UNRAVELLING THE MAZE OF SURROGACY

THE LAW SOCIETY OF SOUTH AUSTRALIA

14 SEPTEMBER 2023

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SURROGACY ACT 2019 (SA)

Surrogacy in South Australia is primarily regulated under this Act, which commenced on 1 September 2020, and is administered by the Attorney-General. With this paper I have attached my paper on the *Surrogacy Act 2022* (NT) presented to the Family Law Section last year. The NT Act commenced in December 2022[2].

History of this law

As with any major change, the *Surrogacy Act* did not suddenly appear.

In the *Baby M* case in New Jersey (1988)[3], the traditional surrogate, Mary Beth Whitehead was paid a fee of US$10,000 to have a baby by William and Elizabeth Stern. The day after relinquishing the child, Ms Whitehead changed her mind, but returned to kill herself if she could not see the baby. The Sterns agreed for Ms Whitehead to care for the baby for a day or two. Instead, she and her husband kept the baby for 87 days. The court held that the contract was void, but ordered, based on its best interests, that the child live with the Sterns.

In reaction to the horror of that case, South Australia, along with other States, then outlawed surrogacy. This was achieved by the *Family Relationships Act Amendment Act 1988* (SA).

Surrogacy nevertheless continued in South Australia, as seen in *Re Evelyn* [1998] FamCA 55, which involved a broken down traditional surrogacy arrangement between two couples: Mr and Mrs Q in Queensland, and Dr and Mrs S in South Australia. Mrs S was the surrogate for Mr and Mrs Q, who were close friends. Mr Q was the genetic father. Dr Q enabled his wife to become pregnant through artificial insemination. Reminiscent of Baby M, Mrs Q handed over the baby, then changed her mind, coming to see the child, then taking him. Ultimately Dr and Mrs Q prevailed, and they ended up with custody of the baby.

Surrogacy arrangements were then also illegal in Queensland under the *Surrogate Parenthood Act 1988* (Qld). My first surrogacy case occurred at the commencement of that Act, in late 1988. Despite their illegality, surrogacy continued in some form.

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[2] I had a significant part to play in the form of the NT Act, as I was a member of that government's surrogacy joint working group, and continued to provide assistance until the day the bill was passed.

[3] *In re Baby M*, 537 A.2d 1227, 109 N.J. 396

South Australia is a shining light on evolutionary change. That change was driven primarily by the Hon John Dawkins MLC, who took the view that while other people could become parents easily, those who could not, but needed to become parents through surrogacy, had great difficulty. He could not fathom why those who could conceive easily were not more empathic to those who could not.

Starting in 2009, under his guidance and urging, there were amendments to the *Family Relationships Act 1975* (SA) to allow heterosexual couples to undertake surrogacy in South Australia. Commercial surrogacy continued to be criminalised.

Mr Dawkins championed change in South Australia with various amendments occurring in 2014, 2015, and from recollection 2016 and 2017. It was a case of constantly chipping away, consistent with Bismark's adage:

> *"Politics is the art of the possible."*

The numbers to enable change had to add up each time.

There was an inquiry by the South Australian Law Reform Institute (SALRI) to remove discrimination against LGBTQIA+ people in South Australia. The issue of law reform with surrogacy again came up.

As a result the then Government sought to remove that discrimination with surrogacy, to enable both same sex couples and singles to access surrogacy. Perversely, in 2017, when amendments were made again to the *Family Relationships Act*, same-sex couples were now allowed to undertake surrogacy in South Australia, but because an Upper House MP (a member of Family First) was opposed to single intended parents undertaking surrogacy, single intended parents were still prevented from doing so.

The Marshall Government referred surrogacy law reform, again at the urging of Mr Dawkins, to SALRI. SALRI issued a report recommending comprehensive change[4]. The first outcome of the report was a consultation bill. As discussed below, following that Bill being circulated, the Government listened and changes were made to it. The Bill that was presented to Parliament was a derivation of the consultation bill, and was further amended on the way through Parliament, eventually becoming the *Surrogacy Act 2019*.

The second reading speech

Attorney-General Vickie Chapman gave her second reading speech on 1 August 2019. Because of the amendments of the Bill, to require criminal history checks, some minor caution should be taken with the speech. I have set out the speech in full, as South Australia does not separately publish explanatory notes of bills:

> *"The Surrogacy Bill 2019 repeals part 2B of the Family Relationships Act 1975 and creates a standalone act to recognise and regulate certain forms of surrogacy in South Australia. Part 2B of the act has been the subject of considerable discussion over recent years and involves an extremely sensitive area of policy for the community. The bill now*

[4] https://law.adelaide.edu.au/ua/media/749/salri_surrogacy_report_oct_2018_0.pdf .

before the parliament can be traced to the Family Relationships (Surrogacy)Amendment Act 2015, as introduced by the Hon. John Dawkins MLC in late 2014, which commenced on assent in 2015 and reformed the area of surrogacy through amendments to the Family Relationships Act.

On 26 December 2017, the South Australian Law Reform Institute was asked by the former attorney-general to inquire into and report on the law regulating surrogacy in South Australia, contained in part 2B of the Family Relationships Act, and to suggest a suitable regulatory framework for surrogacy in South Australia. I supported the SALRI undertaking this reference.

Referral of surrogacy to the SALRI for proper investigation and recommendations for reform based on best practice in this area and with the guidance of other jurisdictions was considered a suitable way to achieve effective, modern and appropriate reform of surrogacy in South Australia. The SALRI presented the government with its report on 30 October 2018. That report made 69 recommendations, including a recommendation for a standalone surrogacy act.

I take this opportunity to thank the SALRI and, in particular, Professor John Williams, Dr David Plater, Dr Sarah Moulds, Ms Madeleine Thompson, Anita Brunacci, and the entire team of University of Adelaide Law Reform students working on this referral. A draft bill was prepared in accordance with the recommendations of the SALRI and tabled in parliament in late 2018 for an extended period of public consultation.

This bill before the parliament is the culmination of the work of Mr Dawkins, the SALRI and the government on this important matter of law reform to affected members of the community. The government has considered the SALRI's report and the submissions of both members of the public and stakeholders in order to present a suitable legislative regulatory framework for surrogacy in South Australia.

Surrogacy—the practice of a woman, (known as the surrogate) becoming pregnant with a child, carrying the pregnancy and giving birth to a child for another person or couple (known as the intending parents)—is a complex and sensitive subject. As noted by the SALRI, surrogacy raises many ethical, legal and other issues and implications. It attracts strong, emotional and often conflicting views from both those directly affected and legal and academic commentators. The development of a complete regulatory framework for surrogacy requires sensitivity and careful consideration to ensure that a moderate and suitable way forward is achieved, giving regard to the resulting impact on South Australian families.

Commercial surrogacy, where a fee is charged for carrying the pregnancy and delivering the child, will remain unlawful. This is a position reflected in the law regulating surrogacy across Australia. The system provided by the bill will facilitate domestic, non-commercial surrogacy, where no fee is charged but various medical and other costs may be recovered, and will result in an application for transfer of parentage by the Youth Court to intending parents if the parties meet the requirements of the regulatory scheme set out in the bill.

A standalone act is preferred, on recommendation of the SALRI, after hearing from the community that parties have difficulty navigating the role and content of the legal requirements in part 2B of the Family Relationships Act. However, the new standalone

bill retains the appropriate basic structure of the current scheme. The bill sets out what is considered to be a 'lawful surrogacy agreement'.

A lawful surrogacy agreement is an agreement that complies with the requirements of the legislation but is unenforceable except for its financial aspects. The intending parents under a lawful surrogacy agreement are entitled to apply to the Youth Court for transfer of parentage of the child. Consistent with the current scheme, an order for the transfer of parentage by the Youth Court must be in the best interests of the child born as the result of the surrogacy agreement. The birth mother must also consent to the transfer.

The lawful practice of surrogacy in South Australia will be guided by the principles set out in the bill, including that the best interests of any child born as a result of a lawful surrogacy agreement is a primary consideration in the administration and operation of the act; and the surrogacy principles as follows:

that the human rights of all parties to a lawful surrogacy agreement, including any child born as a result of the agreement, must be respected; and

that the surrogate mother under a lawful surrogacy agreement should not be financially disadvantaged as a result of her involvement.

