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LEGAL ASPECTS OF DONATION AND SURROGACY IN QUEENSLAND

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LEGAL ASPECTS OF DONOR AND SURROGACY IN QUEENSLAND

By Stephen Page[1]

LAW CONCERNING GAMETE AND EMBRYO DONATION IN QUEENSLAND

My focus in this paper is about surrogacy and egg, sperm and embryo donation – but not about posthumous use, which is a topic all its own.

COMMONWEALTH *HUMAN CLONING ACT*

The law in Queensland is crystal clear that egg, sperm and embryo donation must be altruistic, not commercial. Heavy criminal penalties apply to any egg, sperm or embryo donation that is commercial. Section 21(1) and (2) of the *Prohibition of Human Cloning for Reproduction Act 2002* (Cth) provide:

> *"(1) A person commits an offence if the person intentionally gives or offers valuable consideration to another person for the supply of a human egg, human sperm or a human embryo. Penalty: imprisonment for 15 years.*

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(2) A person commits an offence if the person intentionally receives, or offers to receive, valuable consideration for another person for the supply of a human egg, human sperm or a human embryo. Penalty: imprisonment for 15 years."

Valuable consideration is defined in that section as including:

> *"Any inducement, discount or priority in the provision of a service to the person, but does not include the payment of reasonable expenses incurred by the person in connection with the supply."*

The term *reasonable expenses* is also defined:

"(a) In relation to the supply of a human egg or human sperm -- includes, but it is not limited to, expenses relating to the collection, storage or transport of the egg or sperm; and

(b) In relation to the supply of a human embryo:

(i) does not include any expenses incurred by a person before the time when the embryo became an excess ART embryo; and

(ii) includes, but is not limited to, expenses relating to the storage or transport of the embryo."

CHARGING A BUFFER?

Prior to the enactment of this legislation, there was a similarly worded ban under the then version of the National Health and Medical Research Council, *Ethical Guidelines on the use of assisted reproductive technology in clinical practice and research*.

That ban was considered in *Clark v Macourt*[2] where Dr Anne Clark bought Sutherland IVF from Dr Macourt. The case had started in the Supreme Court of NSW, then was appealed to the NSW Court of Appeal, then appealed to the High Court. The problem in the case was that the stocks of sperm that were purchased were defective. Dr Clark had to acquire sperm from sperm donors and other suppliers, including QFG and Xytex, to make up her losses. Her evidence was that she did not make a profit from patients when using donor sperm which she had purchased and that there was always a *"buffer"* between the real cost to her and those passed onto a patient.

Justice Gageler stated[3]:

> *"In using frozen sperm for the treatment of patients, Dr Clark was in 2002 ethically bound not to charge patients more than the costs and expenses of acquiring the sperm, wherever those costs and expenses happened to be. Dr Clark's evidence before the primary judge about those ethical obligations was unequivocal. She considered it unethical to profit from buying or selling sperm, was not doing so, and had never done so. A technical submission made on her behalf that the ethical guidelines published by the National Health and Medical Research Council, in their proper construction, did not have that affect, is to be rejected. The guidelines had the effect Dr Clark acknowledged in her evidence."*

NSW Court of Appeal had stated[4]:

> *"Although the transaction involved her taking possession of the St George sperm as part of the sale of its business to her, it was considered first, that the St George sperm was in all probability obtained from local donors and, secondly, that apart from any expenses incurred by such donors in making the donation, section 32(1) of the Human Tissue Act 1983 [NSW] prohibited any donor receiving valuable consideration for his*

[2] [2013] HCA 56.
[3] At [69].
[4] [2012] NSWCA 367 at [67].

donation. In these circumstances, it is not surprising that no amount of the purchase price payable under … the deed was (or could be) apportioned to the St George perm which [Dr Clark] was to receive as part of 'the Assets'. As I observed … above, the contract constituted by the Deed was for the sale of [St George's] business or practice, not one for the sale of goods, in whole or in part. I would add that it was not suggested that [Dr Clark] would obtain title to that sperm because she acknowledged that a donor could always withdraw his consent to the use of his sperm at any time."

Justice Keane noted that Dr Macourt did not rely upon section 32(1) of the New South Wales *Human Tissue Act*, which has an exception that payment for supply of sperm *"does not apply to or in respect of the sale or supply of tissue if the tissue has been subjected to processing or treatment and the sale and supply is made for the purpose of enabling the tissue to be used for therapeutic purposes, scientific purposes or medical purposes."*

In the words of Justice Keane[5]:

"Section 32(2) ensured that neither the sale by St George to [Dr Clark], the sale of replacement sperm to [Dr Clark] by Xytex, nor the use of any sperm by [Dr Clark] in treating her patients was prohibited by section 32(1) of the Human Tissue Act."

In the High Court, Dr Macourt argued that Dr Clark could not ethically charge patients for sperm used by her in treatments because she had not actually paid St George for any sperm at all. He said that at the time of entry into the deed it would have been within reasonable contemplation of the parties that Dr Clark could not ethically, and so would not in fact, make any charge to patients to whom she supplied the sperm in respect to the cost to her of that sperm. This argument was rejected by Justice Keane:

"[Dr Macourt]'s contention ultimately rested upon the Code of Practice promulgated by RTAC. The respondent relied upon cl 11.9 and 11.10 of the National Health and Medical Research Council guidelines imported into the RTAC code by cl 7.1 of the code.

[5] At [115].

These guidelines were concerned to prevent commercial trading in human sperm; and they also contemplated that practitioners were entitled to recover their reasonable expenses. [Dr Clark] denied that she made a profit from supplying sperm, and there was no reason to doubt her evidence. [Dr Clark], in providing ART services for a fee, cannot sensibly be said to be engaging in commercial trading in sperm for a profit."

Dr Macourt also sought to rely upon section 16 of the *Human Cloning for Reproduction and Other Prohibited Practices Act 2003* (NSW), the equivalent provision of section 21 of the *Prohibition of Human Cloning for Reproduction Act 2002* (Cth). Justice Keane noted that the New South Wales Act was not in force at the date of the making or completion of the deed. It was not suggested that the law operated retrospectively upon the deed and:

"Accordingly, it does not affect the lawfulness of the deed, or the expectation of the parties to it, or claims to enforce those expectations."

Therefore, it appears quite appropriate for a clinic to charge a reasonable buffer or mark-up for the cost of acquiring eggs and sperm.

EGG BANKS?

In a practical sense, it is very difficult in Australia to operate an egg bank. A model that has been proposed, as seen in the United Kingdom, is to offer a prospective egg donor to freeze her eggs for her later use and at the same time, for her to donate some of her eggs for others. This is sometimes called egg sharing.

ANZICA has previously been opposed to egg sharing, suggesting that it is unethical.

