NORTHERN TERRITORY
FAMILY LAW SECTION
LAW COUNCIL OF AUSTRALIA

SURROGACY ACT 2022 (NT)

Stephen Page

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By Stephen Page[1]

INTRODUCTION

I want to acknowledge the efforts of two extraordinary Top End women, the second being Councillor Rebecca Want de Rowe, who pushed for surrogacy legislation in the NT. This Act is their legacy to Territory families.

The *Surrogacy Act 2022*[2] was enacted on 12 May 2022. It is due to commence on a day fixed by the Administrator, but in any case, no later than 21 March 2024: section 2. I have been advised by an officer of the Department of Health that it could commence as soon as August 2022.

The general outline to the Bill in the explanatory statement by the then Minister for Health says:

> *"The purpose of the Bill is to establish a regulatory framework that enables the transfer of legal parentage of a child born of a surrogacy arrangement from the surrogate mother to the intended parent or parents under the arrangement, provided statutory requirements are met. Like adoption, once the order is made, the intended parent(s) are the child's only legal parents. Transfer of legal parentage will ensure that the child has the same legal rights and status as any other child.*
>
> *The Bill also expressly criminalises commercial surrogacy. This aligns with the legislative position in all Australian jurisdictions.*
>
> *The Bill is underpinned by the principle of the paramountcy of the best interests of the child. This principle derives from Article 3 of the Convention on the Rights of the Child and guides the way the Act is to be administered and the way decisions under it are to be made. Subject to this paramount principle, the Bill includes further principles to promote the protection of the parties to a surrogacy arrangement.*
>
> *The Bill provides that, except for the recovery of reasonable costs of the surrogate mother associated with a surrogacy arrangement and legal proceedings for a*

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[2] https://legislation.nt.gov.au/en/LegislationPortal/Bills/~/link.aspx?_id=8F6DDD7D298B4C12804EAC3968CE8976&_z=z .

parentage order, a surrogacy arrangement is not legally enforceable. This reflects the policy against the forced relinquishment of a child and the associated commodification of women and children. The enforcement of an agreement to pay the surrogate mother's reasonable costs is consistent with the principle that the surrogate mother should not be financially disadvantaged as a result of her involvement in a surrogacy arrangement and mitigates against the exploitation of surrogates.

The Bill sets out conditions that must be met before the Local Court can make an order transferring parentage. The conditions, most of which are found in Part 2 Division 2 of the Bill, are safeguards to protect the parties to a surrogacy arrangement from exploitation, underscore the seriousness of such an arrangement and provide legal clarity about the parent-child relationships that result from a surrogacy arrangement. The Bill, otherwise, is protective of privacy. It does not restrict, on the basis of gender, sexuality or relationship status, who can enter a surrogacy arrangement and does not restrict the form of conception of a child.

Part 3 of the Bill empowers the Local Court to make a parentage order. It deals with procedural issues and sets out the legal effects of a parentage order. The Local Court also has the power, in very limited circumstances, to revoke a parentage order. Proceedings are to be in a closed court, which is consistent with other legislation involving children. Privacy is further protected by restrictions on access to court records.

Part 4 of the Bill establishes offences, including entering into a commercial surrogacy arrangement, brokerage for reward and advertising a commercial surrogacy arrangement. There are also offences related to the disclosure of identifying information or confidential information.

The Bill includes a transitional provision, empowering the Local Court, in certain circumstances, to make a parentage order where a surrogacy arrangement has been entered into before commencement of the Act.

The Bill also amends the Births, Deaths and Marriages Registration Act 1996 to provide for the registration of a parentage order, the issue of a new birth certificate after a parentage order is made and access by the person who is the subject of a parentage order to their full birth record.

The Bill makes minor consequential amendments to other Acts, in particular the Status of Children Act 1978."

At long last, the *Surrogacy Act* brings the Northern Territory into line with every State and the Australian Capital Territory in regulating altruistic surrogacy and criminalising commercial surrogacy. Finally.

UNTIL THIS ACT COMMENCES

The position in the Northern Territory has been that there is no law concerning surrogacy. The reality for Territorians is that they have had to travel interstate or overseas to access surrogacy unless they engaged in a traditional surrogacy at home i.e. the surrogate is also the genetic mother. They could not undertake surrogacy through the only clinic in Darwin, Repromed[3], although it seemed as though it was a free for all. This was because:

1. Under the licensing conditions that applied to Repromed as applied to every other IVF clinic in the country, imposed by the National Health and Medical Research Council, *Ethical Guidelines on the use of assisted reproductive technology in clinical practice and research* (2017), Repromed is banned from engaging in commercial surrogacy.

2. In exchange for a travel subsidy provided to patients to be to access IVF in Darwin, Repromed has agreed with the Northern Territory Government to comply as far as possible with South Australian licensing conditions (by which of course commercial surrogacy cannot be practiced).

3. Given that there was no way in the Northern Territory to allow the intended parents to be recognised as the parents, Repromed made the decision many years ago not to undertake *any* work in any surrogacy matter. This extended to intended parents who were undertaking surrogacy interstate or overseas, or local surrogates for interstate intended parents.

It is likely, given the experience interstate[4], that there will be some children having been born via surrogacy prior to the Act commencing. Under section 57 that application for a parentage order may be made up to two years after commencement of the Act or such longer period as the Local Court may allow in exceptional circumstances.

Section 57(2) provides:

> *"The provisions of this Act apply in relation to the surrogacy arrangement any subsequent parentage order, subject to the following:*
>
> *(a) the surrogacy arrangement is not required to comply with section 14 [i.e. in writing and certificates of the counsellor and the lawyers to be attached];*
>
> *(b) no legal advice or certificate is required to be given in accordance with sections 20 and 21;*

[3] Repromed has been the dominant clinic. More recently, Pivet Medical Centre has established in the Northern Territory, being based in WA (and Cairns). Pivet has recently been sold to Monash IVF, the owner of Repromed.

[4] See for example in Queensland *BLH v SJW* [2010] QChC 1, which concerned a child born prior to the commencement of the *Surrogacy Act 2010* (Qld).

(c) *no counselling is required to be given in accordance with sections 22 and 23;*

(d) *a surrogate mother may be under 25 years of age, contrary to section 17(a), if at least 18 years of age at the time the surrogacy arrangement was entered into;*

(e) *an intended parent may be under 25 years of age, contrary to by section 18(1)(a), if at least 18 years of age at the time the surrogacy arrangement was entered into;*

(f) *the application for the parentage order may be made later than 180 days after the birth of the child, contrary to section 26(2)(b) if made within 2 years from the commencement or such longer period as the Local Court may allow in exceptional circumstances."*

If the arrangement was a commercial surrogacy arrangement as defined under the Act, it is unclear then whether the Local Court can make a parentage order.

The Act makes an enormous change in the lives of Territorian surrogates. I am aware of at least two cases of Territorian surrogates to intended parents who lived interstate. In one case, the pregnant surrogate drove from Darwin to a southern capital along the whole length of the Stuart Highway. It is a matter of luck that neither she and the baby did not die in the middle of the outback, if something had gone wrong. This Act will enable women to give birth locally (or at least relatively locally) and be much safer for them and the children, with a much lower risk of mortality.

DEFINITIONS

Section 3 is the definitions section.

Birth parent

Birth parent is defined as: *"in relation to a child, means a person recognised by law as a parent of the child when the child is born."*

The explanatory note says:

> *"The Status of Children Act 1978 provides for presumptions and rules of substantive law to determine the legal parentage of a child in various circumstances. Whether the surrogate mother's partner at the time of entering into a surrogacy arrangement or a person who becomes her partner at a later date is a birth parent, will depend on the application of the Status of Children Act 1978. Clause 9 expressly provides that the parentage provisions in the Status of Children Act 1978 continue to apply unless the local court makes a parentage order."*

There are a number of minor amendments to the *Status of Children Act 1978* (NT), but there is one significant one tucked away in section 74 which is the repeal of the current section 5F of the *Status of Children Act 1978* (NT) and its replacement. Currently section 5F reads:

> *"Donor of semen used in fertilization procedure of certain women*
>
> 1. *Where semen is used in a fertilization procedure carried out on a woman who is not a married woman or on a married woman otherwise than in accordance with the consent of her husband, the man who produced the semen has no rights and incurs no liabilities in respect of a child born as a result of a pregnancy occurring by reason of the use of that semen unless, at any time, he becomes the husband of the mother of the child.*
>
> 2. *For the purposes of subsection (1), the rights and liabilities of a man who becomes the husband of the mother of a child so born are the rights and liabilities of a father of a child but, in the absence of agreement to the contrary, do not include liabilities incurred before the man becomes the husband of the mother."*

The drafting of the soon to be repealed section 5F says that the man had provided the semen *"has no rights and incurs no liabilities in respect of a child born"*. This drafting came about from a communique of Attorneys-General. Fogarty J stated about the communique[5]:

> *"In July 1980 the standing committee of Commonwealth and state attorneys-general determined that uniform legislation on the status of children born as a result of artificial insemination by donor treatments should be enacted in all Australian jurisdictions, and agreed that the legislation should provide that:*
>
> > *'A husband who consents to his wife being artificially inseminated with donor sperm shall be deemed to be the father of any child born as a result of the insemination*
> >
> > *The sperm donor shall have no rights or liabilities in respect of the use of the semen; and*
> >
> > *Any child born as a result of AID (artificial insemination by donor) shall have no rights or liabilities in respect of the sperm donor.'*
>
> *The standing committee reaffirmed these recommendations in 1981, 1982 and 1983.*
>
> *It was as a result of this agreement that legislation which is identical for relevant purposes was passed in the states and territories, designed to provide that the semen*

[5] *B and J (Artificial Insemination)* [1996] FamCA 124.

donor would incur no liability (nor attain any rights) in respect of a child born as a result of that procedure."

However, currently there are only two jurisdictions that have this phraseology, the Northern Territory and Queensland. Queensland has this in a number of provisions in its *Status of Children Act 1978* (Qld), covering women who have female de facto partners and single women or women without their husbands' consent. For example, section 23(4) and (5) of the Queensland Act provide:

> *"(4) Also, the man who produced his semen has no rights or liabilities in relation to any child born as a result of the pregnancy happening because of the use of the semen unless, at any time, he becomes the husband of the child's mother.*
>
> *(5) The rights and liabilities of a man who produces semen and becomes the husband of the mother of a child born as a result of a pregnancy mentioned in subsection (2) are the rights and liabilities of a father of a child but, in the absence of agreement to the contrary, are restricted to rights and liabilities that arise after the man becomes the husband of the child's mother."*

The new section 5F provides:

> *"If an unmarried woman, or a married woman without the consent of her husband, becomes pregnant by means of a fertilization procedure using sperm obtained from a man who is not her husband, that man is taken not to be the father of any child born as a result of the pregnancy."*

The reason for the change is in direct response to avoiding in the Territory as to what occurred as a result of decisions in *Lamb and Shaw*.

Lamb & Shaw[6]

This was a Queensland surrogacy arrangement that went wrong. It involved a single surrogate. The intended parents were a heterosexual couple, the intended mother being a distant cousin of the surrogate. The intended parents were the genetic parents of the child who was born.

The arrangement broke down in spectacular fashion, such that within two days of the child's birth, in order to avoid the surrogate adopting the child out (as she had considered) the intended parents applied for urgent orders to the Family Court.