Key innovations in the bill adopted from the SALRI report include updating outdated language around surrogacy used in the Family Relationships Act, raising the required age of parties to surrogacy agreements to 25 or older, allowing surrogacy agreements in which neither intending parents provides genetic material, making clearer provision for the payment of reasonable surrogacy costs, including compensating surrogates for loss of income, and providing less complex fertility requirements that include same-sex couples and single intending parents.

The bill also implements the SALRI recommendation of accommodating cross-jurisdictional service provision by removing the requirements for fertility treatment to take place in South Australia, and allowing interstate lawyers and counsellors to fulfil advisory functions under the bill. Existing protections will continue, including the requirement for parties to obtain counselling from an appropriately qualified counsellor and legal advice from a legal practitioner in order for the agreement to be a lawful surrogacy agreement, that the parties not have impaired decision-making capacity, that the surrogate mother must not be pregnant at the time the agreement is entered into and that the agreement must be in writing.

The bill ensures that the counsellors have an appropriate role in the surrogacy process to counsel parties to an agreement. The bill brings the counsellor role back to their core function of ensuring that parties have fully considered the issues arising from a surrogacy agreement, and the proposed parentage order. There are strong and conflicting views about the practice of surrogacy in South Australia, across Australia and internationally. Both the SALRI and the government have listened carefully to and considered the views of the community on this important issue.

Ultimately, there are divergent views and cross-jurisdictional complexities that cannot be resolved by this bill alone. However, it is this government's view that the bill before the parliament strikes an appropriate and suitable balance to properly regulate the practice of non-commercial surrogacy in this state, having regard to the needs of the community

and the acknowledgement of the privacy of parties to lawful arrangements within appropriate parameters set by legislation.

Again, I would like to reflect on the extensive history of this law and thank the Hon. John Dawkins MLC of the other place for his tireless work to assist people in accessing surrogacy in South Australia. I commend the bill for members' consideration, and I hope ultimate approval, and seek leave to have the explanation of clauses inserted without my reading it.

Leave granted.

Explanation of Clauses

Part 1—Preliminary 1—Short title 2—Commencement

These clauses are formal.

3—Simplified outline of Act

This clause provides a simplified outline of the proposed measure.

4—Interpretation

This clause defines key terms to be used in the proposed measure.

5—Interaction with other Acts

This clause provides that, except where the contrary intention appears, nothing in the measure will limit the operation of any law relating to the guardianship, custody, protection or adoption of children.

Part 2—Guiding principles for purposes of Act

6—Best interests of child paramount

This clause provides that the best interests of any child born as a result of a lawful surrogacy agreement is to be a primary consideration (including for the Court) in respect of the administration and operation of the proposed measure.

7—Surrogacy principles

This clause sets out the surrogacy principles which are to inform the Minister, the Court and each person or body engaged in the administration of the proposed measure. The principles are:

the human rights of all parties to a lawful surrogacy agreement, including any child born as a result of the agreement, must be respected;

the surrogate mother under a lawful surrogacy agreement should not be financially disadvantaged as a result of her involvement in the lawful surrogacy agreement.

8—Presumptions under Family Relationships Act 1975 to apply until parentage order made

The clause provides that presumptions and other rules as to the parentage of a child under the Family Relationships Act 1975 continue to apply to a child born as a result of a surrogacy arrangement until such time as the Court makes an order or orders as to parentage of the child under the proposed measure.

Part 3—Lawful surrogacy agreements

Division 1—Lawful surrogacy agreements

9—Surrogacy agreements not in accordance with Act void and of no effect

This clause provides that surrogacy agreements other than as provided for in this Act are void and of no effect.

10—Certain surrogacy agreements lawful in South Australia

The clause sets out the elements of a lawful surrogacy agreement, namely who may be a party to a lawful surrogacy agreement (including definitions of lawful surrogacy agreement, surrogate mother and intended parent), and the provisions that must be satisfied by a surrogate mother and an intended parent under a lawful surrogacy agreement. It also sets out the requirements with which a lawful surrogacy agreement must comply.

11—Extent to which surrogacy costs are payable

This clause provides that no payment of any form may be made in relation to a lawful surrogacy agreement except for matters as provided for in the clause and defined as the reasonable surrogacy costs. A provision in a lawful surrogacy agreement that is inconsistent with the reasonable surrogacy costs as defined is to be void and of no effect. The clause also clarifies that it does not authorise the regulations to allow for commercial surrogacy. The reasonable surrogacy costs include:

such reasonable costs as may be incurred, or likely to be incurred, in respect of the lawful surrogacy agreement (such as costs relating to the pregnancy that is the subject of the agreement, the birth of the child, medical, counselling or legal services provided in relation to the agreement, reasonable out of pocket expenses incurred by the surrogate mother;

payments representing loss of income of a kind to be prescribed by the regulations;

other costs of a kind to be prescribed by the regulations.

12—Variation of lawful surrogacy agreement

The clause allows a lawful surrogacy agreement to be varied if in writing and signed by all the parties to the agreement.

13—Extent to which lawful surrogacy agreement can be enforced

The clause provides that a provision of a lawful surrogacy agreement relating to the reasonable surrogacy costs is enforceable in a court of competent jurisdiction. This does not apply if the surrogate mother refuses or fails to relinquish the custody or rights to the intended parents in relation to a child born as a result of the lawful surrogacy arrangement or the surrogate mother does not consent to the making of a parentage order in relation to the child. A lawful surrogacy agreement is otherwise not enforceable.

Division 2—Counselling

14—Counselling requirements prior to entering lawful surrogacy agreement

The clause provides that a surrogate mother and the intended parents must each undergo counselling before entering a lawful surrogacy arrangements. The counselling must comply with the requirements set out in the clause. The costs of such counselling are to be met by the intended parents.

15—Intended parents to ensure counselling available to surrogate mother during pregnancy and after birth

The clause provides that the intended parents must take reasonable steps to ensure that the surrogate mother and the spouse or domestic partner of the surrogate mother are offered counselling during any period during which the surrogate mother is attempting to become pregnant for the purposes of a lawful surrogacy agreement, or during any pregnancy to which a lawful surrogacy agreement relates. The costs of such counselling are to be met by the intended parents, and it is an offence, with a maximum penalty of $5,000, for the intended parents to refuse or fail to comply with this provision.

Division 3—Preservation of certain rights of surrogate mother

16—Rights of surrogate mother to manage pregnancy and birth

The clause provides that a surrogate mother has the same rights to manager her pregnancy and birth as any other pregnant woman, and that any provision in a lawful surrogacy agreement to the contrary is void.

17—Medical decisions affecting surrogate mother or child

The clause provides that for the purposes of the proposed Act, the Consent to Medical Treatment and Palliative Care Act 1995 and any other Act or law, a question relating to any medical treatment to be provided to a surrogate mother, or to an unborn child to which a lawful surrogacy agreement relates, is to be determined as if the lawful surrogacy agreement did not exist. The proposed Act is also not intended to limit the operation of an advanced care directive under the Advance Care Directives Act 2013.

Part 4—Court orders relating to lawful surrogacy agreements

18—Court may make orders as to parentage of child born as a result of lawful surrogacy agreement

This clause provides for the Youth Court to make orders in relation to a child born as a result of a lawful surrogacy agreement. An application for orders must be made by 1 or both of the intended parents not less than 30 days but not more than 12 months after a child is born as a result of the lawful surrogacy agreement (or such later time as the Court may allow if it is in the interests of the child or exceptional circumstances exist).

The Court may make any of the following orders on application:

that the relationship between the child and the intended parent or parent is as specified in the order;

that the relationship between the child and the surrogate mother is as specified in the order;

that the relationships of all other persons to the child are to be determined according to the other relationships specified in the order;

that the name of the child is as specified in the order;

such consequential or ancillary orders as the Court considers appropriate.

If there is more than 1 child born as a result of the pregnancy, the application will be taken to relate to the child and each of the birth siblings (unless the Court considers it is not in the best interests of the child to do so).

Before making an order, the Court must be satisfied of a number of matters set out in subclause (4), including that making the order is in the best interests of the child. The Court may make an order where only 1 of the intended parents applies for the order

(instead of both) if satisfied that the other intended parent consents, if the other intended parent cannot be contacted to obtain their consent or in other circumstances as prescribed by the regulations.

