act 2010*

²⁹ s22(2)(e)(iii) *Surrogacy Act 2010*

³⁰ ss22(2)(e)(iv)-(vi) *Surrogacy Act 2010*

³¹ s22(2)(f) *Surrogacy Act 2010*

³² s22(2)(g) *Surrogacy Act 2010*

³³ s22(2)(i) *Surrogacy Act 2010* - s32 *Surrogacy Act 2010* sets out the matters that a surrogacy guidance report must address

NEW SOUTH WALES - *SURROGACY ACT 2010* (NSW)

- The application for the parentage order must be made not less than thirty days and not more than six months after the child's birth, if the arrangement was entered into after the commencement of the legislation on 1 March 2011³⁴
- The application for the parentage order may be made not more than two years after the commencement of the *Surrogacy Act 2010* on 1 March 2011 if the arrangement was entered into prior to the legislation coming into effect³⁵
- The application for the parentage order is supported by a report prepared by an independent counsellor³⁶
- The Court must be satisfied that the making of the parentage order is in the best interests of the child³⁷
- The surrogacy arrangement must be altruistic³⁸
- The surrogacy arrangement must have taken place prior to the conception of the child³⁹
- The intended parents must be a single person or a member of a couple⁴⁰
- The age and wishes of the child must be considered⁴¹
- The surrogate mother must have been at least twenty five years of age when she entered into the surrogacy arrangement, if it is an arrangement which post-dates the commencement of the *Surrogacy Act* or alternatively that she is at least eighteen years of age when she entered into the arrangement if it was an arrangement which was entered into prior to the commencement of the Act⁴²
- Each of the intended parents were at least eighteen years of age when they entered into the surrogacy arrangement⁴³
- There is a medical or social need for the surrogacy arrangement - this means that the female parties of the intended parents were unable to conceive for medical reasons, or that the intended parents are a gay male couple⁴⁴
- All parties to the arrangement have consented to the order⁴⁵

³⁴ s16(1) *Surrogacy Act 2010*

³⁵ s16(2) *Surrogacy Act 2010*

³⁶ s17 *Surrogacy Act 2010* - this section sets out the matters that the report is to address

³⁷ s22 *Surrogacy Act 2010*

³⁸ s23 *Surrogacy Act 2010*

³⁹ s24 *Surrogacy Act 2010*

⁴⁰ s25 *Surrogacy Act 2010*

⁴¹ s26 *Surrogacy Act 2010* - this will most likely not be a consideration given the timeframe within which the application for the parentage order needs to be made.

⁴² s27 *Surrogacy Act 2010*

⁴³ s28 *Surrogacy Act 2010*

⁴⁴ s30 *Surrogacy Act 2010*

⁴⁵ s31 *Surrogacy Act 2010*

- The applicants/intended parents are resident in New South Wales at the time of the hearing of the application⁴⁶
- The child must be living with the applicants at the time of the hearing of the application⁴⁷
- The surrogacy arrangement must be in writing if the arrangement was entered into after the commencement of the legislation, however this is not a requirement if the arrangement was entered into prior to the commencement of the legislation⁴⁸
- All parties have received counselling from a qualified counsellor about the surrogacy arrangement and its social and psychological implications prior to entering into the surrogacy arrangement⁴⁹
- Each of the parties have received independent legal advice about the surrogacy arrangement and its implications before entering into the surrogacy arrangement⁵⁰

AUSTRALIAN CAPITAL TERRITORY - PARENTAGE ACT 2004

- The child was conceived as a result of an artificial conception procedure carried out in the Australian Capital Territory⁵¹
- Neither birth parent of the child is the genetic parent of the child⁵²
- There is an agreement between the parties, other than a commercial agreement, under which the intended parents have indicated their intention to apply for a parentage order about the child⁵³
- At least one of the intended parents is a genetic parent of the child⁵⁴
- The intended parents live in the Australian Capital Territory⁵⁵
- The parentage order is made with the consent of the parties⁵⁶
- That the child's home is with both of the intended parents⁵⁷
- Whether both intended parents are at least eighteen years of age⁵⁸
- Whether it was a commercial arrangement⁵⁹