[6] *Lamb & Shaw* [2017] FamCA 769; [2018] FamCA 629.

An issue at trial was whether the intended father was a parent. The surrogate argued that the correct drafting of section 23 was that the intended father was not a parent. Tree J said in the first decision[7]:

> *"It may fairly be said that the law has struggled to adequately grapple with the considerable array of circumstances in relationships which can be associated with surrogacy. Particularly, the intersection between surrogacy and parenting disputes under the Family Law Act has been problematic. In large part, that was because, until very recently, it was by no means clear who, as a matter of law for the purpose of the Family Law Act, can be, and is, a parent of a surrogate child. Perhaps the primary difficulty lies in the absence of any comprehensive definition of 'parent' and 'child' in the Act itself. Nonetheless, as has been seen from my discussion in the statute regime generally, both concepts are fundamental to the resolution of parenting disputes in relation to a child."*

His Honour concluded that the Queensland *Status of Children Act* does not deprive the biological father *"of fatherhood per se, but rather strips that fatherhood of any rights or liabilities, unless he were to marry the birth mother."*[8]

Ms Shaw appealed. The Full Court remitted the matter because it was unclear as to whether at the time of conception she had been in a de facto relationship[9]. Therefore, the matter came before Tree J again in 2018[10].

This issue arose again where his Honour again concluded that the genetic father was a parent albeit one with no rights or liabilities[11].

That decision caused all kinds of grief because for surrogacy cases in Queensland because under the *Surrogacy Act 2010* (Qld), one cannot be both a *birth parent* and an *intended parent* but the effect of his Honour's decision would mean that an intended parent would need to be named on the birth certificate as a birth parent (albeit one with no rights or liabilities) in the case of a single surrogate and then transfer parentage to himself potentially another birth parent on the making of a parentage order.

No judges of the Childrens Court of Queensland followed his Honour's approach. In my own surrogacy journey, my daughter was born just after the decision in *Masson v Parsons* [2019] HCA 21. The question I struggled with was whose name was to be on the birth certificate at commencement prior to the making of a parentage order:

1. The surrogate?

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[7] [2017] FamCA 769 at [54].
[8] At [73].
[9] *Shaw & Lamb* [2018] FamCAFC 42
[10] *Lamb & Sha*w [2018] FamCA 629.
[11] At [24]-[30].

2. The surrogate and my husband?

3. My husband and me?

4. The surrogate, my husband and me?

I came to the conclusion that the decisions by his Honour were incorrectly decided. This was in part because the Queensland Parliament intended that sperm donors to lesbian couples were to have the same status i.e. no rights or liabilities and, at the same time, the *Births Deaths and Marriages Registration Act* in Queensland was amended to have a maximum of two parents.

I am pleased to say that the judge in my matter agreed with me.

Subsequently, the Childrens Court in *RBK v MMJ* [2019] QChC 42[12] decided after *Masson* said at [14]-[17]:

> *"14. It follows from this that the interpretation of the Surrogacy Act by Tree J was unnecessary given that the Family Law Act provides a complete answer to the issue of who is a parent for the purposes of that jurisdiction.*
>
> *15. Tree J's interpretation of the Status of Children Act and the Surrogacy Act in my view cannot be correct if it means that a sperm donor who wishes to be an intended parent is instead a birth parent because of the different terms used in s21 of the Act. This is because the reference to the man who produces semen having no rights or liabilities in respect of a child to be born as a result of pregnancy is also used in s19C(2) in a situation where there has been an artificial insemination and the female bearing the child is a female de facto partner or a female registered partner.*
>
> *16. If it is correct that a child who is born as a result of donor semen by a man intending to become the full-time parent of the child that his male partner becomes for the purposes of the Act a birth parent; then, on that basis, there will be different meanings assigned to the same phrase and ss19C and 21 of the Act. This is because the interplay between those sections and s10A of the Births, Deaths and Marriages Registration Act which allows for only two people registered as parents in the birth certificate. In the case of s19C of the Act that would be the mother of the child and her female partner.*
>
> *17. The better view then is that it cannot be that a semen donor in a case such as this is a birth parent within the meaning of the Surrogacy Act. The interpretation that fits both the Status of Children Act and the Births, Deaths and Marriages Registration Act is that a birth parent by definition is a person <u>other than an intended parent</u>. This means that once a person has entered into*

[12] In which I acted for the intended parents.

a surrogacy arrangement as an intended parent, they are excluded by the definition in section 8(3) of the Surrogacy Act from being a birth parent. This does not take away from the fact that they are a biological parent but accords with the provision that they have no rights or liabilities as a result of the donation of the sperm."

The change to the *Status of Children Act 1978* (NT) removes all that controversy. The man who provides his sperm is not a parent.

If an application is made separately under the *Family Law Act*, as it was in *Lamb & Shaw*, then it is not clear whether the intended genetic father is a parent. I think that the likely answer about who is a parent is this:

- Prior to the making of a parentage order, assuming there are no proceedings under the Family Law Act, who is a parent is determined by Territory law[13].
- If no order is made, and a parenting order is sought, then the test under the Family Law Act 1975 applies[14].
- Even if a parenting order is made, if an application is then made for a parentage order, then the presumptions for the latter will be under the *Status of Children Act 1978* (NT).

Commercial surrogacy arrangement

Do not assume that just because a surrogate (or her partner) is being paid money that there is a commercial surrogacy arrangement. Again, do not assume that just because the intended parents say that they are paying for the surrogate's expenses, that the arrangement is altruistic. It is important to ask- and then compare with what is in the Act.

Commercial surrogacy arrangement is defined in section 3 as meaning a *surrogacy arrangement* with the elements specified in section 48(c). Those requirements are:

> *"i. A person is offered or is to receive a payment, reward or other material benefit or advantage, other than reasonable costs allowed under s12; and*
>
> *ii. The payment, reward or other material benefit or advantage is for the person or another person doing one or more of the following:*
>
> *(A) agreeing to enter into, or entering into, the surrogacy arrangement;*
>
> *(B) permanently relinquishing custody of a child born under the surrogacy arrangement;*

[13] This assumes that a Territory parentage order will be prescribed under reg. 12CAA *Family Law Regulations* 1984 (Cth) for the purpose of section 60HB *Family Law Act 1975* (Cth). See *Bernieres & Dhopal* [2018] FamCAFC 180, which has to be now seen in the light of *Masson v Parsons* [2019] HCA 21.
[14] Cf. *Masson v Parsons* [2019] HCA 21.

(C) consenting to the making of a parentage order for a child born under the surrogacy arrangement."

This definition of what is a *commercial surrogacy arrangement* is modeled upon the equivalent provisions in Queensland[15] and New South Wales[16].

Surrogacy arrangement is defined in section 3 as meaning:

> *"An agreement, understanding or other arrangement entered into by a woman and one or more other persons under which:*
>
> *(a) a child born as a result of the woman's pregnancy is to be treated as a child of the other person or persons instead of the woman; and*
>
> *(b) the other person or persons are to become the parents of and assume custody of the child instead of the woman."*

This is a similar provision to that seen in the ACT, for example[17], and does not require a transfer of parentage[18].

In other words, to establish that there is a commercial surrogacy arrangement, there are three steps, and an exception:

Number	**Step/Exception**	**Provision**
1.	Surrogacy arrangement	s.3 definition
2.	Offer or receipt of a payment, reward or other material benefit or advantage to someone or someone else to do one of three things	S.48(c)(i)
3.1	Agreeing to enter or entering into the surrogacy arrangement	s.48(c)(ii)(A)

[15] Section 10 *Surrogacy Act 2010* (Qld).
[16] Section 9 *Surrogacy Act 2010* (NSW).
[17] Section 23 *Parentage Act 2004* (ACT).
[18] As required for the definition of *surrogacy arrangement* in section 7 *Surrogacy Act 2010* (Qld) and section 5 *Surrogacy Act 2010* (NSW), where a transfer of parentage of a child born is required.

3.2	Permanently relinquishing custody of a child born under the surrogacy arrangement	s.48(c)(ii)(B)
3.3	Consenting to the making of a parentage order for a child born under the surrogacy arrangement	s.48(c)(ii)(C), s.3 definition of parentage order, s.34- making of parentage order
4- exception	If the only payment is for the surrogate mother's reasonable costs	s.48(c)(i), s.3 definition of surrogate mother, s.12 reasonable costs

The amount payable does not have to be money or even have a value. In application *MJC and CSC; re EMC* [2012] NSWSC 1626 an application was made to the Supreme Court of New South Wales for a parentage order under the *Surrogacy Act 2010* (NSW). The evidence, as it first appeared, was that a woman had put a notice on a gay chat group seeking to be a surrogate and for the supply of sperm to her female partner so that her partner could become a parent. Once the evidence was clarified, that was not what the notice had provided, but Brereton J formed the view that if the notice had been consistent with that initial evidence, the surrogacy arrangement would have been a commercial one.

In *Rose* [2018] FamCA 978[19] Mr Rose was a single man living in the United States who had undertaken surrogacy in the United States. He was applying to register the overseas surrogacy order with the Family Court. Carew J declined to do so. The agreement provided for the payment of:

(a) Reasonable medical, legal and ancillary costs and expenses;

(b) Fertility treatment costs and expenses not covered by insurance;

(c) Capped legal expenses for the negotiation of the agreement, ongoing legal advice and court filings to establish parental rights;

(d) Ancillary expenses of 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; and

(e) Actual lost wages.

Her Honour stated at [55]-[56]:

[19] In which I acted for the applicant.

> *"55. 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. The explanatory notes of the Queensland legislation make it clear that the intention of the legislature was to bring Queensland into line with other States and Territories by decriminalising altruistic surrogacy arrangements while maintaining a prohibition on commercial surrogacy. The application to register an overseas child order that may arise out of a prohibited commercial surrogacy arrangement is contrary to the clear intention of Parliament. There are no competing public policy considerations in this case such as the child being in need of protection.*
>
> *56. Accordingly, I decline to exercise my discretion to register the order."*

PURPOSES OF ACT

Section 4 sets out the purposes of the Act:

> *"(a) To regulate surrogacy arrangements;*
>
> *(b) To create offences for conduct related to surrogacy arrangements which a payment, reward or other material benefit or advantage is offered or received, other than payment or reimbursement for certain reasonable costs;*
>
> *(c) To allow the transfer of parentage for a child born under a surrogacy arrangement that meets minimum standards;*
>
> *(d) To recognise the status of a child born under a surrogacy arrangement that meets minimum standards."*

Section 5 says:

> *"The paramount consideration in respect of the administration and operation of this Act is the best interests of any child born under a surrogacy arrangement."*

The explanatory note says:

> *"It derives from article 3 of the Convention on the Rights of the Child."*

Article 3.1 and 3.2 provide:

"1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures."

I am only aware of one surrogacy decision in which the *Convention* has been cited: *KRB and BFH v RKH and BJH* [2020] QChC 7 where Coker DCJ held[20]:

"9. Australia is a signatory to the international convention on the rights of a [sic] child. Article 8 of the convention is relevant here. It relates to states entering into particular arrangements with regard to the rights of children. Article 8 in particular provides:

'States parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognised by law, without unlawful interference.

10. And secondly:

'Where a child is illegally deprived of some or all of the elements of his or her identity, states parties shall provide appropriate assistance and protection, with a view to reestablishing speedily his or her identity.'"