The clause makes further provisions about the manner in which the Court may dispense or excuse a failure to comply either with the provisions of the clause or a requirement under proposed Part 3.

The clause also enables the Court to dispense with certain requirements under Part 3 of the measure, and makes further procedural provision in relation to orders under the proposed section (including provisions revoking existing appointments as guardians and displacing the presumption as to parentage under the Family Relationships Act 1975).

19—Court may revoke order under section 18

The clause provides for the circumstances in which the Court may, on the application of the woman who gave birth to a child the subject of a lawful surrogacy agreement, revoke an order made under proposed section 18.

The clause also requires the Court to make orders declaring the relationship of the child to the birth mother and the intended parents following the revocation.

20—Court may require separate representation of child

This clause provides for the Court to order that a child born as a result of a lawful surrogacy agreement be separately represented in proceedings.

21—Court to notify Registrar of Births, Deaths and Marriages

This clause requires the Registrar of the Youth Court to give written notice to the Registrar of Births, Deaths and Marriages of the details as provided in the clause of any orders made under proposed section 18 or 19.

22—Access to Court records

The clause provides that the records of proceedings relating to an order under proposed section 18 or 19 are not open to inspection.

Part 5—Offences relating to surrogacy agreements

23—Offence relating to commercial surrogacy agreements

The clause provides for an offence with a maximum penalty of imprisonment for 12 months for a person who enters a commercial surrogacy agreement.

24—Offence to arrange etc surrogacy agreement for another person

The clause provides for an offence with a maximum penalty of imprisonment for 12 months for a person who for valuable consideration:

negotiates, or arranges or obtains the benefit of, a surrogacy agreement on behalf of another;

offers to negotiate, or arrange or obtain the benefit of a surrogacy agreement on behalf of another;

arranges, or offers to arrange, introductions between people seeking to enter a surrogacy agreement.

25—Offence to induce person to enter surrogacy agreement

The clause provides for an offence with a maximum penalty of imprisonment for 5 years for a person who, by threat of harm, or by dishonesty or undue influence, induces another to enter a surrogacy agreement. it also provides an offence with a maximum penalty of imprisonment for 2 years for a person who for valuable consideration, induces another to enter into a surrogacy agreement.

26—Offence to advertise certain services relating to surrogacy

This clause provides for an offence with a maximum penalty of $10,000 for a person who publishes an advertisement, statement, notice or other material that seeks, or purports to seek, the agreement of a person to act as a surrogate mother for valuable consideration, or states, or implies, that a person is willing to act as a surrogate mother for valuable consideration.

Part 6—Miscellaneous

27—Provision of information etc for purposes of Births, Deaths and Marriages Registration Act 1996

This clause provides that nothing in the measure affects the requirements in the Births, Deaths and Marriages Registration Act 1996 to have the birth of a child registered.

28—Limitation of liability

The clause provides that, except as specifically provided, no civil or criminal liability.

29—Confidentiality

The clause prevents the disclosure of information by a person obtained in the course of the administration of the proposed Act except to persons and in circumstances specified in the clause.

30—Service

This clause provides for the manner in which notices or other documents required to be given or served on a person under the measure are to be served on a person.

31—Review of Act

This clause provides that the Minister must cause a review of the operation of the proposed Act before the 6th anniversary of its commencement. the report is to be prepared and submitted to the Minister who must then lay a copy of the report before both Houses of Parliament.

32—Regulations

This clause allows the Governor to make regulations in respect of the proposed Act.

Schedule 1—Related amendments and transitional provisions etc

Part 1—Preliminary

1—Amendment provisions

This clause is formal.

Part 2—Amendment of Assisted Reproductive Treatment Act 1988

2—Amendment of section 3—Interpretation

This clause makes a consequential amendment.

3—Amendment of section 9—Conditions of registration

This clause makes a consequential amendment.

Part 3—Amendment of Births, Deaths and Marriages Registration Act 1996

4—Amendment of section 4—Interpretation

This clause makes consequential amendments.

5—Amendment of section 22A—Surrogacy orders

This clause makes consequential amendments.

6—Amendment of section 49A—Saving provision—surrogacy arrangements

This clause makes a technical amendment.

Part 4—Amendment of Family Relationships Act 1975

7—Amendment of section 10—Saving provision

This clause makes a technical amendment.

8—Amendment of section 10EA—Court order relating to paternity

This clause makes a consequential amendment.

9—Repeal of Part 2B

The provisions in Part 2B of the Act are repealed as they are now to be contained in the proposed Act.

Part 5—Transitional and saving provisions etc

10—Continuation of recognised surrogacy agreements under Family Relationships Act 1975 as lawful surrogacy agreements

This clause makes transitional and saving provisions consequential on the repeal of Part 2B of the Family Relationships Act 1975 and the enactment of this measure."

Guiding principles

The Act has three *Guiding Principles*:

- In section 6 the best interests of the child born as a result of a lawful surrogacy agreement is to be the paramount consideration.
- In section 7 there are various surrogacy principles which apply in relation to the lawful practice of surrogacy in South Australia:

    (a) The human rights of all parties to a lawful surrogacy agreement, including any child born as a result of the agreement, must be respected;

    (b) The surrogate mother under a lawful surrogacy agreement should not be financially disadvantaged as a result of her involvement in the lawful surrogacy agreement.

The surrogacy principles do not displace and cannot be used to justify the displacement of the paramountcy principle.

I am particularly proud of the requirement that the human rights of all parties, including the child, must be respected. That clause came about because of my direct submission to Attorney-General Chapman. I was concerned that the emphasis about surrogacy was always about exploitation of the surrogate. I considered that there had not been enough emphasis on the human rights of everyone concerned, including the surrogate, her partner, the intended parents and most particularly, the child. I was delighted when that provision was added into the Bill and then enacted.

- Presumptions under the *Family Relationships Act* continue to apply to a child born as a result of a surrogacy arrangement until such time as the court makes an order or orders as to parentage. I will refer to parenting presumptions below.

PART 3 – LAWFUL SURROGACY AGREEMENTS

Unlike other States which refer to *surrogacy arrangements*, the Act refers to *lawful surrogacy agreements*.

Section 9 provides:

> *"Except as may be provided for in this Act, a surrogacy agreement (however described) is void and of no effect."*

Surrogacy agreement is defined in section 4 as meaning:

> *"an agreement (whether a lawful surrogacy agreement or otherwise) under which—*
>
> *(a) a woman agrees to—*
>
> *(i) become pregnant or attempt to become pregnant; and*
>
> *(ii) surrender parentage or custody of, or rights in relation to, a child born as a result of the pregnancy to another person or persons; or*
>
> *(b) a pregnant woman agrees to surrender parentage or custody of, or rights in relation to, a child born as a result of the pregnancy."*

Section 4(2) provides:

> *"For the purposes of this Act, a reference to a lawful surrogacy agreement includes, unless the context requires otherwise, a reference to a proposed lawful surrogacy agreement."*

Section 10 sets out what are lawful surrogacy agreements. Section 10 provides:

> *"(1) Subject to this Act, a surrogacy agreement that complies with the requirements under this section, and any regulations made for the purposes of this section, will be taken to be a "lawful surrogacy agreement".*
>
> *(2) Subject to this Act, the following persons may be parties to a lawful surrogacy agreement:*

(a) a woman (the "surrogate mother") who is to have a child or children for the purposes of the lawful surrogacy agreement;

(b) a person, or both persons, (an "intended parent") on whom parentage of the child or children born as a result of the lawful surrogacy agreement will be conferred in accordance with this Act.

(3) Subject to this Act, each of the following provisions must be satisfied by, or in respect of, the surrogate mother under a lawful surrogacy agreement:

(a) the surrogate mother must be 25 years of age or older at the time the lawful surrogacy agreement is entered;

(b) the surrogate mother must not have impaired decision-making capacity in respect of the decision to enter a lawful surrogacy agreement;

(c) the surrogate mother must be an Australian citizen or a permanent resident of Australia;

(d) the surrogate mother must not be pregnant at the time the lawful surrogacy agreement is entered;

(e) the surrogate mother must, before entering the lawful surrogacy agreement, undergo counselling of a kind required by section 14;

(f) the surrogate mother must provide to each intended parent a criminal history report in respect of the surrogate mother provided by South Australia Police, or the Australian Crime Commission or an Australian Crime Commission accredited agency or broker, within the 12 months prior to entering a lawful surrogacy agreement;

(g) the surrogate mother must comply with any other requirements set out in the regulations.