⁴⁶ s32 *Surrogacy Act 2010*

⁴⁷ s33 *Surrogacy Act 2010*

⁴⁸ s34 *Surrogacy Act 2010*

⁴⁹ s35 *Surrogacy Act 2010*

⁵⁰ s36 *Surrogacy Act 2010*

⁵¹ s24(a) *Parentage Act 2004*

⁵² s24(b) *Parentage Act 2004*

⁵³ s24(c) *Parentage Act 2004*

⁵⁴ s24(d) *Parentage Act 2004*

⁵⁵ s24(e) *Parentage Act 2004*

⁵⁶ s26 *Parentage Act 2004*

⁵⁷ s26(3)(a) *Parentage Act 2004*

⁵⁸ s26(3)(b) *Parentage Act 2004*

⁵⁹ s26(3)(d) *Parentage Act 2004*

- Whether all parties have received appropriate counselling and assessment from an independent counselling service⁶⁰

VICTORIA - THE STATUS OF CHILDREN ACT 1974

- The child was conceived as a result of an artificial conception procedure carried out in Victoria⁶¹
- The intended parents live in Victoria at the time of making the application⁶²
- The application for the substituted parentage order must be made not less than twenty eight days and not more than six months after the birth of the child, or at another time with the leave of the Court⁶³
- A copy of the child's birth certificate is filed in court⁶⁴
- The Court must be satisfied that the making of the substituted parentage order is in the best interests of the child⁶⁵
- If the surrogacy arrangement was commissioned with the assistance of a registered IVF clinic;
 - then the clinic's patient review panel approved the surrogacy arrangement before it was entered into;⁶⁶
 - The child was living with the intended parents at the time the application was made;⁶⁷
 - The surrogate mother and her partner have not received any material benefit or advantage from the surrogacy arrangements - that it was an altruistic arrangement;⁶⁸ and
 - The surrogate mother consents to the making of the order⁶⁹
- If the surrogate mother's partner is a party to the surrogacy arrangement, then whether the partner consents to the making of the order⁷⁰
- Where the surrogacy arrangement was entered into without the assistance of a registered IVF clinic, then the following additional requirements apply:-

⁶⁰ s24(3)(e) *Parentage Act 2004*

⁶¹ s20(1)(a) *Status of Children Act 1974*

⁶² s20(1)(b) *Status of Children Act 1974*

⁶³ s20(2) *Status of Children Act 1974*

⁶⁴ s20(3) *Status of Children Act 1974*

⁶⁵ s22(1)(a) *Status of Children Act 1974*

⁶⁶ s22(1)(b) *Status of Children Act 1974*

⁶⁷ s22(1)(c) *Status of Children Act 1974*

⁶⁸ s22(1)(d) *Status of Children Act 1974*

⁶⁹ s22(1)(e) *Status of Children Act 1974*

⁷⁰ s22(3) *Status of Children Act 1974*

- That the surrogate mother was at least twenty five years old before entering into the arrangement⁷¹; and
- 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 substituted parentage order is made, and obtaining information about the legal consequences of the making of the substituted parentage order⁷²

SOUTH AUSTRALIA - FAMILY RELATIONSHIPS ACT 1975

- The child is domiciled in South Australia⁷³
- The child was conceived as a result of an artificial conception procedure carried out in South Australia⁷⁴
- One of the following applies:-
 - The husband of the surrogate mother is not presumed to be the parent of the child⁷⁵
 - The sperm donor for the child was not the surrogate mother's husband⁷⁶; or
 - The artificial conception procedure was carried out in circumstances in compliance with the Regulations to this Act⁷⁷
- The Court must not make a parentage order unless satisfied that both the surrogate mother and the sperm donor, with a full understanding of what is involved, agree to the making of the order⁷⁸
- In deciding whether to make a parentage order the Court may take into account anything it considers relevant⁷⁹
- The parties entered into a recognised surrogacy agreement⁸⁰
- The parties to the agreement are the surrogate mother, and if she is married her husband, and the commissioning parents⁸¹