GUIDING PRINCIPLES

Section 6 provides:

"Subject to section 5, the following principles apply to the administration and operation of this Act:

(a) a woman should be able to make a free and informed decision about whether to be a surrogate mother;

(b) the parties to a surrogacy arrangement should be protected from exploitation;

[20] At [9]-[10].

(c) a surrogate mother should not be financially disadvantaged as a result of her involvement in a surrogacy arrangement."

The explanatory note states:

> *"These principles apply subject to the paramount principle of the best interests of the child in clause 5. If there is, for example, any conflict between the best interests of the child and a principle in clause 6, the issue must be resolved to give effect to the best interests of the child."*
>
> *The principles in clauses 5 and 6 substantially reflect recommendation 2 of the report of the House of Representatives Standing Committee on Social Policy and Legal Affairs inquiry, surrogacy matters: inquiry into the regulatory and legislative aspects of international and domestic surrogacy arrangements. This recommendation stated the principles that a model national law should have regard to. The specific principle in clause 6(c) that a surrogate mother should not be financially disadvantaged as a result of her involvement in a surrogacy arrangement has been included as financial disadvantage is a particular type of exploitation."*

SECTION 10 RIGHTS OF SURROGATE MOTHER TO MANAGE PREGNANCY AND BIRTH

This provides:

> *"A surrogate mother has the same rights to manage her pregnancy in birth as any other pregnant woman."*

The explanatory note states:

> *"Neither the intended parents nor anything in the surrogacy arrangement can take away the surrogate mother's rights. This would include, for example, rights in relation to antenatal care."*

Queensland was the first to provide such provision in its *Surrogacy Act*[21] which was subsequently copied in Tasmania[22], Victoria[23] and South Australia[24].

This section enables the surrogacy to have bodily autonomy. It has been extraordinarily powerful, in addition to the provision in the statute, to put a similar clause in surrogacy

[21] Section 16 *Surrogacy Act 2010* (Qld).
[22] Section 11 *Surrogacy Act 2012* (Tas).
[23] Section 44A *Assisted Reproductive Treatment Act 2008* (Vic).
[24] Section 16 *Surrogacy Act 2019* (SA).

arrangement. All my surrogates that I have acted for are keen to know that their rights are protected and that there is a clause to that effect in the surrogacy arrangement.

Even when I have had interstate surrogacy arrangements and the relevant statute does not specifically take up this provision (for example, in New South Wales) my clients have appreciated having that clause there.

Although the section reflects the common law[25], Parliament has made plain the need to protect the bodily autonomy of the surrogate.

REGULATION OF SURROGACY ARRANGEMENTS

Section 11

This provides:

> *"Subject to section 12(3), no surrogacy arrangement is enforceable".*

The explanatory note says:

> *"This gives effect to the policy position in all Australian jurisdictions, that a surrogate mother cannot be forced to relinquish the child and, conversely, the intended parents cannot be forced to assume legal parentage. Forced relinquishment would, improperly, promote the commodification of women and children. Persons entering a surrogacy arrangement need to be prepared to accept the risk of there being no legal remedies, with the exception of the surrogate mother's reasonable costs.*
>
> *The unenforceability of a surrogacy arrangement is one of the matters that must be addressed in legal advice required before a person enters into a surrogacy arrangement (see clause 20(2)(a)).*"

If a surrogate refuses to relinquish the child, then although they may not be recognised as the parents, the intended parents will be filing quick smart in commencing proceedings under the *Family Law Act*, as the intended parents did successfully in *Lamb and Shaw*. There is not the ability to dispense with the consent of a surrogate mother if her refusal to consent it capricious: cf. section 32(3). Section 12 sets out reasonable costs:

> *"(1) A surrogacy arrangement, other than a commercial surrogacy arrangement, may provide for the payment or reimbursement of the reasonable costs associated with the following:*
>
> *(a) the surrogate mother trying to become pregnant, being pregnant and giving birth;*

[25] For example, *F and F* [1989] FamCA 41.

(b) the surrogate mother and her partner, if any, entering into or being a party to the surrogacy arrangement;

(c) the surrogate mother and her partner, if any, being a party to proceedings under this Act.

(2) Without limiting subsection (1) reasonable costs include the following:

(a) reasonable medical expenses incurred by the surrogate mother associated with the surrogacy arrangement, whether incurred prior to conception, during the pregnancy or because of the birth of the child, that are not recoverable under Medicare, health insurance or any other scheme;

(b) reasonable counselling costs incurred by the surrogate mother and her partner, if any, associated with the surrogacy arrangement, including the counselling under sections 22 and 23 and preparation of a report under section 24;

(c) reasonable legal costs incurred by the surrogate mother and her partner, if any, associated with the surrogacy arrangement, including the advice under section 20, the certificate under section 21 and the costs associated with being a party to proceedings under this Act;

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

(e) reasonable out-of-pocket costs incurred by the surrogate mother associated with the surrogacy arrangement or the child;

(f) income lost by the surrogate mother caused by being unable to work on medical grounds associated with the pregnancy and by taking up to 2 months unpaid leave for the birth;

(g) insurance premiums for health, life or disability insurance for the surrogate mother, or for increasing the cover of an existing policy for the surrogate mother, for the period from entering into the surrogacy arrangement until the surrogate mother's post-natal recovery.

Examples for subsection (2)(e)

Costs of travel, accommodation, childcare and housekeeping and post-natal expenses.

(3) A provision of the surrogacy arrangement to provide for the payment or reimbursement of reasonable costs allowed under subsections (1) and (2) is enforceable if:

(a) the cost was incurred; and

(b) the cost is not recoverable under Medicare, health insurance or any other scheme."

The explanatory note says:

> *"It is up to the parties to determine exactly what costs are to be included in the surrogacy arrangement. For example, what amounts to 'out-of-pocket expenses' in clause 12(2)(e), will depend on the particular circumstances of the surrogate mother. If she lives in Darwin and undergo a fertilisation procedure in Darwin, there would likely be no accommodation expense. However, there would be such an expense if the surrogate mother lived in Tennant Creek."*

Section 12 is modeled on equivalent provisions in Queensland[26], New South Wales[27] and, to an extent, South Australia[28]. It is welcome to say that the costs which have been incurred are enforceable in section 12(3).

It is sensible having this wide draft. It allows flexibility of what can be reimbursed.

My experience in courts in Queensland and in New South Wales in particular is that the courts appreciate every last cent being put before it as to what has been spent on behalf of the surrogate.

I strongly encourage in the drafting that there is a schedule on the back of the surrogacy arrangement setting out caps as to what the surrogate should be reimbursed. That way there is some certainty for the intended parents about what they are paying out for, and how much. Of course, this is not required to be so specific between sisters. Use common sense. But having definition about things are being paid for and the upper limit of what is being paid for reduces disputes.

I also strongly encourage having intended parents set up a debit card available for use by the surrogate, so that she can buy things as needed, without having to beg the intended parents for payment. Too many times, surrogates have complained of intended parents with deep pockets, but short arms.

JENNY THE DOG WALKER

[26] Section 11 *Surrogacy Act 2010* (Qld).
[27] Section 7 *Surrogacy Act 2010* (NSW).
[28] Section 11 *Surrogacy Act 2019* (SA).

The key to section 12 is to see whether the expense fits within section 12(1). Section 12(2) is a series of examples only.

I acted for Jenny who owned her own business as a dog walker in Brisbane. The intended parents lived in New South Wales. The Queensland and New South Wales *Surrogacy Acts* have provisions relating to costs which are very similar to section 12 and to each other. The solicitor for the intended parents opposed three provisions in the proposed surrogacy arrangement because the view was taken by that solicitor that they were commercial surrogacy:

1. My client wanted to be reimbursed for massages. I had to argue with the solicitor that having massages during pregnancy was an entirely usual procedure for pregnant women and did not ordinarily render it a commercial surrogacy arrangement. The solicitor relented. It would be different, I said, if my client was being reimbursed for luxury massages, for example, at Mirage Resort on the Gold Coast. That might be commercial.

2. Similarly, my client wanted acupuncture during the pregnancy. Again, we had the same result.

3. My client wanted to employ a locum during the period of her pregnancy. She was a self-employed dog walker who typically would be pulled by a number of dogs whilst she was wearing inline skates. I thought that her view of having a locum was entirely sensible and did not render the surrogacy arrangement commercial.

The other solicitor was opposed because my client wanted to take greater than two months off from her job and in any case was not entitled to the period as she was self-employed (the Queensland/New South Wales Act being slightly different to section 12(2)(f) of the NT Act).

I said bluntly that it was not commercial surrogacy and that:

> *"I am not going to have a pregnant client of mine being pulled by a bunch of dogs whilst she is on roller skates up and down the hills and dales of Brisbane."*

The other solicitor relented. The parties entered into a surrogacy arrangement. A child was conceived and born. The proof was in the pudding. The Supreme Court of New South Wales made the parentage order, which it could not have done if the surrogacy arrangement had been a commercial one.

Quite simply be guided by s.12(1) and use common sense.

REQUIREMENTS FOR A SURROGACY ARRANGEMENT

Section 13 sets out the purpose of division 2, namely, that there are requirements that must be met before a parentage order may be made. The explanatory note states:

> *"The requirements are designed to protect the parties from exploitation and to underscore the life-changing implications of one person having a child for another person or persons with the intention that the child and parentage of the child will be relinquished."*

A surrogacy arrangement must be in writing: section 14(1). It must have attached to it the certificates under section 21 (by each of the lawyers) and section 22(3) (pre-signing counselling). The explanatory note says as to the requirement for it to be in writing: section 14(1):

> *"This is consistent with the requirement in all other Australian jurisdictions except Victoria and the ACT* [where the surrogacy arrangement may be oral]*. It provides a safeguard to the surrogate mother and the intended parents, as it removes any ambiguity about what the parties have agreed. It promotes legal certainty and is evidence that the arrangement was made before conception."*

Section 15 provides:

> *"The surrogacy arrangement must be entered into by the parties before the surrogate mother becomes pregnant with the child expected under the surrogacy arrangement."*

The rationale of this section is obvious – it is possible once pregnant that the surrogate could be subjected to duress. The expectation is that by entering into the surrogacy arrangement before she is pregnant, the surrogate is able to give informed consent.

Section 16 limits the parties to the surrogacy arrangement:

> *"The surrogacy arrangement must not include any party other than the following:*
>
> *(a) the surrogate mother;*
>
> *(b) the partner, if any of the surrogate mother;*
>
> *(c) one or 2 intended parents."*

Partner is defined in section 3:

> *"In relation to a person, means the spouse[29] or de facto partner[30] of the person when the surrogacy arrangement is entered into."*

This approach is consistent with parentage presumptions under the *Status of Children Act 1978* (NT) and the general parentage presumptions under the *Family Law Act 1975* (Cth).

A de facto relationship ends upon separation but as we well know, a marriage does not end until divorce. Accordingly, it has been my practice where a surrogate is married to a man and they have separated at the time that she intends to enter into a surrogacy arrangement, to then insist that she does not enter into the surrogacy arrangement until they are divorced. Sometimes, if they have separated only recently, this might mean a wait of more than a year before the surrogacy arrangement can be entered into. So be it. The last thing that you want or your clients want is that your child is caught in the crosshairs of an ugly divorce – as a bargaining chip in their dispute. It is better to wait.

Care also needs to be taken if you are acting for the intended parents, and one of them is married to someone else. The cleanest approach is for your client to become divorced before entering into the surrogacy arrangement.