(4) Subject to this Act, each of the following provisions must be satisfied by, or in respect of, the intended parents under a lawful surrogacy agreement:

(a) each intended parent must be 25 years of age or older at the time the lawful surrogacy agreement is entered;

(b) an intended parent must not have impaired decision making capacity in respect of the decision to enter a lawful surrogacy agreement;

(c) each intended parent must be an Australian citizen or a permanent resident of Australia;

(d) at least 1 intended parent must be domiciled in South Australia at the time the lawful surrogacy agreement is entered;

(e) each intended parent must, before entering the lawful surrogacy agreement, undergo counselling of a kind required by section 14;

(f) at least 1 of the following circumstances must exist in relation to the intended parent or parents:

(i) at least 1 of the intended parents is a female person who is unlikely to become pregnant, or to be able to carry a pregnancy or give birth (whether because of medical reasons or otherwise); or

(ii) there is a risk that a serious genetic defect, serious disease or serious illness would be transmitted to a child born to an intended parent; or

(iii) there is a risk that becoming pregnant or giving birth to a child would result in physical harm to an intended parent (being harm of a kind, or of a severity, unlikely to be suffered by women who become pregnant or give birth generally); or

(iv) it appears to be unlikely in all of the circumstances of the intended parent or parents that an intended parent would become pregnant, or be able to carry a pregnancy or give birth (whether because of gender identity, sexuality or any other reason);

(g) each intended parent must provide to the surrogate mother a criminal history report in respect of the intended parent provided by South Australia Police, or the Australian Crime Commission or an Australian Crime Commission accredited agency or broker, within the 12 months prior to entering a lawful surrogacy agreement;

(h) the intended parents must comply with any other requirements set out in the regulations.

(5) Subject to this Act, a lawful surrogacy agreement must comply with each of the following provisions:

(a) the lawful surrogacy agreement must be in writing in a form that complies with any requirements set out in the regulations;

(b) the lawful surrogacy agreement must contain a lawyer's certificate in respect of the surrogate mother and each intended parent;

(c) the lawful surrogacy agreement must contain a counsellor's certificate in respect of the surrogate mother and each intended parent;

(d) the lawful surrogacy agreement must contain provisions setting out the arrangements for the payment of reasonable surrogacy costs;

(e) the lawful surrogacy agreement must contain provisions setting out the Court orders under Part 4 that the intended parents will be likely to seek

following the birth of a child under the lawful surrogacy agreement (however, nothing in this paragraph prevents the intended parents from seeking orders that differ from those set out in the agreement);

(f) the lawful surrogacy agreement must comply with any other requirements set out in the regulations.

(6) Without limiting this section, a lawful surrogacy agreement may contain such other lawful provisions as the parties to the lawful surrogacy agreement think fit."

Typically, I will have a schedule in the surrogacy arrangement putting caps on the amount that the intended parents will pay. They will not pay, for example, for the legal fees to have a fight about whether or not a parentage order should be made. They're happy to pay for the reasonable capped fees of the surrogate and her partner to enable an order to be made, but not to then have a fight about it. That may include the fees to enable the surrogate to update her will, and sometimes to get divorced (so that her husband is not presumed to be the father).

Some other lawyers are happy merely to have an open-ended cheque book in the drafting. Having been on both sides of the bar table where a surrogate has demanded more money (either acting for that surrogate, or acting against a surrogate of that nature), I have come to the view, as American and Canadian colleagues have come to the view, that there should be definition as to what is paid. The parties can always agree to a different amount, but it should in my view be defined so that those who are spending the money know what they are up for. This is not to leave the surrogate short. She should always be provided for.

A lawful surrogacy agreement may be varied by instrument in writing signed by each party: section 12.

Generally, a lawful surrogacy agreement is not enforceable: section 13(1). But when payment or reimbursement of the reasonable surrogacy costs which have been incurred have not been paid by the intended parents, then that clause is enforceable in a court of competent jurisdiction but not where the surrogate mother refuses or fails to relinquish the custody or rights in relation to a child born as a result of the lawful surrogacy arrangement to the intended parents or does not consent to the making of an order: section 13(2) and (3).

Section 15 requires the intended parents to take reasonable steps to ensure that the surrogate mother and her spouse or domestic partner are offered counselling by an accredited counsellor while she is trying to become pregnant, during the pregnancy or up to six months after the birth of the child. The reasonable costs associated with the counselling are to be paid by the intended parents. If the intended parents refuse or fail to comply with that, they are guilty of an offence with a maximum penalty of fine of $5,000.

The reasonable costs of that counselling may be recovered against the intended parents as a debt in a court of competent jurisdiction.

This section came about because of a case that I was in where post-birth, my clients, the surrogate and her husband sought counselling. The surrogate wanted to choose the counsellor. She wanted the intended parents to pay for the counselling. There was some disagreement

between the parties about what would be paid for and who would be providing the counselling. The surrogate felt powerless in being able to choose the counsellor of her choice and being beholden to the intended parents who were reluctant to pay.

The result of that case were amendments to the *Family Relationships Act* in about 2015, which have then evolved into this provision.

Section 16 makes plain that the surrogate mother has bodily autonomy, having the same rights to manage her pregnancy and birth as any other pregnant woman. I am delighted that this provision forms part of the Act. It was certainly something that I made submissions about. This provision evolved from a similar provision in the *Surrogacy Act 2010* (Qld), which has since been copied in Tasmania, Victoria and the ACT, as well as South Australia.

It is a powerful statement to surrogates that they have control over their bodies. The provision applies despite any provision of a lawful surrogacy agreement to the contrary: section 16(3). A provision of a lawful surrogacy agreement that is inconsistent with subsection (1), or that purports to require the consent of the intended parents in relation to the management of the surrogate mother's pregnancy, the health of the unborn child or the birth of the child is void and of no effect: 16(2).

A question relating to any medical treatment to be provided to a surrogate mother or to the unborn child is to be determined as if the lawful surrogacy agreement did not exist: section 17(1). This concerns an advanced healthcare directive is still applicable if needed under the *Advanced Care Directors Act 2013*. The consent to *Medical Treatment and Palliative Care Act 1995* is also referenced.

One may think that the definition of *lawful surrogacy agreement* is set out comprehensively in section 10. However, *lawful surrogacy agreement* is defined in section 4 as meaning:

> *"(a) a surrogacy agreement recognised as a lawful surrogacy agreement under section 10; or*
>
> *(b) a surrogacy agreement (however described) entered into in accordance with a prescribed corresponding law of the Commonwealth or another State or Territory."*

It is at this point that we first discover a gap in the Act. One would think that the various interstate *Surrogacy Acts*, such as the *Surrogacy Act 2010* (NSW), would be prescribed. They have not been. I have checked the Act, Regulations, even the *Family Relationships Regulations*. I have searched for any proclamation that might prescribe the laws, but I cannot find anything. Therefore, on the face of it, any interstate surrogacy agreement where the surrogate (and her partner) enter into in South Australia it would not be in accordance with the Act and therefore would be void and of no effect for South Australian law under section 9, though valid under interstate law (such as the *Surrogacy Act 2010* (NSW)).

Jayne Stinson MP said this[5] this about what if a surrogacy agreement did not comply with the Act:

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[5] House of Assembly, 12 September 2019.

"The member is right that there is not some sort of penalty in the bill for entering into an unlawful agreement. It is not unlawful to enter into an unlawful agreement; it is just that it would not be recognised by a court. The consequence of that would be that if you made an unlawful agreement the court would not transfer the parental rights from the birth mother to the intended parents.

Essentially, the custody or the parentage of the child at law would remain with the birth mother and not come over to the intended parents. That would be the consequence of someone entering into an unlawful agreement."

Except of course that if the agreement were unlawful in SA, but lawful interstate, and a parentage order were made interstate, then the order is capable of being enforced in SA and the parents recognised, notwithstanding the unlawfulness of the agreement under SA law: Table 1.