Whether or not it might be unethical (and therefore be unable to obtain the cooperation of an ANZICA counsellor, a vital requirement) egg sharing would appear to be illegal. That is because to encourage the woman to donate as well having her freeze her eggs or use other

of her eggs for her own treatment, would almost certainly mean that there would be an inducement, discount or priority in the provision of service to her, which clearly is valuable consideration within the definition of section 21 of the Commonwealth Act. This means that to enable egg sharing would, on its face, be the commission of an offence under section 21 of the Commonwealth Act.

QUEENSLAND *HUMAN CLONING ACT*

The Commonwealth has limited constitutional powers. The Commonwealth Human Cloning Act does not apply across the board. It applies only to the following[6]:

(a) To corporations. For example, it would apply to public companies, such as Monash IVF Group Limited, but also apply to small companies, such as Doctor Acme Medical Practice Pty Ltd.
(b) To trade or commerce between Australia and places outside Australia, among the States or by way of supply of services to the Commonwealth or to a Commonwealth authority. For example- the importation of sperm and eggs from overseas, or a clinic in Brisbane or the Gold Coast with patients who live in Byron or the Tweed.
(c) As might apply under an international treaty or convention.
(d) To the Commonwealth and Commonwealth authorities.
(e) Concerning statistics.
(f) Incidental Commonwealth powers.

Whilst the Commonwealth Act would clearly apply to any employee of a company, it may not apply in every circumstance to an individual. Accordingly, the Commonwealth has, under section 24 of that Act, enabled parallel State and Territory legislation to also exist. Each State and the ACT have passed parallel legislation. In Queensland the provision is section 17 of the *Research Involving Human Embryos and Prohibition of Human Cloning for Reproduction Act*

[6] Section 4, *Prohibition of Human Cloning for Reproduction Act 2002* (Cth).

2003 (Qld) which is a mirror provision to section 21 of the Commonwealth Act, including as to the 15 years jail term.

TRANSPLANTATION AND ANATOMY ACT 1979 (QLD)

In addition to the Human Cloning Acts, there is a scheme throughout Australia concerning human tissue regulation. Each State and both Territories has human tissue legislation, which is broadly similar but in relation to offences, there are some slight variations from State to State. The legislation is commonly called either the *Human Tissue Act* or the *Transplantation and Anatomy Act*, although in Western Australia it is called the *Human Tissue and Transplant Act*.

In Queensland the legislation is known as the *Transplantation and Anatomy Act 1979* (Qld) (which is also the legislation first to be considered in any posthumous use case). Section 40 provides:

> *"(1) Subject to this section, a person shall not buy, agree to buy, offer to buy, hold himself or herself out as being willing to buy, or inquire whether a person is willing to sell to the person or another person—*
>
> *(a) tissue; or*
>
> *(b) the right to take tissue from the body of another person.*
>
> *Penalty—*
>
> *Maximum penalty—20 penalty units or 6 months imprisonment.*
>
> *(2) Where the Minister considers it desirable by reason of special circumstances so to do, the Minister may, by a permit in writing, authorise a person, subject to such conditions and restrictions as may be specified in the permit, to buy tissue or the right to take tissue from the body of another person.*

(3) Nothing in subsection (1) applies to anything done under and in accordance with a permit granted under subsection (2).

(4) The Minister may at any time, by notice in writing given to a person to whom a permit has been granted under this section, cancel the permit.

(5) Where a permit has been granted under subsection (2) subject to any conditions or restrictions specified therein, a person shall not act on the authority of the permit unless the conditions or restrictions, as the case may be, are or have been complied with.

Penalty—

Maximum penalty—10 penalty units or 3 months imprisonment."

Tissue is defined in section 4 as meaning:

"(a) An organ, blood or part of –

(i) a human body; or

(ii) a human foetus; or

(b) A substance extracted from an organ, blood or part of –

(i) a human body; or

(ii) a human foetus;

but does not include –

(c) immunoglobulins; or

(d) laboratory reagents, or reference in control materials, derived wholly or in part from pooled human plasma; or

(iii) human milk."

The definition concerning human milk was added by the *Health and Other Legislation Amendment Act 2022*, and commences on a date to be proclaimed, which has not yet been advised.

There is a matching provision for the unauthorised selling of tissue in section 42:

"(1) Subject to this section, a person shall not sell, agree to sell, offer to sell, hold himself or herself out as being willing to sell, or inquire whether a person is willing to buy from the person or another person—

(a) tissue (including his or her own tissue); or

(b) the right to take tissue from his or her body or the body of that other person.

Penalty—

Maximum penalty—10 penalty units or 3 months imprisonment.

(2) Nothing in subsection (1) applies to a sale, or an agreement to sell, to a person who is, or is reasonably believed by the vendor to be, acting subject to, and in accordance with a permit granted under section 40 (2)."

Section 41 requires approval for any advertisement for donors:

"A person shall not—

(a) publish or disseminate by newspaper, other periodical, book, broadcasting, television, cinematograph or other means whatever; or

(b) exhibit to public view in a house, shop or place; or

(c) deposit in the area, yard, garden or enclosure of a house, shop or place;

an advertisement relating to the buying of tissue or of the right to take tissue from the bodies of persons unless the proposed advertisement has been approved by the Minister and contains a statement to that effect.

Penalty—

Maximum penalty—10 penalty units or 3 months imprisonment."

During the Newman Government, I took the view the drafting of section 41 did not apply to sperm donors because sperm was ordinarily ejaculated and was therefore not *taken* from the bodies of donors (as opposed to eggs which are taken from the bodies of egg donors). Nevertheless, the view of the Director-General of Queensland Health at the time was that the section also applied to sperm donors.

Section 51A allows the Minister to delegate powers to the Director-General. I understand that the Minister for Health has delegated under section 51A the power to approve advertisements to the Director-General, but in my search of the needle in the haystack, I was unable to find the notice that says that.

Section 42AA provides an exception to sections 40-42:

"(1) Sections 40, 41 and 42 do not apply to the trading of tissue if—

(a) the tissue has been subjected to processing or treatment; and

(b) the trading of the tissue is for a therapeutic purpose, medical purpose or scientific purpose; and

(c) the tissue is—

(i) a biological or a medical device included in the register under the Therapeutic Goods Act 1989 (Cwlth); or

(ii) a registered good under the Therapeutic Goods Act 1989 (Cwlth); or

(iii) any exempt material derived wholly or in part from tissue; and

(d) the tissue is not relevant tissue.

(2) In this section—

"exempt material" means any of the following—

(a) laboratory reagents;

(b) quality assurance material;

(c) reference and control material.

"register" means the Australian Register of Therapeutic Goods kept under the Therapeutic Goods Act 1989 (Cwlth), section 9A.