Accordingly, it would appear to me that the cost of obtaining a divorce (not dealing with property settlement or parenting arrangements, but just the divorce) is a cost associated with the surrogate entering into or being a party to the surrogacy arrangement: section 12(1)(b). In those circumstances, my clients have been prepared to pay a capped amount for a lawyer to represent the surrogate to enable her to obtain a divorce.

Once they have the divorce order in hand, then they sign.

Requirements for surrogate mother

When she enters into the surrogacy arrangement, the surrogate mother must:

(a) be at least 25 years of age, unless the Local Court makes an exception under section 34(2) because exceptional circumstances exist to justify her entering into the surrogacy arrangement: section 17(a) and (b).

(b) be an Australian citizen or a permanent resident of Australia: section 17(b).

The explanatory note says about clause 17(a):

> *"This is consistent with all other Australian jurisdictions, except the ACT, and the definition of 'youth' (15-24 years) endorsed by the United Nations General Assembly. The age requirement recognises that a person younger than 25 may lack the maturity for making the significant decision to become a surrogate and may be at more risk of*

[29] S.19A *Interpretation Act 1978* (NT).
[30] S.3(1) *De Facto Relationships Act 1991* (NT).

> *exploitation or coercion. The Local Court may dispense with this requirement in exceptional circumstances (see clause 34(2)).”*

The explanatory note says about clause 17(b):

> *“The purpose of this requirement is to avoid potential exploitation of women coming from overseas to be a surrogate, including Australian citizens recruiting relatives overseas, and to remove any risk that a child born of such an arrangement could be left stateless.”*

There will be a small number of potential surrogate mothers residing in Australia who are not Australian citizens or permanent residents. As part of your checklist, you need to check the citizenship of all the parties. I can recall two cases in Queensland where the surrogate was not an Australian citizen or permanent resident, one of whom was my client’s sister from Africa. Each matter required extra careful planning.

The non-citizen surrogate

John and Janine were a couple intended to enter into a surrogacy arrangement in Queensland. Their friends, Fred and Freda, who also lived in Queensland, offered for Freda to be the surrogate.

John and Janine were Australian citizens. Fred was a New Zealand citizen who was entitled to live in Australia without being a permanent resident. Freda was a Zimbabwean citizen who was entitled to live in Australia because she was the spouse of Fred. A surrogacy arrangement was able to be entered into, a child born and a parentage order made in Queensland under the *Surrogacy Act 2010* (Qld). A compliant surrogacy arrangement will not be able to be entered into in the Northern Territory in the same circumstances.

Specific advice had to be obtained about the migration status of the child upon birth. The child upon being born in Australia had either New Zealand or Zimbabwean citizenship. Upon the parentage order being made, the child had Australian citizenship[31].

Curiously, there is no requirement for a minimum age for the surrogate’s partner. They could be 18 or older. If under 18 they may not have legal capacity to enter into the surrogacy arrangement.

[31] *Surrogacy Act 2010* (Qld), section 22; *Family Law Act 1975* (Cth), section 60HB; *Family Law Regulations 1984* (Cth), reg 12CAA; *Australian Citizenship Act 2007* (Cth), section 8.

There is no requirement under the Act for the surrogate to have had a baby before. This was a deliberate policy decision. Every case should be assessed on its own merits. Nevertheless, if a surrogate has not had a baby before, the matter should be treated with the greatest trepidation given the potential risks to her and her desire to hang onto the child, and the requirement for informed consent: s.6(a).

Just because the legislation does not contain a requirement that the surrogate must have had a child before, does not mean that a clinic may be bound to that. A clinic may for risk reasons decline to provide treatment. Whether you act for the intended parents or the surrogate and her partner- great care must be made to protect the surrogate's health. She, after all, has a risk of injury or death for carrying someone else's baby.

Similarly, there is no restriction under the Act against traditional surrogacy (unlike say through IVF clinics in Victoria). Traditional surrogacy arrangements should be dealt with on a case by case basis with a thorough assessment of risk having regard to the possibility that the surrogate may wish to keep the child – as seen in *Re Evelyn* [1998] FamCA 2379. Extreme care should be taken with traditional surrogacy matters. A clinic may decline to treat, based on risk.

By the time the application is heard by the Local Court, of course the child has already been born. The Local Court is presented with a fait accompli. The question for dispensation is driven by three factors:

1. To ensure that the child is protected i.e. that the parentage of the child reflects the child's reality. Failure to make a parentage order may result in the child not having its parents recognised.

2. Responsibility instead is thrown upon the solicitors at the commencement of the matter for you to be satisfied that the surrogate has the requisite maturity – because the risk otherwise is that a parentage order isn't made, with complaints being made against you and at worst, a claim for negligence.

3. Therefore, responsibility being thrown onto the counsellor to satisfy themselves that the surrogate has the requisite maturity. This will need to be a matter that is properly dealt within the counsellor's report.

4. If the surrogacy arrangement is one involving assisted reproductive treatment, then consideration by the relevant IVF clinic about whether it should treat, given that the surrogate is under the age of 25.

5. That the material before the court shows that the surrogate had the requisite maturity.

Section 34(2) provides:

"In the case of a surrogate mother who is under 25 years of age when entering into the surrogacy arrangement, the Local Court may make a parentage order if:

(a) the surrogate mother was at least 18 years of age when she entered into the surrogacy arrangement; and

(b) the counsellor's certificate required under section 22(3) certified that exceptional circumstances existed to justify the surrogate mother entering into the surrogacy arrangement; and

(c) the Local Court is satisfied that exceptional circumstances exist to justify making the parentage order."

In my view, the Local Court would want to have a copy of the counsellor's report, consistent with interstate practice.

The requirements for each intended parent are set out in section 18 that they must, when they enter into the surrogacy arrangement:

"(a) be at least 25 years of age, unless the Local Court makes an exception under section 34(3) because the intended parent is sufficiently mature to understand the implications of a parentage order; and

(b) be an Australian citizen or a permanent resident of Australia."

Section 18(2) provides:

"If there are 2 intended parents, they must be partners of each other."

Section 18(2) contrasts with the *Surrogacy Act 2019* (SA) by which there can be two intended parents, but they don't have to have a relationship with each other: section 10(2)(b).

Partner is defined in clause 3 to mean a spouse or de facto partner.

The explanatory note says of clause 18(1)(a):

"This requirement may be dispensed with (see clause 34(3)) if the Local Court is satisfied that intended parent under the age of 25, but at least 18 years old, has a sufficient level of maturity to understand the implications of a parentage order being made. Providing this discretion acknowledges the policy position that age may be an imperfect measure of maturity."

The floor of 25 is an arbitrary measure of maturity.

Section 34(3) provides:

"In the case of an intended parent who is under 25 years of age when entering into the surrogacy arrangement, the Local Court may make a parentage order if:

(a) the intended parent was at least 18 years of age when the intended parent entered into the surrogacy arrangement; and

(b) the counsellor's certificate required under section 22(3) certified that the intended parent was sufficiently mature to understand the implications of the surrogacy arrangement; and

(c) the Local Court is satisfied that the intended parent is sufficiently mature to understand the implications of the parentage order."

So far as the surrogate mother in section 34(2)(c) the Local Court must be *"satisfied that exceptional circumstances exist to justify making the parentage order"*. This contrasts with that for an intended parent under the age of 25 where the court must be *"satisfied that the intended parent is sufficiently mature to understand the implications of the parentage order"*.

The explanatory note to clause 34 says:

"There is a higher threshold for a surrogate mother under 25 than for an intended parent to ensure against the risk of exploitation of a surrogate mother."

There is no ceiling for the age of the surrogate, her partner or the intended parents. The upper age limit for the surrogate will typically be determined by medicine. Doctors are reluctant to treat a surrogate over the age of 50. The oldest surrogate who I have seen treated (in NSW) was 55. A report was required from a high risk obstetrician before treatment could commence. I did not want to proceed until that report approved the matter proceeding. Intended parents who are a combined age of 55+ will typically not be treated in Australia, out of concerns for the best interest of the child, based on ethical principles under the NHMRC *Ethical Guidelines*. Older intended parents typically go overseas.

There is no discrimination based on sexuality or relationship status as to who may be the intended parents. LGBTIQ+ intended parents are welcome[32]. Whether they are married, de facto or single, that's fine. Similarly, there is no requirement for the surrogate to have a partner. She can be single.

The current provision under the *Anti-discrimination Act 1992* which allows discrimination in the provision of artificial fertilisation procedures in section 4(8) is repealed. This brings the

[32] Consistent with Australia's international obligations as reflected in s.22 *Sex Discrimination Act 1984* (Cth) concerning SOGIE people.

Anti-discrimination Act into line with section 22 of the *Sex Discrimination Act 1984* (Cth), which provides:

> *"It is unlawful for a person who, whether for payment or not, provides goods or services, or makes facilities available, to discriminate against another person on the ground of the other person's sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, or breastfeeding:*
>
> *(a) by refusing to provide the other person with those goods or services or to make those facilities available to the other person;*
>
> *(b) in the terms or conditions on which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person; or*
>
> *(c) in the manner in which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person."*

Section 19 provides:

> *"The reason for the intended parent or intended parents entering into the surrogacy must be one of the following:*
>
> *(a) the intended parent or intended parents are unlikely for any medical reason to become pregnant, be able to carry a pregnancy or give birth;*
>
> *(b) it is unlikely because of other circumstances that the intended parent or intended parents would become pregnant, be able to carry a pregnancy or give birth (whether because of gender identity, sexuality or any other reason).*
>
> *Examples of paragraph (a):*
>
> *1. A risk of transmission of a serious genetic defect, serious disease or serious illness to a child born to an intended parent.*
>
> *2. A risk that a woman, who is an intended parent, is unlikely to survive childbirth or suffer significant harm from childbirth."*

The explanatory note says:

> *"This clause reflects the policy objectives of preventing the commodification of children born of surrogacy and the exploitation of a surrogate mother. It*

also recognises that, while surrogacy is a legitimate means of having a child, it should be a limited option.

To make a parentage order the Local Court must be satisfied that an intended parent, or intended parents, entered into the surrogacy arrangement for one of the reasons in clause 19.

Paragraph (a) provides that an intended parent or intended parents are unlikely for a medical reason to have their own child. The note at the end of this clause gives examples of medical reasons. Essentially a medical reason could relate to an inability to conceive, carry or bear a child, a risk to the life or health of the child, or a risk to the life or health of the mother.

Paragraph (b) recognises that the reason an intended parent or intended parents may be unlikely to have a child of their own may be non-medical, such as due to gender identity or sexuality. Examples within the ambit of paragraph (b) include a male same-sex couple or a trans man who is physically able to become pregnant but for whom pregnancy would conflict with their gender identity. Paragraph (b) recognises the broader policy objective of recognising diverse forms of family."

With any pregnancy or childbirth there is a risk of death or injury to the woman who is becoming pregnant. In my case of *Wickham and Toledano* [2022] FedCFamC1F 32, although not a surrogacy case, it is a poignant reminder of what can go wrong with pregnancy and childbirth. The birth mother was implanted with two embryos in 2020. In 2021 she gave birth to twins and died three days later of birth complications.

I have only seen one case in which an intended mother wished to undertake surrogacy by reason of not ruining her figure. I declined to act. Self-evidently:

- If you have a heterosexual couple, the evidence will need to establish a medical reason for her to require surrogacy in section 19(a) and for him is for any reason in 19(b).