Table 1: Recognition of an interstate parentage order in South Australia

Law	**Effect**
s.118 *Constitution*	Full faith and credit shall be given, throughout the Commonwealth, to the laws, the public Acts and records, and the judicial proceedings of every State.
s.185 *Evidence Act 1995* (Cth)	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 offices of that State or Territory.
s.60HB *Family Law Act 1975* (Cth)	Recognition of parentage of those who are parents through surrogacy when an order is made under a prescribed law of a State or Territory.
reg. 12CAA *Family Law Regulations 1984* (Cth)	The list of those laws prescribed for s.60HB.
s. 8 *Australian Citizenship Act 2008* (Cth)	The child takes the citizenship of the parent and spouse or de facto partner under s.60H or under the s.60HB order.

It is important to beware of this limitation with the Act, and to ensure the drafting in the surrogacy arrangement claims that the other State or Territory has exclusive jurisdiction. Special care must be taken if there is an oral surrogacy arrangement in either the ACT or Victoria. I do not recommend oral surrogacy arrangements, but they can and do exist under ACT and Victorian law.

The requirements for the surrogate, described as *surrogate mother* are:

- She must be 25 years of age or older at the time of entering into the lawful surrogacy agreement. It is common in most other states to have this requirement.

- She must not have impaired decision-making capacity to enter into the lawful surrogacy agreement.

- She must be an Australian citizen or a permanent resident of Australia. Therefore, a visa holder who is not a permanent resident cannot be a surrogate under this Act. Presumably, the reason that this provision is in place is to discourage foreign surrogates coming to Australia. Presumably, this requirement was in ignorance of the requirements for a subclass 2 602 medical visa under the *Migration Regulations 1994* (Cth). Clause 602.212(2)(a) sets out the requirements:

> *"All of the following requirements are met:*
>
> *(a) the applicant seeks to obtain medical treatment (including consultation),* ***other than treatment for the purposes of surrogate motherhood****, in Australia."* (emphasis added)

- The surrogate mother must not be pregnant at the time the lawful surrogacy agreement is entered. This has been described in other legislation, such as the *Surrogacy Act 2010* (NSW) as being a preconception surrogacy arrangement, or in Queensland, requiring the surrogacy arrangement to be entered into before the child was conceived. The purpose is to ensure that when the surrogate enters into the agreement, she is able to give willing consent rather than the potential of being under duress, having already been pregnant.

- The surrogate mother must, before entering the lawful surrogacy agreement, undergo counselling of a kind required by section 14. This is implications counselling that is provided by a counsellor accredited who is a member or eligible for membership of the Australian and New Zealand Infertility Councils Association (ANZICA): section 4, reg 4. The counselling must be consistent with the ANZICA Guidelines and Ethical Guidelines issued by the National Health and Medical Research Council[6]. It must also comply with any requirements set out in the Regulations for the purposes of the paragraph. There are no requirements set out in the Regulations. This is an improvement on the previous Act, which was unclear about the requirements. The previous Act until about 2015 required three separate counsellors- with the inevitable outcome that sooner or later a case would come along when the counsellors did not talk with each other, and the relationship broke down. That happened in a case I was in 2014. I sought and was glad to see the change for there to be one counsellor- so the parties have a unanimity of vision of their surrogacy journey, tested before the one counsellor before they launch their boat.

- The surrogate mother must provide to each intended parent her criminal history report. This requirement was not recommended by SALRI but taken up by an individual MP and then became part of the Act. This clause was added to the Act ironically at the same time as Victoria was moving in the other direction. It had long been a requirement for

[6] *Ethical Guidelines on the use of artificial reproductive technology in clinical practice and research* (2017, updated as of 2023).

Victorian surrogacy that there be a criminal history report. In Victoria, that resulted often in a presumption against treatment. That requirement was abandoned in Victoria.

- The surrogate mother must comply with any other requirements set out in the Regulations. There are no other requirements set out in the Regulations.

There is no specification as to the requirements of the surrogate's partner. Presumably, the surrogate's partner would need to be 18 but there is no requirement on the face of it for the partner to receive any of these prescribed requirements. I discuss the surrogate's partner's role below.

It is odd that the various requirements of the surrogate are not also requirements for the partner.

Each of the intended parents must:

- Be 25 years or older at the time the lawful surrogacy agreement is entered. Comment: again, this is a familiar provision in other surrogacy Acts.

- Must not have impaired decision-making capacity in respect of the decision to enter a lawful surrogacy agreement.

- Each intended parent must be an Australian citizen or a permanent resident of Australia. Comment: this is not a requirement in other States, although there is now a similar requirement in the Northern Territory.

- At least 1 intended parent must be domiciled in South Australia at the time the lawful surrogacy agreement is entered.

  I was quite critical of the two requirements under the *Family Relationships Act* that:

  (a) The commissioning parents in effect had to live in South Australia during the whole of the journey, and

  (b) IVF needed to be undertaken in South Australia.

  As to the first criticism, this really did not give flexibility for South Australian jurisdiction, unlike Queensland and New South Wales (and now the Northern Territory) where the intended parents do not need to live in that jurisdiction until the time of applying or the time of orders being made by the court. The difficulty was illustrated to me by a couple who because of work requirements were posted on rotation in the Outback between South Australia, the Northern Territory and Queensland. They could not say that they were resident in South Australia, and therefore could not pursue their surrogacy journey in South Australia.

  A feature of this Act which came about following the consultation Bill and my representations was the removal of the requirement that the IVF had to be done in South Australia. It can in fact be done anywhere in the world – but with the current regulatory regime, the transfer will not occur in Western Australia or Victoria. IVF can in effect occur anywhere else in Australia or a suitable location overseas. The reason that it can't occur in Victoria or Western Australia is because the implantation would be for the

purposes of surrogacy and that in turn would require approval by the State regulator, in each place, being the Victorian *Assisted Reproductive Treatment Authority* (VARTA) in Victoria and the *Reproductive Technology Council of Western Australia*.

Another feature is to allow surrogacy to proceed when there is no genetic relationship between the intended parents and the child. The *Family Relationships Act* required a genetic link. It is no surprise that intended parents always want a genetic link if possible, but sometimes this is not possible.

The reference to *intended parent* was something that I and others lobbied for, which was a much better language than that used under the *Family Relationships Act* of *commissioning parent*. In my view, the national and international recognised term, descriptive of what they are doing, is intended parent. Commissioning parent always sounded to me like someone buying a fridge or commissioning a baby – may be being there at the launch of a ship. It related to an object or a thing, not the intention of becoming a parent. I considered it demeaning. I am delighted that the Act uses the term *intended parent*.

- That each intended parent must before entering the lawful surrogacy agreement undergo counselling that is compliant with section 14.

  Again, this is provided by an ANZICA or an ANZICA eligible counsellor and there must be at least one session of counselling to each intended parent in the absence of the other. I question why that provision is in the Act because that is the procedure adopted by ANZICA in any event. The counselling must be consistent with the ANZICA guidelines and the NHMRC *Ethical Guidelines*. Again, the costs of counselling must comply with any regulations – but there is no requirement set out in the regulations. The costs of counselling are met by the intended parents. Curiously, there is silence in the Act about the costs of counselling for the surrogate mother's partner.

  Section 14(4) provides:

  > *"The reasonable costs of counselling under this section (including the costs of counselling the surrogate mother) may be recovered against the intended parents as a debt in a court of competent jurisdiction."*

- There must be a medical or social need for surrogacy. This is described as at least one of the following must exist in relation to one or both intended parents:

  - At least one of them is a female person who is unlikely to become pregnant, or to be able to carry a pregnancy or give birth (whether because of medical reasons or otherwise).

  The reference to unlikely is of course the opposite of likely. Experience has taught me that some fertility specialists are more conservative than others. Some worry that an event has to be proved, in effect, on the balance of probabilities. Fertility specialists worry about breaching the law, and worry about making a woman other than the intended mother pregnant unnecessarily, because of the risk of maternal death.