⁷¹ s23(2)(a) *Status of Children Act 1974*

⁷² s23(2)(b) *Status of Children Act 1974*

⁷³ s10EA(1)(a) *Family Relationships Act 1975*

⁷⁴ s10EA(1)(b) *Family Relationships Act 1975*

⁷⁵ s10EA(1)(c)(i) *Family Relationships Act 1975*

⁷⁶ s10EA(1)(c)(ii) *Family Relationships Act 1975*

⁷⁷ s10EA(1)(c)(iii) *Family Relationships Act 1975*

⁷⁸ s10EA(3) *Family Relationships Act 1975*

⁷⁹ s10EA(5) *Family Relationships Act 1975*

⁸⁰ s10HA(2) *Family Relationships Act 1975*

⁸¹ s10HA(2)(b)(i) *Family Relationships Act 1975*

- All the parties to the agreement are at least eighteen years old⁸²
- The commissioning parents are legally married or have cohabited continuously together in a de facto relationship for a period of three years immediately preceding the date of the agreement, or for periods aggregating not less than three years during the period of four years immediately preceding the date of the agreement⁸³
- The commissioning parents are domiciled in South Australia⁸⁴
- Either the female commissioning parent is or appears to be infertile, or there appears to be a risk that a serious genetic defect, serious disease or serious illness will be transmitted to a child born to the female commissioning parent⁸⁵
- The surrogate mother has been assessed by and approved as a surrogate by a counselling service⁸⁶
- The surrogate mother and both commissioning parents each have a certificate issued by a counselling service that states that the parties have received counselling about the personal and psychological issues that may rise in connection with the surrogacy arrangement and that in the opinion of the counsellor who undertook the counselling the proposed surrogacy agreement would not jeopardise the welfare of any child born as a result of the pregnancy that forms the subject of the agreement⁸⁷
- The agreement states that the parties intend that the pregnancy is to be achieved via the use of a fertilisation procedure carried out in South Australia, and that at least one of the commissioning parents will provide the DNA for the child⁸⁸
- The surrogacy arrangement is an altruistic arrangement⁸⁹
- The surrogacy agreement states that the parties intend the commissioning parents will apply for a parentage order after the child is born⁹⁰

WESTERN AUSTRALIA - SURROGACY ACT 2008

- The intended parents reside in Western Australia and at least one of them has reached twenty five years of age⁹¹
- When the surrogacy arrangement was entered into, or after that time but before the application was made the intended parents are an opposite sex couple who are in a

⁸² s10HA(2)(b)(ii) *Family Relationships Act 1975*

⁸³ s10HA(2)(b)(iii) *Family Relationships Act 1975*

⁸⁴ s10HA(2)(b)(iv) *Family Relationships Act 1975*

⁸⁵ s10HA(2)(b)(v) *Family Relationships Act 1975*

⁸⁶ s10HA(2)(b)(vi) *Family Relationships Act 1975*

⁸⁷ s10HA(2)(b)(vii) *Family Relationships Act 1975*

⁸⁸ s10HA(2)(b)(viii) *Family Relationships Act 1975*

⁸⁹ s10HA(2)(b)(ix) *Family Relationships Act 1975*

⁹⁰ s10HA(2)(b)(x) *Family Relationships Act 1975*

⁹¹ s19(1)(a) *Surrogacy Act 2008*

marriage or de facto relationship and are unable to conceive a child due to medical reasons, or if they are able to conceive a child the child would be likely to be effected by a genetic abnormality or a disease⁹²

- The application for the parentage order is lodged after twenty eight days after the child's birth and not later than six months after the child's birth, except with the leave of the Court in exceptional circumstances⁹³
- The surrogate mother and her married or de facto partner, and the intended parents, have received independent legal advice about the effect of the parentage order and have received counselling about the effect of the parentage order⁹⁴
- The child was in the care of the intended parents at the time that the application for the parentage order was lodged with the Court⁹⁵
- All parties have agreed in writing to the surrogacy arrangement⁹⁶
- The surrogate mother is not the child's genetic parent, and at least one of the intended parents is the child's genetic parent⁹⁷

⁹² ss19(1)(b) and (2) *Surrogacy Act 2008*

⁹³ ss20(2) and (3) *Surrogacy Act 2008*

⁹⁴ ss21(2)(b) and (c) *Surrogacy Act 2008*

⁹⁵ s21(2)(d) *Surrogacy Act 2008*

⁹⁶ s21(2)(f) *Surrogacy Act 2008*

⁹⁷ s21(4) *Surrogacy Act 2008*