- If you act for a single man or a gay couple, they will fall within section 19(b).

- If you act for a lesbian couple, **both** will have to meet the bar in section 19(a) as to a medical reason.

The phrase *"any medical reason to become pregnant"* is wide-ranging. I've had a number of cases where a woman is medically eligible although she could be pregnant. It may be that you have to obtain a report from a treating specialist. For example:

- A woman may have no difficulty becoming pregnant. However, she has a psychiatric condition and takes antipsychotic medication. The advice of

doctors is that that medication could be extremely harmful to the unborn child. Therefore, if she is to be pregnant their strong advice is that she not take it. The advice of her psychiatrist, however, is that if she ceases taking her antipsychotic medication, then there is a high risk of attempts at suicide.

- A woman had no difficulty in becoming pregnant or carrying the child. However, during the course of her IVF journey, she has discovered that she has a serious heart murmur. If she becomes pregnant, there is a significant risk of death.

Legal Advice

I want to comment at this point that I did not write up the explanatory note. Section 20 provides:

> *"(1) Each party to a surrogacy arrangement must receive legal advice from a legal practitioner about the surrogacy arrangement and its implications before entering into the surrogacy arrangement.*
>
> *(2) The legal advice must include advice on the following matters:*
>
> *(a) the unenforceable nature of the arrangement, other than for reasonable costs under section 12;*
>
> *(b) the parties' legal obligations under the arrangement and this Act;*
>
> *(c) the legal implications of the surrogate mother does not relinquish the child, including whether child support would be payable by the child's biological father under the Child Support (Assessment) Act 1989 (Cth);*
>
> *(d) the legal implications if, after the birth of the child, no birth parent or intended parent wants to be permanently responsible for the child's custody and guardianship;*
>
> *(e) the legal implications of a parentage order;*
>
> *(f) the reasons why the party should be open and honest about the child's birth parentage.*
>
> *3. The legal practitioner providing the advice must be independent of any business providing fertility services.*

4. *The intended parents must receive legal advice from a legal practitioner who is independent of the one providing legal advice to the surrogate mother and her partner, if any."*

Once the advice is given, a certificate is provided under section 21:

> *"(1) A person providing legal advice under section 20 must prepare a certificate on that advice and give it to the person advised.*
>
> *(2) The certificate must certify the following matters:*
>
> *(a) the qualifications of the person giving the legal advice;*
>
> *(b) the names of the persons who are given legal advice;*
>
> *(c) the day or days when the advice was given;*
>
> *(d) that advice was given on the matters listed in section 20(2) and whether the recipient of the advice appeared to understand it."*

To provide a certificate copies the practice under the *Surrogacy Act 2019* (SA) and before it the *Family Relationships Act 1975* (SA). The shopping list of matters under section 20(2) are, in essence, copied from the *Surrogacy Act 2010* (Qld), section 30(1)(b).

There is no definition of *fertility services* in the Act, although I entitle my firm *family & fertility lawyers*, I would not consider that I provide *fertility services*. They would ordinarily be provided by doctors through GPs providing artificial insemination or through an IVF clinic. Similarly, I would not consider that fertility counsellors would provide *fertility services* because although the counselling is provided for the focus on the fertility, those who enable someone to become pregnant are, in essence, are doctors or those who work in IVF clinics. An offence provision, section 51 is entitled "fertility services for commercial surrogacy arrangement", which concerns assisting a woman to become pregnant. The heading is part of the Act, and therefore fertility services relates to providing a service to helping women become pregnant.

The explanatory note says in clause 20:

> *"This clause sets out the requirement for the parties to obtain independent legal advice before entering into the surrogacy arrangement. This requirement ensures that the parties understand the legal affect of a surrogacy arrangement and the rights and obligations of each party under it [i.e. informed consent]. The requirement to obtain legal advice mitigates the risk of exploitation.*
>
> *The advice must be provided by an Australian legal practitioner (see section 6(a) Legal Profession Act 2006). This means that a party could obtain advice from a lawyer with, for example, a Queensland practicing certificate.*

Subclause 2 sets out the matters that the legal advice must cover.

Subclause 3 provides the legal practitioner must be independent of any business providing fertility services and subclause 4 provides that the legal practitioner who gives advice to the intended parent or parents cannot be the same, and must be independent from, the legal practitioner who gives advice to the surrogate mother and her partner." (I have highlighted this- because I did *not* draft this, but I thank the Government for saying this!)

As noted in the explanatory note to clause 21 the lawyer's certificate must be attached to the written surrogacy arrangement.

Pre-signing counselling

Section 22 provides:

> *"(1) Each party to the surrogacy arrangement must undertake counselling about the surrogacy arrangement and its implications before entering into the surrogacy arrangement.*
>
> *(2) The counselling required under subsection (1) may be provided by more than one counsellor.*
>
> *(3) A counsellor who provides the counselling must prepare a certificate on the counselling and give it to the person counselled.*
>
> *(4) The certificate must certify the following matters:*
>
> *(a) the qualifications of the counsellor;*
>
> *(b) that the counsellor is independent of any business providing fertility services;*
>
> *(c) the names of the persons who were counselled;*
>
> *(d) the dates of the counselling;*
>
> *(e) that counselling on the required matters was provided;*
>
> *(f) in the case of a surrogate mother under 25 years of age – that exceptional circumstances exist to justify her entering into the surrogacy arrangement;*

(g) in the case of an intended parent under 25 years of age – that the intended parent is sufficiently matured understanding the implications of the surrogacy arrangement."

There is a requirement for counsellors under section 25:

"(1) A counsellor must be:

(a) a member, or a person eligible for full membership, of the Australian and New Zealand Infertility Counsellor's Association; or

(b) a person with other qualifications prescribed by regulation.

(2) A counsellor must be independent of any business providing fertility services.

(3) The counselling provided by a counsellor must be consistent with any guidelines relevant to surrogacy, in effect as of the time of the counselling, issued by:

(a) the Australian and New Zealand Infertility Counsellor's Association; and

(b) the National Health and Medical Research Council."

The explanatory note says concerning clause 22:

"This clause provides that the parties must undertake counselling before entering into a surrogacy arrangement. The requirement for counselling ensures that, before entering into a surrogacy arrangement, the parties have the opportunity to explore emotional and ethical issues. Although the Bill does not set out a 'tick list' of issues, they may include matters such as: the psychological effects on the parties including their relationships; the nature of informed consent; medical issues that could arise during pregnancy and after birth; and ways of telling the child about their conception and birth. Counselling promotes the protection of the best interests of the child and provides a safeguard that protects the parties, but in particular the surrogate mother, from exploitation and undue pressure.

Subclause (2) permits the parties to see the same counsellor or different counsellors. Clause 25 sets out further requirements related to who can provide counselling.

Subclause (3) requires the counsellor who provides prearrangement counselling to provide the person counselled with a certificate, detailing the information set out in subclause (4). As provided in clause 14(2) a certificate required by this clause must be attached to the written surrogacy arrangement."

The National Health and Medical Research Council has issued published guidelines which are licensing conditions for IVF clinics: *Ethical Guidelines on the use of assisted reproductive*

technology in clinical practice and research (2017) which also concern surrogacy. ANZICA in turn has issued published surrogacy guidelines. These can be found online.

In several States, South Australia, Tasmania and Western Australia, who is a counsellor is determined by regulation.

In Tasmania, for example, the regulations are vague and who does the counselling is unclear. I have heard anecdotal reports (no more) that the counsellors were not thorough because they have not had the relevant qualifications. Considerable time was spent by ANZICA with the joint surrogacy working group to ensure that surrogacy in the Northern Territory could be provided.

I would encourage where possible that there is only one counsellor who does all the counselling, so that there is a unity of vision of what the parties are seeking. It is important that the parties are in the one canoe, paddling in the same direction. This should be a collaborative process.

It is absolutely imperative before they sign the surrogacy arrangement that the report from the counsellor is obtained (so that you avoid any nasty surprises later on), that there is sufficient time to undertake the report and that the counsellor knows what they are doing. Prior to amendments in about 2015 to the *Family Relationships Act 1975* (SA), the pure model of counselling was that there were three separate counsellors involved prior to entering into the surrogacy arrangement. In one case in which I later became involved, it was clear that the three counsellors had at least inadequately talked to each other, setting the scene for the disaster that then unfolded. Having one person doing all the counselling of all parties prior to entering into the surrogacy arrangement greatly reduces risk. Surrogacy arrangements that have gone wrong are incredibly volatile – typically much worse in volatility than a bitter parenting dispute. *Everything* that can reasonably be done should be done to avoid that outcome.

An issue with ANZICA prior to Covid was that their preference was that all counselling be in person. Covid prompted a change, so that most of this counselling is now done via Zoom or on Teams.

The issue of distance was keenly discussed in the joint surrogacy working group. I was particularly concerned if ANZICA took the view that all surrogacy counselling had to be in person. This is one to keep monitoring.

THE CHILD IS BORN, NOW WHAT?

In the lead up to the child being born, there must be planning. That planning includes the following:

1. Have all parties who might be a party to the surrogacy arrangement been identified?

2. Have they all signed the surrogacy arrangement?

3. Have all parties obtained independent legal advice i.e. one solicitor for the intended parents and one for the surrogate and her partner?

4. Has the pre-signing counselling report been obtained?

5. Has the clinic approved the surrogacy arrangement?

It is important to not put your cart before the horse. Some years ago I saw a surrogacy arrangement where all the legal steps had been done – independent legal advice, counselling and signing the surrogacy arrangement, but the surrogate hadn't yet been checked by a doctor as to whether she was suitable! That should have been the first step.

Other planning steps are these:

1. Basic estate planning for the intended parents. Most of my surrogacy clients don't have wills. Your clients need to have wills and ensure that they have life insurance and superannuation, so that if a child is born and they are either dead or have lost capacity, a guardian is appointed for that and that child is not left as a penniless orphan.

   As an illustration, in *Wickham and Toledano* [2022] FedCFamC1F 32, I acted for the sister of the mother and the sister's fiancée. The mother had a brief, chaotic relationship with another woman. A solicitor (not me) had prepared the mother's will, which included a provision as to embryos but there was no provision for the appointment of a testamentary guardian.

   Following the birth of the twins, the mother died three days later. As there had been no appointment of a testamentary guardian under the will, in order for the children to live lawfully with my clients, they urgently made application to the court for the children to live with them. It is possible that that application might have been avoided if the will had contained something as basic as the appointment of a testamentary guardian.

2. Similarly, there should be adequate life insurance (and if possible, income protection insurance) for the surrogate in case she dies (or is injured) during the surrogacy arrangement.

3. Consideration should be given as to what hospital the surrogate gives birth. The emphasis first should be on adequate medical care. I've had three children, two of whom almost died in childbirth. In both cases I have no doubt that it was the quality of the hospital that led to both children living.

4. If your surrogate is living remotely, she will need to move so she is close to good quality health care. You will not want to have her death on your conscience.

5. Is your surrogate going to be a private patient or a public patient? If she is going to be a private patient, then, does she have private cover for maternity? If not, there is typically a 12 month waiting period. If private maternity cover is not obtained in time, then the costs of the private health care will need to be met in any event by the intended parents.