"relevant tissue" means—

(a) tissue stored at a tissue bank under section 42A; or

(b) tissue mentioned in section 42AB (1)."

In effect, section 42AA does not apply to egg, sperm or embryos. Section 42AC makes plain that advertising by individuals for donation of human eggs or sperm is lawful provided the advertisement is by the recipient, is for their own personal use with assisted reproductive technology and no valuable consideration is given.

Section 42AC provides:

"(1) Section 41 does not apply to a donation of human eggs or human sperm within the meaning of the Research Involving Human Embryos and Prohibition of Human Cloning for Reproduction Act 2003 if—

(a) an individual (the "recipient"), as mentioned in that section, publishes, disseminates, exhibits or deposits an advertisement stating that the recipient seeks another individual (the "donor") to donate human eggs or human sperm to the recipient; and

(b) the human eggs or human sperm are to be used with assisted reproductive technology for the recipient's personal use; and

(c) the recipient does not give the donor valuable consideration for the donation.

(2) In this section—

"valuable consideration," or a donation of human eggs or human sperm by an individual, means any form of payment, reward or other material benefit or advantage, but does not include the payment of the individual's reasonable expenses in connection with the donation."

The curious drafting of section 42AC would mean that a woman who is seeking a private sperm donor at home may be committing an offence because the sperm is not *"to be used with assisted reproductive technology"*. *Assisted reproductive technology* is not defined as a term in this Act. As a concept, it would ordinarily not include at home insemination. *Assisted reproductive technology* is defined in the *2017 ICMART glossary*[7] as:

"All interventions that include the in vitro handling of both human oocytes and sperm or of embryos for the purpose of reproduction. This includes, but is not limited to, IVF and embryo transfer ET, intracytoplasmic sperm injection ICSI, embryo biopsy,

[7] https://www.icmartivf.org/glossary/a-d/

preimplantation genetic testing PGT, assisted hatching, gamete intrafallopian transfer GIFT, zygote intrafallopian transfer, gamete and embryo cryopreservation, semen, oocyte and embryo donation, and gestational carrier cycles. Thus, ART does not, and ART-only registries do not, include assisted insemination using sperm from either a woman's partner or a sperm donor."

Section 42AC was introduced by amendments in 2014. The explanatory note and the Health Minister's second reading speech are silent about the section. We are none the wiser about whether Parliament intended the ability to advertise to extend to those proposing to engage in at home insemination, or through an IVF clinic.

If an intended parent intended to undergo IUI through a clinic, then on the face of it they would not be protected by s.42AC either. However, if they were to undertake IVF, they would be.

The definition of *valuable consideration* is consistent with section 17 of the *Research Involving Human Embryos and Prohibition of Human Cloning for Reproduction Act 2003*.

If there were any doubt, section 44A clarifies the relationship between part 7 *Prohibition of Trading in Tissue* of the *Transplantation and Anatomy Act* and section 17 of the *Research Involving Human Embryos and Prohibition of Human Cloning for Reproduction Act 2003*. The latter prevails:

"(1) This section applies to human eggs, human sperm and human embryos within the meaning of the Research Involving Human Embryos and Prohibition of Human Cloning for Reproduction Act 2003.

(2) To the extent of an inconsistency between this part and the Research Involving Human Embryos and Prohibition of Human Cloning for Reproduction Act 2003, section 17, that section prevails."

So how much can be paid to donors?

As the National Health and Medical Research Council made plain in its writing to clinics in about August 2016, if standard payments are made to donors, then the NHMRC will assume that commercial trading is taking place. The payment to be reimbursed to donors in each case must be unique to that donor and must be a *reasonable expense*.

The FSA advised in 2011 (see below) that payments to donors can be based on the *Surrogacy Act 2010* (NSW), i.e. reasonable costs. There may be some flexibility in payment[8], but given the need to comply with licence conditions, as well as the stiff criminal penalties involved, extreme caution is urged.

RTAC CODE OF PRACTICE

The current 2021 Code of Practice requires in 1.3(h):

> *"Compliance with the NHMRC Ethical Guidelines on the use of ART in clinical practice and research (2017 or more recent review), except where in conflict with the legislation, or where alternative requirements have been directed by a registered and compliant [human research ethics committee] affiliated to the Unit."*

As far as I am aware, no Monash IVF unit in Queensland has a registered and compliant human research ethics committee.

As you would be well aware, the *Ethical Guidelines* have extensive requirements regarding donor gametes and embryos. There are requirements for:

- Counselling.
- Consent.

[8] *Re Halvard* [2016] FamCA 1061, which concerned surrogacy.

- Accepting and allocating gamete donations.
- Exchange of information between all relevant parties.
- Responsibility for gametes and embryos.
- Withdrawal of consent for donation.
- Transparency.
- Cap limits.

There is no cap provided for Queensland.

Guidelines 5.3.2 and 5.3.3 provide:

> *"5.3.2 Gametes from a single donor must be used to create only a limited number of families. In the absence of specific state or territory legislation, clinics must take account of the following factors when deciding on an appropriate number of families to be created:*
>
> - *The number of persons already born from the donor's gametes*
> - *The risk of a person born from donor gametes inadvertently having a sexual relationship with a close genetic relative (with particular reference to the population and ethnic group in which the donation will be used)*
> - *Any limitations on the number of families expressed as part of the consent of the donor*
> - *Whether the donor has already donated gametes to another clinic.*
>
> *5.3.3 In the absence of a national registry for gamete donation, to encourage disclosure of multiple donations and multiple clinics, potential gamete donors*

should be reminded of the importance of limiting the number of families created from a single donor. Prior to donation, clinics must:

- *Ask potential donors whether they have donated at other clinics*
- *Obtain consent from potential donors to contact other clinics about any previous donations."*

The view is held that the number in Queensland is 10, which of course means 9, the other family being that of the donor. That's the common view about the cap, based on FSA advice from 2011 (see below). The requirement in the Ethical Guidelines is a limited number. If in a regional city, for example Cairns or Rockhampton, one might wish to limit the number of families from that donor to a much smaller number, due to the risk of consanguinity. However, if spread across the State, there may be cases where greater than 10 is appropriate. Each case will have its own unique characteristics that should be taken into account.

It would also be wise to ask if there have been any private donations, given the news stories and websites that make it quite plain that there have been many private donations by donors[9] who have also donated through clinics.