That is not what Parliament intended. *Likely* means a significant chance or risk. The classic discussion of *likely* was by the Full Federal Court in *Tillmanns Butcheries Pty Ltd v AMIEU* [1979] FCA 85, for example by Deane J at [10] (with citations removed):

> *"The word "likely" can, in some context, mean "probably" in the sense in which that word is commonly used by lawyers and laymen, that is to say, more likely than not or more than a fifty per cent chance. It can also, in an appropriate context, refer to a real or not remote chance or possibility regardless of whether it is less or more than fifty per cent. When used with the latter meaning in a phrase which is descriptive of conduct, the word is equivalent to "prone", "with a propensity" or "liable". When so used, it is sometimes equated with the concept of foreseeability in the law of negligence. Thus, if I fire a rifle through drawn curtains into a quiet lane in a country village, it is not likely, in the sense of more likely than not or an odds-on chance, that I will injure anyone. It would, however, be difficult to deny that there was a real chance or possibility (or likelihood in that sense) that an occasional passer-by would be wounded by the bullet. Plainly, the act of firing a rifle through drawn curtains into a lane used by pedestrians would be an act which was, in the circumstances, prone or liable (likely in that sense) to cause injury to a passing pedestrian."*

- There is a risk that a serious genetic defect, serious disease or serious illness would be transmitted to a child born to an intended parent.

  Comment: The Act describes this as a risk. It does not say whether it is an outside risk or not. Doctors are reluctant to proceed with surrogacy unless there is a clear medical need for it because of the risk of maternal death of the surrogate. While Australia has one of the lowest maternal death rates in the world (three deaths per 100,000), nevertheless those are much worse odds than getting hit by lightning or winning the Lotto.

- There is a risk that becoming pregnant or giving birth to a child would result in physical harm to an intended parent (being harm of a kind or of a severity, unlikely to be suffered by women who become pregnant or give birth generally).

- It appears to be unlikely in all the circumstances of the intended parent or parents that an intended parent would become pregnant, or be able to carry a pregnancy or give birth (whether because of gender identity, sexuality or any other reason).

  Comment. Evidently, someone who is not born with a uterus cannot become pregnant. Some women are born without a uterus.

- Each intended parent must supply to the surrogate mother a criminal history report. **Comment:** Again, this was because of the requirements of the MP agitating for this to be provided.

- Must comply with any other requirements set out in the regulations. There are no other requirements set out in the regulations.

Further, a lawful surrogacy agreement under subsection (5) must also:

- Be in writing in a form that complies with any requirements set out in the regulations. There are no requirements set out in the regulations.

- Contain a lawyer's certificate in respect of the surrogate mother and each intended parent. *Lawyer certificate* is defined in section 4 as meaning:

> *"A statement in a lawful surrogacy agreement signed by a legal practitioner certifying that—*
>
> *(a) the legal practitioner explained the legal implications of the agreement to a specified person or specified persons; and*
>
> *(b) the legal practitioner gave the prescribed information in respect of the lawful surrogacy agreement to a specified person or persons."*

Although the Act does not say so, the lawyer for the surrogate mother must be independent of that for the intended parents, in accordance with our professional responsibilities.

Legal practitioner is defined in section 4 as meaning:

> *"a legal practitioner or interstate legal practitioner (both within the meaning of the Legal Practitioners Act 1981)."*

This is a change from the *Family Relationships Act* which required that a lawyer who provided legal advice for the purposes of a lawful surrogacy agreement under that Act had to be a barrister or solicitor of the Supreme Court of South Australia. It is for that very reason that I became admitted in South Australia in 2013. I took the view that although I was entitled to practice in South Australia as a legal practitioner, I was not admitted to the Supreme Court of South Australia. The definition under the *Surrogacy Act* is consistent with Australian legal practitioners nationwide being able to give advice.

- It must contain a counsellor's certificate in respect of the surrogate mother and each intended parent. *Counsellor's certificate* is defined in section 4 as meaning:

> *"A statement in a lawful surrogacy agreement signed by an accredited counsellor [i.e. ANZICA counsellor or ANZICA eligible] certifying that the accredited counsellor provided the counselling required under section 14 to a specified person or persons."*

The number of accredited ANZICA counsellors undertaking surrogacy work in South Australia in recent years has been, from recollection, two. There would be every chance that the person undertaking the counselling and providing the counselling will be an interstate practitioner. A blessed change courtesy of Covid is that counsellors are now prepared to undertake counselling with their clients courtesy of Zoom or Teams, rather than what was required before Covid, which had to be in person. Therefore, there should be no difficulty if a local counsellor is not available for a counsellor to be available quickly who is interstate.

- It must contain provisions setting out the arrangements for the payment of *reasonable surrogacy costs*. These are defined in section 11:

> *"No payment of any form may be made (whether to a surrogate mother, an intended parent or any other person or body) in relation to a lawful surrogacy agreement except payment of the following kinds (the "reasonable surrogacy costs") –*
>
> *(a) such reasonable costs as may be incurred, or likely to be incurred, in respect of the lawful surrogacy agreement, being—*
>
> *(i) costs relating to the pregnancy (including any attempt to become pregnant) that is the subject of the lawful surrogacy agreement; and*
>
> *(ii) costs relating to the birth of a child born as a result of the lawful surrogacy agreement; and*
>
> *(iii) costs relating to the postnatal care of a child born as a result of the lawful surrogacy agreement; and*
>
> *(iv) medical, counselling or legal services provided in relation to the lawful surrogacy agreement; and*
>
> *(v) reasonable out of pocket expenses incurred by the surrogate mother in relation to the lawful surrogacy agreement; and*
>
> *(vi) any other costs, or costs of a kind, prescribed by the regulations for the purposes of this paragraph."*

Regulation 5 provides:

> *"For the purposes of section 11(1)(b) of the Act, payments representing loss of income of the surrogate mother of the following kinds are prescribed in relation to the pregnancy to which the lawful surrogacy agreement relates:*
>
> *(a) loss of income during any period of the pregnancy when the surrogate mother was unable to work due to attendance at medical appointments relating to the pregnancy;*
>
> *(b) loss of income during any period of the pregnancy when the surrogate mother was unable to work on medical grounds relating to the pregnancy;*

(c) *loss of income during any period within 2 months after the end of the pregnancy when the surrogate mother was unable to work on medical grounds relating to the end of the pregnancy."*

There is much greater flexibility with the costs than there has been in the past. However, a provision of a lawful surrogacy agreement that is inconsistent with subsection (1) is void and of no effect. If there were any doubt, subsection (3) makes it clear that nothing in the section authorises regulations to be made that allow for commercial surrogacy (however described).

If you have a client, as I did, who needs to engage a locum because it would be risky for the client to work during the course of the surrogacy arrangement, it is not her being unable to work due to attendance at medical appointments through the pregnancy. It may be that a doctor can say that she was unable to work on medical grounds related to the pregnancy but it may be difficult to place within the Act and Regulations.

GOING TO COURT

An application for a parentage order (although the Act does not use that specific term) is under section 18. The application is made to the Youth Court, being either a judge or a magistrate[7] and must be brought between 30 days and 12 months after birth[8], and longer with leave of the court if there are exceptional circumstances.

The problem arises if the child has a disability of some kind or needs continued hospitalisation. What then?

Sadly, children are not always born healthy. Parents are then stuck in the gap between when the child is born and when a parentage order gives them parental responsibility.

The possible ways of fixing this gap are:

1. **The first option** is for a parenting plan under the *Family Law Act 1975* (Cth). This only works if there are two parents. Parenting plans are quick, cheap and effective. *KRB & BFH v RKH & BJH* [2020] QChC 7 is an example of such a case. A parentage order was made in Queensland for a child born through surrogacy in South Australia. The child was hospitalised following the birth, then medi-vacced to Queensland, with further hospitalisation. The parenting plan was accepted by each of the hospitals and the medivac service as giving my clients, the intended parents, with parental responsibility.

   Of course, when considering this option, there must be consideration of who is a parent under the *Family Law Act*. The easiest way of looking at this is to identify the surrogate. If she has a partner, then she and the partner are the parents under the *Family Relationships Act 1975* (SA), section 10C.

   Therefore, if there is a single intended parent or a couple, because the surrogate would likely be considered to be a parent and her partner may well be considered to be a parent,

[7] Section 4.

[8] Section 18(2)(a).

then there may be two parents for the purposes of section 62C of the *Family Law Act*, which prescribes that there be two parents. The effect of *Masson v Parsons* [2019] HCA 21 leaves it unclear about who may be a parent in each case. The Court left open the possibility of more than two parents: at [26].