6. An issue to be addressed prior to entering into the surrogacy arrangement is under what circumstances would the surrogate be agreeable to an abortion? Although she has complete control over whether or not to have an abortion, this should be an issue that is properly canvassed. In essence, careful steps at the beginning protect against future shock later on in case there is an emergency of some kind. By having engaged in careful discussion prior to entering into the surrogacy arrangement, the parties have an action plan about what to do next. While not binding, it sets expectations.

7. Will the intended parents be able to stay in the hospital with the baby? This is a fundamental, not an esoteric question. You ought to know before the parties enter into the surrogacy arrangement. A regional Queensland hospital as recently as 2018 refused to allow an intended mother to stay with the child in hospital. For hospitals in the NT, like everyone else, this will be a learn and grow experience where they are acting as pioneers. Please try and patiently lead.

Typically you will have a clause in the surrogacy arrangement saying that the intended parents choose the name of the child, although it's the obligation the surrogate and her partner to register the birth. At birth, under the *Status of Children Act 1978* (NT) the surrogate and her partner are the parents. As I said above, even if the surrogate is single, she will be the only parent and the intended parents will not be. The Act is clear that the surrogate cannot be bound to relinquish the child at that point.

Typically, the child will go home at the time that the surrogate is discharged and not before. If there is some medical emergency involving the child, then the means by which the intended parents have parental responsibility are one of these:

1. An application in the Federal Circuit and Family Court of Australia under the *Family Law Act* for parental responsibility. This should be able to be done urgently, but it's not cheap.

2. Applying to the Supreme Court under the *parens patriae* jurisdiction to the same effect. Presumably it can be done quickly, but again it won't be cheap.

3. As a colleague had done in a case in Queensland, it may be possible to move the timeframe forward in making the application to the court for a parentage order. However, section 26(2) contains no exception in moving the 30 day period forward. This option appears not to be available.

4. Where the surrogate has a partner, then the solution that I've used in the past is a parentage plan under the *Family Law Act 1975* (Cth). Of course, it requires two parents[33]. In one case[34] the child was born in Adelaide to the surrogate, who was the sister of the intended mother. The child had various medical complications that required ongoing treatment. The parties considered entering into a parenting plan. The test was not only the theory of entering into a parenting plan, but whether the two hospitals (the hospital in Adelaide and the hospital in Townsville) and the medevac service between them would recognise the grant of parental responsibility under the parenting plan. If any of them didn't then a court order would be needed. After my clients made enquiries to determine that an appropriate parenting plan would be recognised by all three, the parties entered into the parenting plan. The benefit of a parenting plan over a court application is of course it's effective (as is a court order), it should be quicker than a court order and it's cheap.

5. The obligation of the surrogate and partner is to register the birth of the child. A birth certificate must be obtained, payable by the intended parents.

6. An independent report is then to be obtained from a separate counsellor about what is in the best interests of the child. This is a similar process to a family report, albeit with a lot less tension. The preparation of this report is typically with a home visit, and the cost is considerably lower than that of a family report.

7. In one case, I read the post-birth report (which are also required in Queensland and New South Wales) where the report writer waxed lyrical about the parenting capacity of the intended parents. However, there was something missing. There was no reference by the counsellor to having seen the child. Alarmed, I rang the counsellor.

   I said: *"The report doesn't make any mention of you having seen the child."*

   She said: *"That's right."*

   I said: *"Is it your usual practice not to see the child?"*

   She said: *"No, not at all. My usual practice is to see the child. Your clients (the intended parents) had a nanny who said that the child was asleep and they didn't want to wake the child for the interviews."*

[33] S.63(1)(b) *Family Law Act 1975* (Cth).
[34] *KRB and BFH v RKH and BJH* [2020] QChC7.

I said: *"I'm an officer of the court. I have to tell the court that although the report has been prepared, it makes no mention of your having seen the child, because you didn't see the child. This will mean, almost certainly, that the court will not be prepared to make a parentage order and the matter will be adjourned for say 14 or 21 days until that is rectified."*

Not surprisingly, a further interview was carried out to observe the child. The report writer, after having seen the child, recommended in the updated report that a parentage order be made.

Section 24 provides:

> *"(1) Each party and any birth parent of the child who is not a party to the surrogacy arrangement must submit to an interview by a counsellor for the purpose of a report for the Local Court.*
>
> *(2) The interviews must take place after the birth of a child under the surrogacy arrangement but before any application is made for a parentage order.*
>
> *(3) The counsellor must prepare a report on the interviews that states the following matters:*
>
> *(a) the qualifications of the counsellor;*
>
> *(b) that the counsellor is independent of any business providing fertility services;*
>
> *(c) the names of the persons who were counselled;*
>
> *(d) the dates of the counselling;*
>
> *(e) the counsellor's opinion on the best interests of the child born under the surrogacy arrangement and the grounds for that opinion.*
>
> *(4) The counsellor's report may include the counsellor's opinion on the following matters:*
>
> *(a) each person's understanding of the social and psychological implications of a parentage order on themselves and the child;*
>
> *(b) each person's level of acceptance that openness and honesty about the child's birth parentage is in the best interests of the child;*

(c) *the arrangements that the intended parent or intended parents propose for the care and nurture of the child;*

(d) *any other matter relevant to the wellbeing of the child.*

(5) The counsellor, under this section, must not have provided any previous counselling to the parties.

(6) A copy of the report must be given to each person interviewed before an application is made for a parentage order."

A practical issue is whether the ANZICA counsellor (there being no other regulations about who may be a counsellor) requires this assessment to be carried out in person. That may be a practical issue, as it is my understanding there is only one ANZICA counsellor in Darwin. Unless your clients can find an ANZICA counsellor who is prepared to undertake this assessment process remotely, they may have to incur the cost of flying the counsellor to Darwin where they are (and presumably one night's accommodation) – and should budget for this at the beginning of the matter.

This report, like a family report, is often the most important document. This is because it provides an independent check to the court about the best interests of the child and whether or not it is in the best interests of the child for a parentage order to be made.

RELINQUISHMENT COUNSELLING

The Northern Territory will join New South Wales in having mandatory post-birth relinquishment counselling of the surrogate and her partner. There is no requirement for the report of that counselling to be provided to the court. In my view, best practice is to obtain a report from the counsellor and to provide it to the court, as I do in my applications to the Supreme Court of New South Wales. The counsellor can, and should be in my view, ordinarily the counsellor who undertook the pre-signing counselling (so that the surrogate and her partner will only have therefore dealt with two counsellors i.e. the pre-signing counsellor and relinquishing counsellor, and the one providing the report for the court, not three or more. The surrogate and her partner should not be subjected to systems abuse.

Section 23 provides:

"(1) The surrogate mother, her partner, if any, and any other birth parent must undertake counselling about the surrogacy arrangement and its social and psychological implications after the birth of the child and before consenting to the parentage order.

(2) The counselling required under this section may be provided by the same counsellor that provided counselling to any of the parties before they entered into the surrogacy arrangement."

What is contemplated in s.23 is that the surrogate has split up from her partner with whom she signed the surrogacy arrangement. This means that that person needs to be a party to this counselling, as does her new partner. Although the new partner does not need to be a person interviewed for the report to the Court, they should be. It would be anomalous ifthe new partner were interviewed for the relinquishment counselling but not for the report to the court.

APPLICATION FOR PARENTAGE ORDER

The intended parent or intended parents may apply to the Local Court for a parentage order: section 26(1).

The application must be made:

"(a) no more than 30 days after the birth of the child; and

(b) no later than 180 days after the birth of the child, unless the Local Court is satisfied that there are exceptional circumstances to justify a later application."

This timeframe is broadly consistent with those interstate.

The explanatory note says:

"Setting a minimum time period of 30 days provides time for the surrogate mother to confirm that she wants to relinquish parentage. The upper limit of 180 days provides legal certainty, ensuring that the child and the parents are not left in a state of limbo. The Local Court has the power to grant leave for a late application in exceptional circumstances."

Of course, you don't want to be a lawyer in one of those exceptional circumstances.

Experience over the last 10 years has been that initially there were delays in filing, primarily caused by delays with the counsellors and the doctors, in either obtaining reports from them or undertaking interviews. Over time, what has transpired is that the parents are the ones mainly causing delays. When they come and consult you, looking through the telescope to the near future, they have a very keen desire to have an order made as soon as possible, given that currently they don't have a child and they want to have a child and be recognised as the parents.

The reality, however, is that once a child is born their desire for speed in obtaining orders often wains. It is not uncommon for applications to be made at four or five months post-birth despite urging from my office of my clients. As one client put it to me poignantly:

"We have our child and family now. We are getting no sleep. We will get back to you about preparing the court documents."

Section 26(3)-(5) provide:

> *"(3) If there are 2 intended parents in the surrogacy arrangement, the application must be made by both intended parents jointly unless:*
>
> *(a) they are no longer partners; or*
>
> *(b) one of them has died; or*
>
> *(c) one of them does not have the legal capacity to make decisions in relation to the proceedings; or*
>
> *(d) one of them cannot be located after reasonable efforts to do so; or*
>
> *(e) the Local Court is satisfied that there are exceptional circumstances to justify an application by only one intended parent.*
>
> *(4) If the intended parents are no longer partners:*
>
> *(a) each intended parent may apply separately for a parentage order instead of jointly; and*
>
> *(b) if both intended parents do apply separately – the applications must be heard together.*
>
> *(5) Notice of the application must be served on:*
>
> *(a) every other party to the surrogacy arrangement; and*
>
> *(b) any birth parent of the child who is not a party to the surrogacy arrangement."*

I would encourage you to do these things:

- Have the parents bring the babies to court. The judges LOVE seeing the babies. Sometimes, the judges want to hold the babies. One judge in Victoria arranged with the local Lions club to always give the baby a small teddy bear.
- If the court allows it, have pictures taken in court. Some judges are happy to be in the picture, most aren't. Pictures have been taken in the courtroom in Victoria, NSW and Queensland. It is much better, if possible, to have the picture taken in the courtroom, where it has some meaning, and in the air conditioning, than outside against some sterile wall of the courthouse, in the heat.

PARENTAGE ORDER

Section 34 sets out the requirements for making a parentage order:

> *"(1) The Local Court may make a parentage order if satisfied of the following:*
>
> *(a) the surrogacy arrangement is not a commercial surrogacy arrangement;*
>
> *(b) the requirements of Part 2, Division 2 are met* [the form of the surrogacy arrangement, that the pre-signing, relinquishment counselling and the report have been obtained]
>
> *(c) the place of residence of the child required under section 27* [with the applicant at the time of filing the application and the time of making of the parentage order. My practice in Queensland proceedings is to file a joint affidavit of the parents on the morning by leave to satisfy the latter.]
>
> *(d) the consents required under section 32 were given or dispensed with* [ordinarily, each party and any other birth parent- which demonstrates why you must know your parentage presumptions.]
>
> *(e) the place of residence of each applicant required under section 33* [Unless there is an exemption for exceptional circumstances, each applicants must reside in the territory at the time of the hearing of the application. My practice in Queensland proceedings is that the joint affidavit of the parents on the morning by leave will include this.]
>
> *(f) the parentage order is in the best interests of the child."*

A problematic matter

Harry and Hilda were a married couple living in New South Wales. Hilda's mother, Jolene offered to be the surrogate. Jolene had separated from her husband Joe many years before. Harry and Hilda, and Jolene all lived in New South Wales. They obtained

independent legal advice from New South Wales solicitors. They underwent counselling. The reason that Hilda was undertaking surrogacy was because she had had leukemia as a child. Whilst she was recovering from leukemia, her parents' marriage split up and she had to deal with that breakup. Despite the differences between her parents, Hilda took on a management role with her father's company. By the time she entered into the surrogacy arrangement, she was 22 years and several months. The counsellor was satisfied that Hilda had the requisite maturity.