Guidelines 5.4 and 5.5 provide:

"5.4 Provide reimbursement of verifiable out-of-pocket expenses

The current situation in Australia is a gamete donation must be altruistic, and that commercial trading in human gametes or the use of direct or indirect inducements is prohibited by legislation. This position reflects concerns about

[9] For example, see https://www.theage.com.au/national/victoria/the-man-behind-australias-private-sperm-donor-boom-20210521-p57u1q.html ; https://www.dailymail.co.uk/news/article-9087093/Meet-Australias-oldest-sperm-donor-fathered-50-kids.html; https://www.news.com.au/lifestyle/real-life/news-life/brisbane-sperm-donor-investigated-after-fathering-23-kids-in-one-year/news-story/dfb0c65c7477a4b9bdaea9fc773928e9; https://www.youtube.com/watch?v=NGhbcTGZmkI .

the potential exploitation of donors (particularly egg donors) and the potential risks to all parties.

5.4.1 While direct or indirect inducements are prohibited, it is reasonable to provide reimbursement of verifiable out-of-pocket expenses directly associated with the donation, including, but not limited to:

- *Medical and counselling costs, both before and after the donation*
- *Travel and accommodation costs within Australia*
- *Loss of earnings*[10]
- *Insurance*
- *Childcare costs were needed to allow for the donor's attendance at donation related appointments and procedures*
- *Legal advice.*

5.5 Use of imported gametes

5.5.1 Treatment in Australia using gametes donated by persons living in another country must not take place unless it can be established that the gametes were obtained in a manner consistent with any commonwealth legislation and any relevant state or territory legislation, accreditation body guidelines and these Ethical Guidelines

[10] *Donors who access paid leave during the donation process cannot be reimbursed for loss of earnings. Loss of earnings can be demonstrated by the donor providing pay slips verifying that unpaid leave was taken.*

- *Where a recipient has had a child born[11] before the introduction of these Ethical Guidelines [2017] and gametes or embryos are in storage, within Australia, for the recipient's future use, the gametes or embryos may be used in the treatment of the recipient provided that the relevant requirements outlined in paragraph 4.4.1 are satisfied."*

USING AN OVERSEAS DONOR

Many Queenslanders undertake egg donation overseas. If doctors or staff of IVF clinics aid or abet the patient to undertake egg donation overseas, then the doctor or staff member may be committing an offence as a principal offender, punishable by up to 15 years imprisonment. Section 12 of the *Criminal Code* makes plain in respect of Queensland legislation that it has application overseas if the effect of the act which constitutes the offence or part of the act that constitutes the offence occurs in Queensland. Section 12 is what is known as a long arm law, because it stretches the jurisdiction of Queensland much like a long arm. It provides:

> *"(1) This Code applies to every person who does an act in Queensland or makes an omission in Queensland, which in either case constitutes an offence.*
> *(2) Where acts or omissions occur which, if they all occurred in Queensland, would constitute an offence and any of the acts or omissions occur in Queensland, the person who does the acts or makes the omissions is guilty of an offence of the same kind and is liable to the same punishment as if all the acts or omissions had occurred in Queensland.*
> *(3) Where an event occurs in Queensland caused by an act done or omission made out of Queensland which, if done or made in Queensland, would constitute an offence, the person who does the act or makes the omission is guilty of an offence of*

[11] *Or has had an embryo transferred before the introduction of these Ethical Guidelines, and the birth of the resulting child is pending*.

> *the same kind and is liable to the same punishment as if the act or omission had occurred in Queensland.*
>
> *(3A) It is a defence to prove that the person did not intend that the act or omission should have effect in Queensland.*
>
> *(4) Where an event occurs out of Queensland caused by an act done or omission made in Queensland, which act or omission would constitute an offence had the event occurred in Queensland, the person who does the act or makes the omission is guilty of an offence of the same kind and is liable to the same punishment as if the event had occurred in Queensland.*
>
> *(5) This section does not extend to a case where the only material event that occurs in Queensland is the death in Queensland of a person whose death is caused by an act done or an omission made out of Queensland at a time when the person was out of Queensland."*

Therefore, the offence under the Queensland *Human Cloning Act* (up to 15 years imprisonment) and the offence under the *Transplantation and Anatomy Act* (up to 6 months imprisonment) can apply in some circumstances to overseas transactions.

The Commonwealth *Human Cloning Act* offence (up to 15 years imprisonment) as I said above may apply to some overseas transactions.

It is common for Queenslanders to enter into a commercial egg donation arrangement overseas whereby they might be sent an agreement in PDF, they then print it, sign it in Queensland, scan it in Queensland and email it off. They may unintentionally therefore commit a serious offence in Queensland. Any doctor or staff member of an IVF clinic who encourages them to undertake that agreement may be committing a serious offence along with them.

Doctors and nurses have a duty of care to patients. It is also the case that doctors and nurses are not lawyers, just as I am not a doctor. I am often asked medical questions, to which I reply: *"I'm a lawyer, not a doctor."*

My point of making this obvious differentiation is that there can be nuances with the law, and the need to protect yourselves from any suggestion that you have breached the law, or you have told the patient something that is legally incorrect or failed in your duty of care to your patient. If a patient is saying that they are considering undertaking overseas egg, sperm or embryo donation, I suggest that you say:

1. It is an offence in Queensland to engage in commercial egg, sperm or embryo donation.
2. It may be an offence in Queensland to do so overseas.
3. Go and obtain legal advice.

Then record this advice in a detailed, dated file note.

COMMENT ABOUT THE *ETHICAL GUIDELINES*

Prior to the current version of the *Ethical Guidelines*, following the Senate Inquiry into donor practices, RTAC issued *Technical Bulletin 3: Donor Issues* in 2011. RTAC set out its advice to units:

> *"1. Units are reminded that the NHMRC 'Ethical Guidelines on the use of assisted reproductive technology in clinical practice and research', 2004 revised June 2007, are an integral part of the RTAC Code of Practice, and contained within Critical Criterion 1.*
>
> *Hence:*

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- *Donors must be identifiable to their donor offspring (NHMRC 6.1, 7.1), which means the donors recruited from 2002 must consent to the release of identifying information to offspring or their parents.*
- *Comprehensive non-identifying information must be collected about each donor, including the items covered in NHMRC sections 6.10 and 10.3*
- *Units must have written donor-recipient linking procedures (NHMRC 6.11, 6.13)*

2. *Donors from outside Australia must meet the same requirements as if they donated in Australia. This applies, but is not limited to, donor sperm sourced from outside Australia.*

   Use of imported donor sperm should be supported by written independent legal opinion specific to the origin of the donor sperm, State and Federal requirements for the State where the sperm is used, and the unit's clinical practice using this sperm. This legal advice should be available to auditors upon request. The legal opinion should cover the type and amount of 'reimbursement' given to the sperm donor by the sperm bank, the availability of identifying and other information for offspring and their parents, retention of records, and the maximum number of offspring or donor families possible from each donor.