Who is a parent under the *Family Law Act* according to the court in Masson is a question of fact, and where there is a conflict between the *Family Law Act* and the State provision, the former prevails.

In response to the argument that a sperm donor is not a parent, the plurality said at [54]:

> *"Those submissions must also be rejected. As has been explained, the ordinary, accepted English meaning of the word "parent" is a question of fact and degree to be determined according to the ordinary, contemporary understanding of the word "parent" and the relevant facts and circumstances of the case at hand. To characterise the biological father of a child as a "sperm donor" suggests that the man in question has relevantly done no more than provide his semen to facilitate an artificial conception procedure on the basis of an express or implied understanding that he is thereafter to have nothing to do with any child born as a result of the procedure. Those are not the facts of this case. Here, as has been found – and the finding is not disputed – the appellant provided his semen to facilitate the artificial conception of his daughter on the express or implied understanding that he would be the child's parent; that he would be registered on her birth certificate as her parent, as he is; and that he would, as her parent, support and care for her, as since her birth he has done. Accordingly, to characterise the appellant as a "sperm donor" is in effect to ignore all but one of the facts and circumstances which, in this case, have been held to be determinative."*

But what if the surrogate is only single? If there is a single intended parent (or couple) and the surrogate is single, then that should be enough. All that is needed for those who are agreeing is two parents: s.63C(1)(ba), but if the High Court's view that there are more than two parents, then all need to sign.

And to complicate matters, if one side comes from Western Australia, and the child is considered ex nuptial, then the *Family Court Act 1997* (WA) will also need to be complied with. S.76 of that Act is a mirror provision to s.63C.

In two recent decisions following *Masson*, the Family Court (or Federal Circuit and Family Court Division 1) has found that an intended genetic father through a surrogacy arrangement, where no parentage order was made, is a parent for the purposes of the *Family Law Act*: *Seto & Poon* [2021] FamCA 288; *Tickner & Rodda* [2021] FedCFamC1F 279.

In *Tickner*, Aldridge J transposed *Masson,* when his Honour said:

> *"Here, the first applicant [genetic intended father] provided the sperm for the conception of the child, on the basis that he would be the child's parent, that he would be registered on the child's birth certificate (which indeed he was) and that he would care for the child as his parents. He has done the latter and insofar that he is*

able under the interim orders as verified by the consent arrangement after mediation.

I have no difficulty in finding the first applicant is a parent of the child."

2. **The second option**, one might think, is to dispense with the requirement for the one month timeframe and move the date forward. That is available elsewhere, for example, in Queensland. However, the scheme of section 18 does not allow that time to be moved forward: section 18(7) only allows for dispensation of various non-prescribed requirements under Part 3, and does not allow dispensation of the time requirement.

3. **The third option** might be to make an application to the Federal Circuit or Family Court of Australia for parental responsibility. Of course, this is doable, but may not be quick. It is not cheap. If it is a consent order, it may be outside the jurisdiction of a registrar.

4. **The fourth option** is to make an application to the Supreme Court under the *parens patriae* jurisdiction, and cross-vested *Family Law Act* jurisdiction (if needed). It is likely quicker than the third option, but also expensive and stressful.

5. **The fifth option**, which is not recommended, is to place one of the intended parents' names on the birth certificate as a parent. While this is consistent with the approach taken in *Tickner & Rodda*, for example, that the genetic intended father is a parent, under the *Family Relationships Act 1975*, section 10C, he is not. I am reluctant to endorse this approach because:

   a. It might be an offence to falsely name the parent, as considered under South Australian law.

   b. It may complicate the application for a parentage order. A judge may decline to make an order, or may insist on there being extensive (and therefore costly to the clients) submissions. Test cases are interesting, except when they're you're own.

In the New South Wales case of *S v B; O v D* [2014] NSWSC 1533 two intended fathers were named on the birth certificates as the fathers, prior to the two parentage orders being made. Under the New South Wales *Status of Children Act*, the partner of the surrogate was the parent. In the words of the court[9]:

> *"The man who was irrebuttably presumed to be the father of the child did not join in the application [to register]. The man named as the father of the child on the birth registration statement was not the man recognised by law at the time of the registration to be the father of the child. He only becomes a father of the child in the making of a parentage order (or an adoption order if that be necessary)."*

Further[10]:

[9] At [20].

[10] At [25]-[28].

"A difficulty in both cases was that the husband of the birth/surrogate mother was not prepared to complete a birth registration statement that named as the father of the child, notwithstanding that until a parentage order were made under the Surrogacy Act (or adoption made if that were required), he was irrebuttably presumed to be the child's father.

The solicitor for the plaintiffs advised that she provided legal advice to the parties that the birth mother (that is, the surrogate mother) should be recorded on the birth certificate as the child's mother and that the intended father should be named on the birth certificate as the child's father. She advised that in both cases the husband of the birth mother did not wish to be named on the birth certificate as the child's father. She stated:

> *"As the husband of the surrogate mother did not wish to be recorded on the birth certificate, as there was the intention by the plaintiffs to apply for a parentage order with the consent of the defendants and as there was no penalty for registering the second plaintiff as father, or no specific exclusion not to be registered, the advice given by me was for the second plaintiff to be recorded on the birth certificate as father. (In each case the second plaintiff was the intended father)."*

The solicitor for the plaintiffs submitted that it was in the best interests of a child from the outset that the intending fathers be registered as the children's fathers. Having their name on the birth certificate as father assisted the process of having the child's name on the Medicare card of the intending father soon after the birth of the child. The children lived with their intended parents very soon after birth. ***If there had been any post-birth complications for which a father's consent to medical treatment might have been required, having the intended father's name on the birth certificate could have avoided complications.***

In one of the cases the solicitor advised that following the birth of the child the surrogate mother and her partner separated and remained separated and the partner of the surrogate mother initially refused to sign a consent to the application for the parentage order, although it was always the intention and agreement of the parties that the intending father would become the father of the child and the partner of the surrogate mother would never act as the father of the child.

Hence, recording the intending father as the child's father on the birth certificate reflected the physical realities of the situation." (emphasis added)

There was the ability in New South Wales to dispense with this requirement, as to who was named on the birth certificate, in exceptional circumstances.

The court then did so, but said[11]:

[11] At [32].

> *"I think it must be unusual and out of the ordinary for parties to be advised by a solicitor that they need not comply with the requirements of the law. That is what the solicitor's advice amounted to in this case. No doubt the advice was well-meaning, but it was wrong."*

Further[12]:

> *"The solicitor said it was intended that the plaintiffs (the intended parents) would apply for a parentage order with the parents' (the surrogate mother and her husband) consent. But the application initially made was only for the transfer of the mother's parentage. If that had been the only order made the child would be without a father. The incorrect details on the birth certificate would not withstand scrutiny if the child's parentage were an issue. I infer that the reason that the intended fathers in the present case did not initially seek a parentage order for the transfer of the parentage of the children from the partners of the surrogate/birth mothers to them was that they considered that having been recorded on the birth certificate as the children's fathers, they would have that status and nothing more would need to be done. Whilst the registration as the children's fathers gave rise to a presumption that they had that status, the presumption could readily be rebutted with potentially irreversible consequences, for example, if one of the intended fathers died and the question was whether his estate should pass to his child on intestacy."*

The case illustrates another point- that if there is a refusal to consent, then the intended parents are stuck. Luckily following *Masson*, this has meant that the intended genetic father is a parent under the *Family Law Act*. It is unclear if the other intended parent is also a parent under that Act, or what would be the case if there were not a genetic relationship (or the genetic relationship is by the mother and there was a sperm donor, for example).

Seto and *Tickner* make plain that one parent can be identified, which means that in due course a step-parent adoption order can be made. That may also require a leave to adopt application to be made under s.60G of the *FLA*. In my view, leave to adopt should not be required, unless at the time the parentage order is made, the child was a child of the marriage or child of a de facto relationship under that Act, and leave is needed.

Because parentage orders are made by the Youth Court, then cross-vested jurisdiction is not available to the Court under the *FLA*.

Position of the surrogate mother's partner

This discussion highlights an odd piece of the Act. Under the Act, the consent of all parties must be given to the making of an order, being the surrogate mother and the intended parents. There is silence about what is required to be done concerning the surrogate mother's partner. There is no requirement for the partner to have counselling or legal advice or the age of the partner, nor even for the partner's consent.