Whilst Jolene was pregnant, Joe developed terminal cancer. In order to care for Joe, Harry and Hilda and Jolene all moved from New South Wales to Queensland.

By the time that Harry and Hilda came to see me, Joe had died. There were four difficulties with the matter:

1. Had the requirements of the *Surrogacy Act 2010* (NSW) been satisfied?

   The obvious answer was that they had not been, despite Harry and Hilda, and Jolene obtaining independent legal advice and despite Harry and Hilda and Jolene all taking part in counselling and dispute approval of the surrogacy arrangement by the relevant IVF clinic's ethics committee. No one had bothered to ask whether Jolene and Joe had ever divorced. They hadn't. As Joe was Jolene's spouse, he should therefore have been a party to the surrogacy arrangement.

   New South Wales also required that Hilda ordinarily be the age of 25.

2. Had the requirements of the Queensland *Surrogacy Act* been met?

   The same issues that arose in New South Wales arose in Queensland, namely, that:

   1) Joe should have been a party to the surrogacy arrangement but hadn't been.

   2) The issue of Hilda being under the age of 25.

   3) The requirement that Joe consent to the surrogacy arrangement.

   It is clear that all parties had been poorly served by the solicitors acting in the beginning of the matter.

   It was also clear from the evidence, namely:

   1) The pre-signing counsellor's report.

   2) The post-birth surrogacy guidance report.

   3) The lengthy detailed affidavit by Hilda (with corroboration by Harry and Jolene in their affidavits) of her travails – which showed her clear maturity.

4) The IVF had been funded by Joe.

As I was concerned about whether or not Joe had consented to any of the arrangement, Jolene managed to find email correspondence between herself and Joe in which he said to the effect that he was looking forward to the child from the IVF and to send him the bill for the IVF.

In the circumstances, the Queensland court was able to dispense with various requirements and be satisfied as to the best interests of the child that a parentage order be made. The court was satisfied as to Hilda's maturity at the time of entering into the surrogacy arrangement despite the fact that she was not 25.

Queensland jurisdiction was able to be met as Harry and Hilda were living in Queensland when the orders were made. The NT has the same flexibility (as does NSW, but ACT, SA, Tasmania, Victoria and WA do not).

Section 43 provides for rules or practice directions of the Local Court which therefore may make further provisions about service. My understanding is that current rules are being prepared and no doubt will be published in due course.

Section 28 provides that:

> *"The application must include the following:*
>
> *(a) a copy of the surrogacy arrangement, including the certificates required under sections 21 and 22(3);*
>
> *(b) the report from the counsellor required under section 24;*
>
> *(c) a certified copy of the birth certificate of the child born under the surrogacy arrangement."*

The court has the power under section 29 to appoint a separate legal representative. Although there is similar power interstate, I've never seen this occur.

If there are multiple children, a parentage order is made for all of them: section 30.

The purpose of a parentage order is set out in section 31, which:

> *"Is to transfer the parentage of a child born under a surrogacy arrangement to the intended parent or intended parents if the requirements of this Act are met."*

Section 32 provides as to consent:

"(1) Subject to this section, each party in any birth parent of the child who is not a party to the surrogacy arrangement must consent to the making of a parentage order.

(2) The Local Court may dispense with the consent of an intended parent only if:

(a) the person has died; or

(b) the person does not have legal capacity consent; or

(c) the person cannot be located after reasonable efforts to do so; or

(d) the person is no longer a partner of the applicant and dispensing with consent in the circumstances is in the best interests of the child.

(3) The Local Court may dispense with the consent of a surrogate mother only if:

(a) the child is living with an intended parent who is the applicant; and

(b) one of the following circumstances exist:

(i) the person has died;

(ii) the person does not have legal capacity to consent;

(iii) the person cannot be located after reasonable efforts to do so; and

(c) dispensing with consent in the circumstances is in the best interests of the child.

(4) The Local Court may dispense with the consent of a partner of the surrogate mother or a birth parent of the child who is not a party to the surrogacy arrangement only if:

(a) the child is living with an intended parent who is the applicant; and

(b) the Local Court is satisfied that:

(i) the person has died; or

(ii) the person does not have legal capacity to consent; or

(iii) the person cannot be located after reasonable efforts to do so; or

(iv) dispensing with consent in the circumstances is in the best interests of the child."

In opening words of the explanatory note about clause 32:

> *"Consent is integral to the making of a parentage order, consistent with the position that surrogacy arrangements are not enforceable."*

If you have a capricious surrogate or her partner who withdraws consent then, subject to relief that might be obtained in the *parens patriae* jurisdiction or under the *Family Law Act*, there may be no ability to transfer parentage subject to being patient and waiting. As an example, see *Lamb and Shaw* (above).

Clause 33 provides as to residence:

> *"(1) A parentage order must not be made unless each applicant resides in the Territory at the time of the hearing of the application.*
>
> *(2) Despite subsection (1), the Local Court may dispense with the requirement that an applicant reside in the Territory in exceptional circumstances."*

The Territory joins Queensland and New South Wales in having flexibility with its jurisdiction. This contrast with restrictions in the ACT, South Australia, Tasmania, Victoria and Western Australia whereby one or both parties must reside in that jurisdiction from beginning to end. This enables parties to alter their circumstances so that they can move to the Territory and complete the journey. I have had a number of matters where parties have moved interstate or internationally to Queensland or New South Wales to take advantage of that jurisdiction – with orders being made.

The only reported case of that happening concerned a gay couple living in the US, who were American citizens, the sister of one of whom was living in NSW and was the surrogate. The NSW Supreme Court made the order[35]. The same could not occur in the Territory unless both were Australian citizens or permanent residents: s18(b).

Contents of parentage order

Section 35 sets out the contents of the parentage order. Section 36 provides as to the child's name.

Section 37(2) provides:

[35] *Surrogacy Application by a Couple from the United States of America* [2017] NSWSC 1806.

"On and from the date the parentage order is made:

(a) the child becomes the child of the intended parent or intended parents; and

(b) the intended parent or intended parents become the parent or parents of the child; and

(c) the child is no longer the child of the surrogate mother and any other birth parent; and

(d) the surrogate mother and any other birth parent are no longer the parent or parents of the child."

Section 185 of the *Evidence Act 1995* (Cth) provides:

> *"All public acts, records and judicial proceedings of a State or Territory that are proved or authenticated in accordance with this Act are to be given in every court, and in every public office in Australia, such faith and credit as they have by law or usage in the courts and public officers of that State or Territory."*

Interstate parentage orders are recognised by being taken up by section 60HB of the *Family Law Act* and regulation 12CAA of the *Family Law Regulations 1984* (Cth) as to citizenship under section 8 of the *Australian Citizenship Act 2007* (Cth). This Act is not yet prescribed under reg. 12CAA.

Of course, once citizenship is obtained by the child at birth, then the making of the parentage order does not cause a loss of that citizenship. The child would be an Australian citizen at birth in any event under section 12 *Australian Citizenship Act 2007* (Cth) having been born to a surrogate mother in Australia who is an Australian citizen or permanent resident: s. 17(b) *Surrogacy Act 2022* (NT).

If a parentage order is made but the child is born in Victoria then, subject to any administrative arrangements that might be made by the Registrar of Births Deaths and Marriages (NT) a registration order must be made in Victoria under the *Status of Children Act 1974* (Vic) so that the intended parents are recognised as the parents.

However, the necessity to obtain a registration order in Victoria only arises when there is a corresponding interstate surrogacy law: section 17 *Status of Children Act 1974* (Vic) which is defined as meaning: *"A prescribed law of another State or a Territory relating to parentage of a child born under a surrogacy arrangement."* The laws that are prescribed are under regulation 5 of the *Status of Children Act Regulations 2014* (Vic) and corresponding surrogacy parentage order is prescribed in regulation 6. It is no surprise that this Act and orders made under it are not yet prescribed. Regulations 5 and 6 in respect of South Australia refer to the *Family Relationship Act 1975* (SA). The *Surrogacy Act 2019* (SA) has been in force since 1 September 2019 but is not yet prescribed. Section 38 deals with duty of trustee and personal

representative. Section 39 deals with sexual offence – familial relationships. Sections 40-42 deal with the revocation of a parentage order.

The application for a parentage order must comply with the rules or practice directions of the Local Court: section 43.

The proceedings are in closed court: section 44(2). Despite the court being closed interstate, the practice in Victoria, New South Wales (where there are appearances in person) and Queensland has been for the baby to come to court and photographs to be taken in court after the orders are made, although always at the discretion of individual judges. On one occasion the Childrens Court in Brisbane heard the matter in normal session, i.e., the other parties in other Childrens Court matters and their lawyers were also present in court. This had the advantage to show the (criminal) lawyers present the magic that happens when a parentage order is made- quite unlike the often depressing nature of courts dealing with wayward juveniles.

A parentage order may not be appealed – which would make sense because it can only be made by consent, except in the most limited circumstances. However, a refusal to make one can be appealed: section 45.

Once a parentage order is made, the registrar of the court must give a copy of the order to the Registrar of Births, Deaths and Marriages as soon as practicable after it is made: section 46(1). If the birth is interstate, then it is given to the interstate authority: section 46(3).

I have experienced considerable delays in at least one Births, Deaths and Marriages Registry-NSW. So that the parents, surrogate and her partner know are kept informed, it would be helpful that when the court registrar sends a copy of the order to Births, Deaths and Marriages, that the parties are copied in with the email.

Court records are generally sealed: section 47, and that section prevails to the extent of any consistency with any other law of the Territory.

OFFENCES

Section 48 provides:

> *"A person commits an offence if:*
>
> *(a) the person intentionally enters into, or intentionally offers to enter into, an arrangement; and*
>
> *(b) the arrangement is a surrogacy arrangement; and*
>
> *(c) under the surrogacy arrangement:*

(i) a person is offered or is to receive a payment, reward or other material benefit or advantage, other than reasonable costs allowed under section 12; and

(ii) the payment, reward or other material benefit or advantage is for the person or another person doing one or more of the following:

(A) agreeing to enter into, or entering into, the surrogacy arrangement;

(B) permanently relinquishing custody of a child born under the surrogacy arrangement;

(C) consenting to the making of a parentage order for a child born under the surrogacy arrangement; and

(d) the person has knowledge of the circumstances in paragraphs (b) and (c).

Maximum penalty: 100 penalty units or imprisonment for 12 months."

The offence is modeled on section 9 of the *Surrogacy Act 2010* (NSW) and section 10 of the *Surrogacy Act* (Queensland and related sections as to offences).

The explanatory note states as to the offence:

> *"This offence reflects the Australia-wide policy prohibiting commercial surrogacy, as confirmed by recommendation 1 of the report of the House of Representatives standing committee on social policy and legal affairs inquiry, surrogacy matters: Inquiry into the regulatory and legislative aspects of international and domestic surrogacy arrangements."*

Unlike the ACT, New South Wales and Queensland, there is not a specific extraterritorial element.