3. *The Senate inquiry reported that some units were confused about the RTAC Code of Practice and NHMRC guidelines relating to the maximum number of offspring for a donor and 'reasonable expenses'.*

   Where State legislation does not apply, the following are advised:

- *A maximum of ten donor families per sperm donor. This is based on the highest limit in existing State legislation (Victoria). The number of families per donor includes all families wherever the donor's sperm is used, not just the number of families from one unit, in one city, or in one country. This interpretation is based on the definition in existing State legislation.*

- *Reasonable expenses be based on the principles in the Surrogacy Act 2010 of NSW, which applying to sperm donation would cover:*

  - *Reasonable medical, travel or accommodation costs associated with offering to be a donor and associated with donation*

  - *Receiving any legal advice associated with donation*

A cost is reasonable only if the cost is actually incurred and the amount of the cost can be verified by receipts or other documentation. For the convenience of donors and units, it is suggested that units may decide to waive requiring receipts for individual items below $50.

4. Where State legislation does not apply, key information relating to a donor who has donor offspring or to a recipient who has donor offspring must not be destroyed. The key information that must be retained about the donor includes his or her identity, last known address, and relevant medical history about the individual and his or her immediate family. Key information to be retained about the offspring includes the identity of the donor used."

Reasonable expenses is the term used in the Commonwealth and State *Human Cloning Acts*. The term used under the *Surrogacy Act 2010* (NSW) is *reasonable costs*. In my view there is no difference between *reasonable costs* and *reasonable expenses*.

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In *Re Halvard* [2016][12] the Family Court of Australia was considering a US surrogacy arrangement and in particular, whether it was a commercial surrogacy arrangement under the *Surrogacy Act 2010* (Qld) and *Surrogacy Act 2010* (NSW).

Justice Forrest stated[13]:

> *"In his written submissions for the applicants when addressing discretionary considerations, the applicants' solicitor refers to public policy considerations surrounding surrogacy arrangements. He refers to the fact that the Australian States of New South Wales and Queensland as well as the Australian Capital Territory have expressly criminalised the entry into commercial surrogacy arrangements abroad by persons ordinarily resident in those States or in the ACT and he points out that as the applicants are not ordinarily resident on one of those places that prohibition does not apply to them. It appears thereby, that the solicitor's submission is that, consequently, the discretion should not be exercised against the registration of the Tennessee Court's Order.*
>
> *With all due respect, I do not quite understand the submission, as I do not understand the surrogacy agreement that the applicants entered into to have been a commercial one. The Queensland Surrogacy Act 2010 defines a commercial surrogacy arrangement as one in which a person receives a payment, reward or other material benefit or advantage other than the reimbursement of the birth mother's reasonable surrogacy costs. The New South Wales legislation defines commercial surrogacy in very similar terms, also permitting payment to the birth mother for reimbursement of her reasonable surrogacy costs.*
>
> *The agreement in this case between the applicants and the gestational carrier in Tennessee was one in which the gestational carrier was reimbursed by the applicants for all of her pregnancy related out-of-pocket expenses. The terms of the agreement*

12 [2016] FamCA 1051.
13 At [32]-[35]

that provided for that certainly appeared quite generous but not so generous that I would consider it a commercial surrogacy agreement masked as one in which reimbursement is provided.

Whilst an overseas child order that came into existence as a consequence of a commercial surrogacy agreement might have difficulty attracting a favourable exercise of the discretion to register in this court for public policy reasons, I do not consider that applies in this matter."

In my view, the effect of the decision in *Re Halvard* is that there may well be some wriggle room as to what can be reimbursed to donors – but great care needs to be taken, given the serious consequences involved.

I am not aware of there having been any prosecutions ever concerning payments to egg, sperm or embryo donors anywhere in Australia.

KNOWN DONORS AND CO-PARENTS

A feature in recent years has been the rise in the number of known donors. In light of several decisions of the Courts, especially *Re Patrick* [2002] FamCA 193 (where the birth mother killed herself and Patrick after the judgment was delivered) and *Masson v Parsons* [2019] HCA 19, I strongly recommend that if intended parents wish to have a known donor, then to lower risk, they ought to take three steps:

1. Go to an IVF clinic- so that medical tests are properly undertaken, to reduce transmissible conditions like cystic fibrosis and diseases like HIV.
2. Have a properly drafted donor agreement. Go and see a lawyer. Although it is unclear if the document is legally binding, the intentions of the parties will be made plain, including whether a man who provides his sperm is to be a parent or a donor.

3. Undergo counselling with an ANZICA counsellor and obtain the report before the agreement is entered into. The report should clearly state whether the donor is to be a parent or a donor.

Above all, the recipient (or one of them) should not be having sex with the donor in order to conceive the child. Assuming that a child is conceived that way, a would be sperm donor in that circumstance will most likely not be a donor, but a parent, who among other responsibilities will be liable for child support. One only has to look online to see how many are prepared to buy a ticket in that lottery, with many prospective sperm donors being prepared to engage in "NI" – natural insemination, i.e. sex.

SURROGACY

The *Surrogacy Act 2010* (Qld) regulates the post-birth transfer of parentage of children born through altruistic surrogacy arrangements and criminalises commercial surrogacy arrangements.

At the end of my paper is my firm's Queensland surrogacy timeline, which we give to clients so that they have a visual understanding of the steps involved.

The *Surrogacy Act* contains four offences:

1. Entering into or offering to enter into a commercial surrogacy arrangement: section 56.
2. Advertising for a surrogacy or seeking to advertise for intended parents by a surrogate: section 55.
3. Making or receiving payment under a commercial surrogacy arrangement: section 57.

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4. Providing technical professional medical services for a commercial surrogacy arrangement: section 58.

The last offence, under s.58, appears to apply only to providing assistance to a surrogate in a commercial surrogacy arrangement. For the offence to be committed there are three elements, all of which must be met:

- A person intentionally provides a technical, professional or medical service to another person; *and*
- The person knows the other person is, or intends to be, party to a commercial surrogacy arrangement; *and*
- The person provides the service with the intention of assisting the other person to become pregnant for the purpose of the arrangement.

Therefore, the offence is aimed specifically at clinics and agencies because it is aimed specifically at conduct towards would be surrogates. The offence is not committed if the service is provided after the surrogate has become pregnant: s.58(2).

A person who aids and abets another, or counsels or procures another to commit an offence is a principal offender under Queensland law: section 7 *Criminal Code*. Therefore, a doctor who aids and abets a patient to enter a commercial surrogacy arrangement is guilty of an offence under section 56 of the *Surrogacy Act*.

In addition to the longarm provisions under section 12 of the *Criminal Code* (discussed above), section 54 makes plain that the offences under the *Surrogacy Act* are committed if, outside Queensland, the relevant acts occur that constitute the offence are undertaken by someone who is ordinarily resident in Queensland. *Ordinarily resident* is a question of fact.

Therefore, if a Queensland resident enters into a surrogacy arrangement anywhere else in the world, for example, in Ukraine, that by definition is a *commercial surrogacy arrangement*

(a term defined under section 10 of the Queensland Act) then the relevant offence is committed. Whether the surrogacy arrangement is lawful overseas is irrelevant.

There are only four places in the world that have this overseas criminalization of commercial surrogacy:

- Hong Kong
- ACT
- NSW
- Queensland

Residents of South Australia, Western Australia and soon, the Northern Territory could also be committing offences by engaging in commercial surrogacy overseas, due to criminalisation of commercial surrogacy in SA, WA and the NT- and long arm laws like section 12 of the *Criminal Code* (described above).

Offences relating to surrogacy have been in place since about October 1988 when the predecessor legislation, the *Surrogate Parenthood Act 1988* (Qld) commenced. Between 1988 and 2008 there were about six prosecutions under the *Surrogate Parenthood Act*. I am not aware of any offences having been prosecuted under the *Surrogacy Act*.

As *Re Halvard* (cited above) makes plain, just because someone goes overseas to the United States, does not necessarily mean that the surrogacy arrangement is a commercial surrogacy arrangement as defined under the *Surrogacy Act 2010* (Qld). Careful analysis of the transaction needs to be undertaken to see whether it is a commercial surrogacy arrangement as defined under the Act.

If you have a patient who is considering undertaking surrogacy overseas, then they should obtain legal advice. By all means tell them that they might be committing a criminal offence and to seek legal advice. Document that you said that in a careful file note.

From the most recent data that I have obtained, by analysing:

- The number of surrogacy births via gestational surrogacy through ANZARD
- Freedom of information requests of the Department of Home Affairs for applications for citizenship by descent for children born overseas via surrogacy
- Annual reports of the Childrens Court of Queensland,

the following can be determined:

1. For every child born in Australia via surrogacy about four are born overseas. To put it another way, only one in five children born via surrogacy are born in Australia.
2. More Australian children are born via surrogacy in the United States than in Australia.
3. The Queensland numbers reflect the Australian numbers i.e. for every child born in Queensland through surrogacy, four are born overseas. By contrast, in Western Australia, for every child born in Western Australia via surrogacy, 22-25 are born overseas (the number fluctuates each year) – which would seem to be a remarkable failing of the ability to access surrogacy in Western Australia.
4. The top six countries in which children were born in the year ended 30 June 2021 and applied for Australian citizenship by descent were:
    1) United States
    2) Ukraine
    3) Canada
    4) Republic of Georgia.

5) Mexico.

6) Thailand.

Current trends are likely in the 2022 year to see a drop off understandably in Ukraine and the Republic of Georgia and Thailand. Current trends would indicate an increase in surrogacy in Colombia that likely would take effect primarily in the 2023 year.

It is important when undertaking surrogacy in Queensland to get your ducks in a row. Assuming that there isn't a need for an egg donor, then the requirements are:

1. If a woman is an intended parent, she must be an *eligible woman* – which means there needs to be an assessment from a relevant medical practitioner. The criteria under the *Surrogacy Act* section 14 is wide-ranging and the relevant medical practitioner who could provide evidence would ordinarily be a fertility specialist, but could be some other specialist such as a cardiologist or a psychiatrist.

2. The surrogate must be medically suitable.

3. Ordinarily, all parties must be over the age of 25.

4. The intended parents reside in Queensland. It is lawful in Queensland, NSW, South Australia and Tasmania (and soon, the Northern Territory) for ART to occur anywhere in the world for a local surrogacy journey. However, great care must be taken in doing so, to ensure that the arrangement is compliant with local law (as otherwise a parentage order may not be made). Therefore, IVF could occur in Queensland for intended parents who live interstate (for example, who live in Byron or the Tweed). There are restrictions on all or part of the ART occurring interstate for intended parents residing in the ACT, Victoria or Western Australia. It is lawful in Queensland for a clinic in Queensland to provide treatment for intended parents who live interstate or overseas. However, great care should be taken that the intended parents will be able to become the parents at the conclusion of the journey. For example, some

years ago I saw clients from a Pacific Island country who wanted to do surrogacy in Queensland. While medical treatment in Queensland was lawful and possible, there were practical barriers- such as migration law and an inability to transfer parentage (because they were not eligible, as non-Queensland residents from obtaining a parentage order) that meant that they did not proceed with their Queensland journey.

The crucial legal steps for the surrogacy arrangement are:

1. The parties have separate independent legal advice. In one recent case, a lawyer who was clearly inexperienced thought that the surrogate and her husband should be represented by two lawyers. Wrong! The surrogate and her partner will be represented by one lawyer- and the intended parents will be represented by a separate, independent, lawyer.
2. Pre-signing counselling will occur with all parties, typically by an ANZICA counsellor, who will then provide the parties, their lawyers and the clinic with a report. If you feel that the report is inadequate, say so. Just because a counsellor says it is OK to proceed, if you feel that the report is hopelessly inadequate at identifying risks, or is non-compliant, then you can decide not to provide treatment (or hold off doing so until there is a compliant report).
3. The parties then enter into a written, signed surrogacy arrangement, that is not generally legally binding.
4. The lawyers then give legal clearance.
5. The clinic then approves treatment.
6. The intended parents, surrogate and her partner should all have wills in place. The intended parents, surrogate and her partner should all have basic estate planning in place- as to superannuation and life insurance.
7. At birth, the surrogate and her partner are the lawful parents.
8. A birth certificate issues showing the surrogate and her partner as the parents. If the surrogate is single, then only she is shown on the birth certificate. Typically, the name of the child is chosen by the intended parents. For example, the surrogate and her

partner are Francis and Francine Fishpaw, and the intended parents are John and Paul Jackson. The child's name at birth is Pauline Francine Jackson- but the parents shown are Francis and Francine.

9. Between 28-31 days post-birth and 6 months post-birth the intended parents apply to the Childrens Court of Queensland for a parentage order.
10. In support of that application, they file many sworn statements, or affidavits. The requirements of the Surrogacy Act are long and exacting. Most of the legal costs by intended parents is therefore at the end. Typically, these affidavits are from:
    - Intended parent 1
    - Intended parent 2
    - On the morning of court, a joint updating affidavit by both.
    - Surrogate
    - Surrogate's partner
    - Lawyer for the intended parents
    - Lawyer for the surrogate and surrogate's partner
    - Counsellor who wrote the pre-signing counselling report
    - Counsellor who carried out a post-birth assessment as to the best interests of the child- called a surrogacy guidance report
    - Doctor who can say that the intended mother is an eligible woman, and the date of conception.
11. All parties come to court, along with the baby, where the matter is heard by a Childrens Court judge. Court hearings are between 2 weeks and 8 weeks after the matter is filed, depending on listing availability. Most of these are dealt with in Brisbane but have been heard in other places. For example, I have appeared on parentage order applications in Cairns and Townsville also.
12. The court make the parentage order, whereby the intended parents are then recognised as the child's parents. Usually there will be photos taken in court of this joyous occasion.