However, that is not the end of the matter. Section 43CA of the *Criminal Code* provides:

"(1) An offence against the law is committed if:

(a) disregarding any geographical considerations, all elements of the offence exist; and

(b) a geographical nexus exists between the Territory and the offence.

(2) A geographical nexus exists between the Territory and offence if:

(a) the offence is committed completely or partly in the Territory, whether or not the offence has any effect in the Territory; or

(b) the offence is committed completely outside the Territory (whether or not outside Australia) but has an affect in the Territory."

Often clients will wonder why there might be some concern about committing an offence concerning surrogacy when, after all, it is lawful for them to engage in commercial surrogacy in the overseas jurisdiction.

Section 43CB provides:

"(1) This Division applies to an offence committed partly in the Territory and partly in a place outside the Territory (whether or not outside Australia), ***even if it is not also an offence in that place****.*

(2) This Division applies to an offence committed completely outside the Territory (whether or not outside Australia) only if:

(a) it is also an offence in the place where it is committed; or

(b) it is not also an offence in that place, but the tribunal of fact is satisfied the offence is such a threat to the peace, welfare and good government of the Territory that justifies criminal punishment in the Territory."

Section 49 provides:

"(1) A person commits an offence if:

(a) the person intentionally provides services or intentionally offers services; and

(b) the services consist of assistance for another person to enter into a surrogacy arrangement; and

(c) the person has knowledge of the circumstance specified in paragraph (b); and

(d) the person is not a legal practitioner representing a person seeking legal assistance in relation to the surrogacy arrangement; and

(e) the person asked to receive or receives payment, reward or other material benefit or advantage for the conduct specified in paragraph (a)

Maximum penalty: 100 penalty units or imprisonment for 12 months.

Examples for subsection (1)(b):

1. Introducing people who are looking to enter into a surrogacy arrangement.

2. *Arranging a surrogacy arrangement for negotiating or negotiating a surrogacy arrangement."*

As the explanatory note says, this clause creates a brokerage offence and strict liability applies to the final two elements i.e. not being a legal practitioner representing a person seeking legal assistance in relation to the surrogacy arrangement and ask for or receive a payment, reward or other material benefit or advantage for providing or offering to provide the services.

It is also noted:

> *"The offence applies to any surrogacy arrangement. It is not limited to commercial surrogacy arrangements. The element of seeking or receiving payment, reward or other material benefit or advantage gives the offence a commercial aspect, allowing a third party to profit from a surrogacy arrangement."*

Section 50 provides:

> *"A person commits an offence if:*
>
> *(a) the person intentionally publishes information; and*
>
> *(b) the information:*
>
> *(i) purports to seek another person to enter into a commercial surrogacy arrangement; or*
>
> *(ii) states or implies that a person is willing to enter into a commercial surrogacy arrangement; and*
>
> *(c) the person is reckless in relation to the circumstance specified in paragraph (b).*
>
> *Maximum penalty: 100 penalty units or imprisonment for 12 months."*

As the explanatory note states:

> *"This clause creates an offence of advertising a commercial surrogacy arrangement."*

More importantly is what it doesn't say - which is it is lawful for an intended parent (or surrogate) to seek out the other by way of advertising, including social media, or even an ad in the *NT News*- provided that the surrogacy arrangement is not a commercial surrogacy arrangement.

Although there is no definition of *fertility services*, it appears clear from section 51 that *fertility services* relates to seeking to enable a woman to become pregnant.

Section 51 provides:

"A person commits an offence if:

(a) the person intentionally provides services or intentionally offers services; and

(b) the services consist of assistance for a woman to become pregnant; and

(c) the services are provided or offered to another person who:

(i) is a party to a commercial surrogacy arrangement; or

(ii) is expected to be a party to a commercial surrogacy arrangement; and

(d) the person has knowledge of the circumstances specified in paragraphs (b)(c).

Maximum penalty: 100 penalty units or imprisonment for 12 months."

What is unsaid by the Act is that assisted reproductive treatment does not need to occur in the Northern Territory. It can occur anywhere. The same flexibility now exists with surrogacy laws in New South Wales, Queensland, South Australia and Tasmania, but not the ACT, Victoria and Western Australia. This allows flexibility primarily for intended parents to obtain IVF interstate and occasionally overseas. In establishing that there is a medical need for the surrogacy arrangement, evidence should be obtained from the treating specialist (including as to the date of implantation, to show that the surrogacy arrangement is a preconception surrogacy arrangement. Great care must be taken if an overseas specialist is undertaking the IVF, so that there is cooperation from that specialist in the preparation of any report and affidavit for the court.

Section 52 provides:

"(1) A person commits an offence if:

(a) the person intentionally publishes information; and

(b) the information identifies, or is likely to lead to the identification of, any of the following:

(i) a child born under a surrogacy arrangement;

(ii) a child who is the subject of an application for a parentage order;

(iii) a party to a surrogacy arrangement;

(iv) a party to a proceeding under this Act;

(v) a person whose consent is required for a surrogacy arrangement or a parentage order; and

(c) the person is reckless in relation to the result specified in paragraph (b).

Maximum penalty: 100 penalty units or imprisonment for 12 months.

(2) It is a defence to a prosecution for an offence against subsection (1) if the defendant has written consent to publish information identifying the person from:

(a) the person identified; or

(b) in the case of a person who is under 18 years of age – the person with parental responsibility for the person identified."

Section 53 provides:

"(1) A person commits an offence if:

(a) the person obtains information in the course of performing a function connected with the administration of this Act or exercising power under this Act; and

(b) the information is confidential and the person is reckless in relation to that circumstance; and

(c) the person intentionally engages in conduct; and

(d) the conduct results in the disclosure of the information and the disclosure is not:

(i) for a purpose connected with the administration of this Act, including a legal proceeding arising out of the operation of this Act; or

(ii) to a person who is otherwise entitled to the information; and

(e) the person is reckless in relation to the result and circumstance referred to in paragraph (d).

Maximum penalty: 200 penalty units or imprisonment for 2 years.

(2) Strict liability applies to subsection (1)(a).

(3) If the information referred to in subsection (1) relates to a person, it is a defence to a prosecution for an offence against that subsection if the person has consented to the disclosure of the information."

This would appear to apply to any doctor, lawyer representing a party or fertility counsellor, as well as any court official. The explanatory note notes that there is some overlap with the offence in clause 52.

Under section 54 prosecutions cannot be commenced without the consent of the Director of Public Prosecutions. The explanatory note says:

> *"This provides a safeguard against over-criminalisation. A similar provision applies to the Adoption of Children Act 1994."*

All of these offences are summary offences because they are not stated to be indictable offences and the penalty of imprisonment is not for more than two years: s. 3(2)(b), s. 3(3)(ii) *Criminal Code*. As no special time limit has been imposed for prosecution, prosecution must occur within six months from the time when the matter of the complaint arose: s. 52 *Local Court (Criminal Procedure) Act 1928* (NT).

There are amendments to other legislation:

- *Advanced Personal Planning Act 2013*
- *Anti-discrimination Act 1992* (referred to above)
- *Births, Deaths and Marriages Registration Act 1996*
- *Criminal Code*
- *De Facto Relationships Act 1991*
- *Guardianship of Adults Act 2016*
- *Status of Children Act 1978* (largely discussed above).

CLOSING THOUGHTS

I am delighted that at long last the Northern Territory has a law concerning surrogacy. The sooner it can start, the better.

Surrogacy is the most complex way to become parents. It is truly an extraordinary gift of life whereby a woman who risks her life gives a child to someone else. Handled well, surrogacy is magical. To treat it purely as a transaction as opposed to an extraordinary human experience, will be to sell all the parties short and increase the chances of the surrogacy arrangement crashing and burning, turning into a nightmare court case.

The key requirements of any surrogacy arrangement are:

1. That there is mutual respect between the intended parents and the surrogate and her partner.

2. That there is flexibility. Things don't always go according to plan.

3. That there is communication.

Some research from the United States says that surrogates would rather be surrogates there for gay couples than for straight couples[36]. Why wouldn't a woman rather be a surrogate to another woman who can't have children? But when one looks at the practicalities of life, one understands why that research has come about:

1. A gay couple, as I once had to explain to a judge, cannot conceive naturally. If a woman comes along and offers the gift of life, she is a goddess at whose feet the intended parents worship. Generally, they will bend over backwards and do everything to love, honour and cherish her. As a prospective surrogate, why wouldn't you want to be in a surrogacy arrangement with them?

2. Sadly, by the time a straight couple undertakes surrogacy, it is often option D:

    a. Sex.

    b. IVF.

    c. Egg donation.

    d. Surrogacy.

    In the meantime, part of the woman's heart has shriveled and died whilst she has been subjected to endless rounds of the rollercoaster emotion of IVF and all her friends and family seemingly have had children whom they talk about endlessly, whereas she has not had children. If she is religious, she might feel cursed by God. There is a risk of such a woman having endured such pain to make sure nothing goes wrong with this surrogacy journey – in other words, of micromanaging the surrogate.

3. If you were a prospective surrogate in such a circumstance who would you prefer?

It is essential in the surrogacy arrangement to ensure that all the boxes are ticked. If you are meticulous, then nothing should go wrong. However, if you overlook one matter and that box is not ticked, then you could have a major problem on your hands.

There is one group of clients I have found need extra care. These are intended parents who are single, female lawyers. They have often endured the difficulties I just described. Being

[36] By Bergman et al, published by the American Society for Reproductive Medicine (2014).

lawyers, they are often depressives, who overthink matters and can over-analyse. And they don't have a partner to calm down their instincts.

What is the effect of a parentage order?

In *KRB and BFH v RKH and BJH* [2020] QChC7 Coker DCJ stated at [65]-[68]:

> *"65. Adopting the submissions and Mr Page, for which I cannot give enough thanks[37], he specifically notes the following:*
>
> > *'Section 22 [of the Surrogacy Act 2010 (Qld) which is the basis for a parentage order] goes to the most fundamental aspects of status, and transcending even status, to the very identity of the child as a human being: who he is and who his parents are. It is central to his being, whether as an individual or as a member of his family.'*
>
> *66. That statement, of course, clearly reflects the article 8 considerations in the convention which has been adopted in Australia relating to the rights of the child. Additionally, the submissions go on:*
>
> > *This case is fundamentally about Baby P's identity and his relationship with the intended parents. Fundamental as these matters may be to the intended parents they are, if anything, even more fundamental to the child.*
>
> *67. A parentage order, it is submitted and I accept, has a transformative effect not just in its effect on the child's legal relationships with the surrogate and intended parents, but also in relation to the practical and psychological realities of the child's rare identity. A parentage order, like an adoption order, has an effect extending far beyond the merely legal. It has the most profound personal, emotional, psychological, social and, may be in some cases, cultural and religious consequence. It creates a psychological relationship of parent and child with those far-reaching manifestations and consequences.*
>
> *68. The consequences are lifelong, and of course the Act requires that any determination by me in the exercise of my discretion, considered not only the child as a child, but the child for the rest and entirety of his life. In considering an application for a parentage order, therefore, the court is required to treat the child's wellbeing and best interests throughout childhood and for the rest of his life as the paramount consideration.*

[37] I couldn't help myself putting that quote in there, sorry.

There can be, in my assessment, little doubt that that is exactly what this matter is about and what is required."[38]

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[38] The passage I referred the court to that was then incorporated by Judge Coker was from *Re X (a child) (Surrogacy: time limit)* [2014] EWHC 3135 (Fam) at [54].