13. The intended parents then notify the Registrar of Births, Deaths and Marriages of the order, and a new birth certificate then issues, showing the intended parents as the parents.

It is important that the counselling is completed before the surrogacy arrangement is signed. Occasionally there will be surprises in the counsellor's report. I would rather know about those surprises in advance before the surrogacy arrangement is signed- so that the surprises can be addressed, rather than having to fix a potential mess.

One case comes to mind where the parties put the cart before the horse. They had:

1. Signed the surrogacy arrangement.
2. Had the counselling.
3. Both sides had had independent legal advice.

However, nobody had thought to have a doctor check whether the surrogate was medically suitable.

In 2019 the President of the Fertility Society of Australia and New Zealand wrote to all clinics noting that clinics (other than in Victoria and Western Australia) were no longer to ask for a copy of the surrogacy arrangement. Instead, consistent with the practice in the United States and Canada, clinics were to ask for legal clearance to be given by the solicitors for both parties, including that the surrogacy arrangement was not a commercial surrogacy arrangement.

Doctors and embryologists are not lawyers, in the same way that I am neither a doctor nor an embryologist. Liability for a defective surrogacy arrangement should fall on the shoulders of the lawyers, and not of doctors and embryologists. Therefore, clinics should trust lawyers to get it right.

The process in Queensland involves a post-birth transfer of parentage applied for between approximately one month and six months post-birth. There can be flexibility with this period

(particularly at the beginning) in the case of some emergency involving the child. Experience has taught me that most parents apply towards the end of the period. Their focus at that point is on the care of their much wanted child (and getting sleep), not on the legal process.

If you have a complex surrogacy question or your patients do, just pick up the phone and call me. I will have a view about whether treatment can be given or whether there might be some difficulty in obtaining a parentage order. Do not assume. To assume is to potentially fall into error.

FOUR FLEXIBLE POINTS UNDER THE *SURROGACY ACT*

Point 1 Jurisdiction

Jurisdiction in Queensland in the Childrens Court of Queensland under the *Surrogacy Act 2010* (Qld) only arises after the child is born. It is at the point of the court hearing that the intended parents must reside in Queensland.

Both Queensland and New South Wales, alone of all the States, have similar flexibility. What this means is that someone who underwent surrogacy interstate but completes the journey in Queensland can access surrogacy in the Childrens Court, or someone who happens to reside interstate or overseas at the commencement of the journey can finish the journey in Queensland. There are therefore intended parents who cannot access surrogacy where they live due to several reasons, including local regulation, but maybe able to access surrogacy in Queensland because of the general flexibility under the *Surrogacy Act*. Five examples are:

1. A Tasmanian couple who have a surrogate who lives interstate. The requirements of the *Surrogacy Act 2012* (Tas) ordinarily require both the intended parents and the surrogate and her partner all to reside in Tasmania at the time of signing the surrogacy arrangement.

2. An Australian couple living in London whose sister-in-law in Brisbane wishes to be the surrogate.

3. Intended parents who live in Victoria who wish to undertake traditional surrogacy. Traditional surrogacy is permissible in Victoria at home, but not through an IVF clinic.

4. A single intended parent from the ACT or intended parents as a couple from the ACT who have a single surrogate. The *Parentage Act 2004* (ACT) requires the intended parents to be a couple and the surrogate to be part of a couple.

5. A single man or a male couple or non-binary or transgender person or couple who do not meet the definition of single woman or female couple or heterosexual couple who wishes to undertake surrogacy from Western Australia. They will be able to do so in Queensland. The *Surrogacy Act 2008* (WA) restricts surrogacy in Western Australia to single women, lesbian couples and heterosexual couples only. The status of non-binary individuals or transgender individuals is unclear. In effect, single men and gay couples are excluded by the Western Australian legislation.

6. Anyone from the Northern Territory. However, the *Surrogacy Act 2022* (NT) has now been enacted- and will come into effect sometime between August 2022 and 21 March 2024.

Point 2 – where IVF occurs

Queensland, New South Wales and Tasmania have not had restrictions about where IVF occurs for the purposes of surrogacy, provided the other requirements of the legislation are met. South Australia used to have such a requirement. When there was a review of surrogacy legislation there, I was firmly of the view that the restriction should end, so that intended parents have freedom of choice in choosing the clinic they wanted to go to. I was delighted when the *Surrogacy Act 2019* (SA) was enacted that enabled that flexibility. The Northern

Territory will also have that flexibility once its *Surrogacy Act* commences. Therefore, for example, if there are intended parents living in Darwin but it is easier to provide treatment for example on the Gold Coast, then treatment will be able to occur on the Gold Coast through Monash IVF instead of Repromed in Darwin. Neither Victoria nor Western Australia have that flexibility.

One of the great barriers to intended parents undertaking surrogacy is having an egg donor. Some of my clients have had a local i.e. Australian surrogate, but have been unable to find an egg donor. The Supreme Court of New South Wales and the Childrens Court of Queensland have made parentage orders in cases of clients of mine where they've had an Australian surrogate, but the IVF has occurred in the United States, where the parties have had the benefit of having a US egg donor.

Point 3 – reasonable costs

The essence of section 11 of the *Surrogacy Act* is that the birth mother is entitled to payment of her reasonable costs related to the surrogacy journey. The legislation sets out examples – but they are only that, examples. The flexibility of the Queensland legislation (mirrored in Tasmania, and mirrored, although not stated in exactly the same language in New South Wales, and with variations in South Australia and the Northern Territory. Less flexibility in Victoria and Western Australia) is that all types of expenses can be met – provided they are reasonable. In a Supreme Court of New South Wales case (which in my view would also apply in Queensland), the court held that to provide sperm to the partner of a proposed surrogate so that the partner could become pregnant and have a child as part of that relationship would be a commercial surrogacy arrangement.[14] Sperm, not money, was the basis of commerciality.

[14] Application MJC & CSC; at *Re EMC* [2012] NSWSC 1626.

However, there are limits as to what are reasonable costs. This was seen in my case of *Rose* [2018] FamCA 978. My client was an Australian living in the US who underwent surrogacy in the US. The Family Court of Australia considered whether the surrogacy arrangement was a commercial surrogacy arrangement in Queensland and couldn't exclude it as being a commercial surrogacy arrangement. The surrogate was paid base compensation of US$26,000 in which this was said:

> *"Ancillary expenses for food and meals, housing expenses such as rent or mortgage expenses and utilities. The 'base amount' is set at USD$26,000 and receipts are not required."*

Justice Carew stated[15]:

> *"It seems to me that the payment of rent, mortgage expenses and utility expenses fall into the category of a 'payment, reward or other material benefit or advantage' that is directly related to the entering into the Agreement. Such payments do not fall within the definition of a birth mother's surrogacy costs."*

By contrast, with the flexibility in Queensland, Western Australia is highly proscriptive about expenses that can be allowed. Surprisingly, given its size, Western Australia makes no allowance for travel costs or accommodation. Many Australians undertake surrogacy in Canada, which is also an altruistic regime. Whilst surrogacy is altruistic in Canada, care must be taken for any Australians who undertake surrogacy there that they are not committing a breach of the relevant State legislation here. Canada is huge. A feature of every Canadian surrogacy agreement that I've ever seen is a provision for travel and accommodation. This is an immediate problem for people from Western Australia, but not for people from Queensland.

Another feature I have seen in every Canadian surrogacy agreement is that there is a provision for snow shoveling for the surrogate. Canada can be a cold place. The last thing we would

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[15] At [55].

want to have happen is for a pregnant surrogate to be shoveling snow and then be injured. Under the Queensland *Surrogacy Act* an expense relating to snow shoveling in an appropriate case is altruistic. In Western Australia it is commercial.

Point 4 – traditional surrogacy

From its enactment, the *Surrogacy Act* has allowed traditional surrogacy to occur. Quite rightly, there are concerns about traditional surrogacy because of the perceived risk that the surrogate may wish to hang onto the child – as seen for example in *Re Evelyn* [1998] FamCA 2379.

Whether a particular IVF clinic undertakes traditional surrogacy in Queensland is in my view an assessment by that clinic of risk. I don't see it as a discrimination issue – but a concern in the eyes of the clinic as to whether or not it is appropriate to assist, given perceived risks as to the surrogate not relinquishing the child.

Nevertheless, a number of IVF clinics in Queensland are prepared to undertake traditional surrogacy, provided that each case is decided on a case by case basis, with careful assessment, particularly with careful consideration of the pre-signing counsellor's report.

WHO ARE THE PARENTS AT BIRTH?

The *Surrogacy Act* in section 17 takes up the presumptions under the *Status of Children Act 1978* (Qld). In effect, at birth the surrogate and her partner are the parents.

There has been some difficulty if the surrogate is single. A decision in North Queensland came to the conclusion that the wording of the *Status of Children Act* meant that the intended genetic father was a parent, albeit one with no rights or responsibilities[16].

However, a subsequent decision of the Childrens Court[17] held that the other case was wrong because if that other case would logically follow through then, using the same interpretation approach, a sperm donor to a lesbian couple would be recognised as a parent albeit with no rights or responsibilities – whereas Parliament made it quite plain that there were to be only two parents on the birth register. Therefore, the clear intent of the Queensland Parliament was that there were to be only two parents and that the sperm donor was not to be recognised as a parent.

Therefore, where there is a single surrogate, the only person to be registered on the birth certificate as a parent before the making of a parentage order is that surrogate.

CONCEPTION

Monash IVF has a proud place in the legal history of Queensland. In *LWV v LMH* [2012] QChC 26, Judge Clare QC had to determine whether the requirement of section 22 of the *Surrogacy Act* that the surrogacy arrangement had to be entered into *before the child was conceived,* meant that conception was either the act of fertilisation or that of pregnancy. Dr Nasser concluded that conception was the act of pregnancy which must have occurred after implantation. Her Honour agreed with Dr Nasser and accepted my submissions that conception was the act of pregnancy not implantation, in a world-first ruling as to what is conception.

[16] *Lamb & Shaw* [2017] FamCA 769; *Lamb & Shaw* [2018] FamCA 629.
[17] *RBK v MMJ* [2019] QChC 42, in which I acted for the intended parents.

WHAT IF THE CHILD HAS SOME DISABILITY POST-BIRTH?

The issue is here to ensure that the intended parents have parental responsibility to be able to give authority to doctors to provide treatment. There are a number of solutions:

1. Obtain an urgent order in the Federal Circuit and Family Court of Australia under the *Family Law Act 1975* (Cth) as to parental responsibility or a similar order in the Supreme Court of Queensland under its common law *parens patriae* jurisdiction. Whilst each is doable, each is a stressful process and costly.

2. Obtain relevant dispensation in the light of the special circumstances and best interests of the child under section 23 of the *Surrogacy Act 2010* (Qld) to bring the time forward from the usual one-month post-birth. A colleague of mine has done this. I'm of the view again that whilst this is doable, and cheaper than option 1, it is relatively costly.

3. If the surrogate is not single, obtain agreement between the surrogate and her partner as the parents recognised under the *Family Law Act 1975* (Cth) to enter into a parenting plan with the intended parents; whereby the intended parents have parental responsibility for the child and the child live with them. I've done this a number of times. The case that comes to mind was a child born in Adelaide with a disability. When given the various options, my clients chose the recommended approach - a parenting plan. It was recommended because it was the cheapest, quickest and most practical immediate outcome. Of course, it is one thing to advise clients to take a course of action, and yet another for that course of action to be accepted by those who are caring or who will be caring for the child - the hospitals and medevac team. The child had to be medevaced to Queensland. The parenting plan was accepted by the hospital in South Australia, the medevac team and by the hospital in Queensland as granting my clients' parental responsibility for the child.

A parenting plan can only be undertaken when the surrogate has a partner. When she does not have a partner, then it can't be used because there is a requirement for two parents to agree under a parenting plan. The effect of *RBK v MMJ* is that neither of the intended parents is a parent, which means that one of the other options would need to be considered.

DEVELOPMENTS

At the time of preparation of this paper, there is an inquiry before a committee of the Queensland Parliament to enquire whether there should be a central donor registry in Queensland, whether it should have retrospective operation and whether there should be an ART Act in Queensland. I made a lengthy submission[18]. I gave evidence on 13 May[19].

We should expect that in due course when the committee reports, it will recommend that there be a central registry. I do not know if the committee will recommend that there be retrospective transparency of donors, in the same scheme that has applied since 2004. There will need to be legislation to that effect. Whether that legislation will be as wide in scope as similar legislation in Victoria or Western Australia or be much more restrictive as the legislation in South Australia is, time shall tell.

3 June 2022

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[18] https://documents.parliament.qld.gov.au/com/LASC-C96E/I-7780/submissions/00000013.pdf .

[19] My evidence can be found here: https://documents.parliament.qld.gov.au/com/LASC-C96E/I-7780/Proof%20-%2013%20May%202022.pdf .