[12] At [33].

However, although the Act is silent about the need for the partner's consent, it would appear that the partner's consent is required. That is because until an order is obtained, the parentage presumptions under the *Family Relationships Act* are to apply. In some cases, the partner may be a parent under the *Family Law Act*.

Section 10C makes plain that the spouse or partner, of the woman who becomes pregnant as a result of a *fertilisation procedure*, which includes assisted insemination, is a parent, if the spouse of partner consented. A recent English case[13] has highlighted that consent may have occurred even if the IVF consent forms have not been executed by the spouse or partner. What is consent varies with each case.

It is clear that the *Surrogacy* Act, by being silent about the form of surrogacy, or to put it another way, how the surrogate became pregnant, is intended to apply to gestational surrogacy (where the surrogate is not the genetic parent), which necessarily has to occur through an IVF clinic, or traditional surrogacy (where the surrogate is the genetic parent), which may involve either IVF or artificial insemination.

Section 10A of the *Family Relationships Act* defines *fertilisation procedure* as meaning:

> *"(a) assisted insemination (within the meaning of the Assisted Reproductive Treatment Act 1988); or*
>
> *(b) assisted reproductive treatment (within the meaning of the Assisted Reproductive Treatment Act 1988)."*

Assisted insemination is defined in section 3 of the *Assisted Reproductive Treatment Act 1998* (SA) as:

> *"In this Act, unless the contrary intention appears –*
>
> > *"assisted insemination" means assisted reproductive treatment (not being an in vitro fertilisation procedure or a surgical procedure) in which human sperm are introduced, by artificial means, into the human female reproductive system."*

Assisted reproductive treatment is defined in section 3 as:

> *"In this Act, unless the contrary intention appears –*
>
> > *"assisted reproductive treatment means any medical procedure directed at fertilisation of a human ovum by artificial means and includes an in vitro fertilisation procedure."*

There is no definition of what is a *medical procedure*.

In vitro fertilisation procedure is defined in section 3 as meaning:

> *"any of the following procedures—*

[13] *Re S (Children: Parentage and Jurisdiction)* [2023] EWCA Civ 897.

(a) the removal of a human ovum for the purpose of fertilisation within or outside the body;

(b) the storage of any such ovum prior to fertilisation;

(c) the fertilisation by artificial means of any such ovum within or outside the body;

(d) the culture or storage of a fertilised ovum outside the body;

(e) the transference of a fertilised or unfertilised ovum into the human body;"

Artificial insemination, or to use the jargon, assisted insemination, even though the *Assisted Reproductive Treatment Act* describes it as a *medical procedure*, can occur at home. There may not be any involvement of an IVF clinic.

Indeed, there is nothing under the *Surrogacy Act* that says that conception could not have occurred naturally.

Such a case occurred in the Tasmanian case of *Lowe & Barry* [2011] FamCA 625. This is the only judgment I have ever read which has cited Wikipedia to define what is *surrogacy*. Benjamin J starts with:

> *"Surrogacy in one form or another is probably as old as humankind itself, whether the arrangements are by way of commercial, altruistic or other method. This case involves an apparently informal altruistic surrogacy entered into by some members of a family in respect of the child, L, who was born in November 2010."*

His Honour went on to say[14]:

> *"Surrogate parenting arrangements vary from the understandable aspirations of families (whether single parent, heterosexual or same sex relationships) to more sinister aspects including use of children for body parts or of children for exploitation. There are aspects of surrogacy (in the broader context of the use of that term) which reflect the cultural practices of some particular communities, such as Kupai Omasker within the Torres Strait Islander groups and similar practice in other Melanesian cultures within the South Pacific basin. It seems clear that prohibition of surrogacy does not work and in Australia, most States approach this difficult policy issue by way of regulation. Such regulation is difficult in a globalised world where travel from continent to continent is no longer difficult. Added to this, in some parts of the western world, there is wealth to the extent that funding of surrogacy (whether commercial or altruistic) is easily achieved."*

Further, he says[15]:

> *"These particular proceedings involve an application filed in January 2011 by the so called 'social parents'; Ms and Mr Lowe. The applicants asked the Court make consent*

[14] At [4].

[15] At [7].

orders to give them parental responsibility for, and the care of, the child L. Their application seeks to put in place an effective legal structure by way of orders under the Family Law Act 1975 (Cth) ("the Family Law Act") reflecting the current parenting arrangements for the child. He has lived with the applicants since he was born. At all material times, the applicants resided in Tasmania. The child was born in Tasmania and has lived all of his life in Tasmania."

The child was conceived naturally.

It would appear that a child conceived naturally where there is a surrogacy arrangement compliant with the Act would fall within the purview of the Act.

The court should not make an order terminating the parentage of the surrogate's partner unless it is with the consent of that person. Otherwise, it may be that both the parentage of the child is in dispute and that natural justice has not been followed.

It is critical in my view that the human rights of the child, through the surrogate's partner are also protected, which is the clear intention of Parliament under the *Surrogacy Principles* in section 7(1)(a) that:

"The human rights of all parties to a lawful surrogacy agreement, including any child born as a result of the agreement, must be respected."

Even if the partner is not a party to the lawful surrogacy agreement, the child is recognised as the partner's lawful child. The human rights of the child include, under Article 8 of the *UN Convention on the Rights of the Child,* of the right to an identity. That identity might relate to the surrogate's partner.

The odd position under the Act is that on the face of it, the partner does not have to be a party to the lawful surrogacy agreement, but the partner's responsibilities as a parent otherwise are taken away by the making of a parentage order.

Criteria for the order

The court needs to be satisfied:

1. Making the order is in the best interests of the child.

2. The intended parent or parents are fit and proper to assume the role of parent of the child [this being the same criteria that was under the *Family Relationships Act 1975*].

3. Subject to this section, the surrogate mother under the lawful surrogacy agreement consents to the making of the order [and by its silence no reference to the surrogate mother's partner], and

4. Subject to this section, each intended parent under the lawful surrogacy agreement consents to the making of the order: section 18(5).

The surrogate's mother's consent may be dispensed with if she is dead or incapacitated or the applicants cannot contact her after making reasonable enquiries: section 18(6).

Section 18(6)(c) also provides for dispensation in any other circumstances prescribed by the regulations. The Act makes many references to events being prescribed by the regulations. This paragraph is illustrative of the point that most of the references to possible circumstances being prescribed by the regulations simply are not. The regulations are silent on this point.

The court may conditionally or unconditionally excuse a failure to comply with a particular requirement under Part 3 (other than a prescribed requirement) if satisfied that, in the circumstances of the particular case, it is appropriate for the court to make orders despite the failure and, in such a case, may order that, subject to such conditions as may be stipulated by the court, that the requirement be dispensed with: section 18(7).

The court may, where only one intended parent has applied for the order, and the other intended parent is alive, make an order in favour of the applicant only if the other intended parent consents to the order or the other intended parent cannot, after reasonable enquiries be contacted to obtain their consent: section 18(9).

The court may, before deciding whether to make an order require any party to provide an assessment of a specified kind from an accredited counsellor (obtained at the expense of the intended parents): section 18(10). This would usually only occur in a difficult matter. It is not expected that this requirement would occur in the run of the mill matters. I had this occur in a Victorian case where the surrogate had delivered the child but declined to relinquish parentage at that point. Parliament has not mandated to require a post-birth assessment of the child in every case, as is mandated in Queensland and NSW (which is to assist the court in determining best interests).

Section 18(11) makes plain that once the parentage order is made:

(a) the appointment of anyone who is guardian of the child is revoked;

(b) any child protection order concerning the child is revoked and any parentage presumptions under the *Family Relationships Act 1975* will be taken not to apply.

The court is not bound by the rules of evidence but may inform itself as it thinks fit and must act according to equity, good conscious and the substantial merits of the case without regard to technicalities and legal forms and may take into account anything it considers relevant: section 18(12). Nevertheless, it would still be subject to principles of natural justice.

An applicant for an order must provide to the court information as is known to the applicant as to the identity of the donor of any human reproductive material: section 18(3)(a). A feature of the Act, following the abolition of the requirement that the transfer must occur in South Australia, is that intended parents can undertake IVF overseas, where the donor may be anonymous. Even if the donor is within Australia, the identity of the donor may not be known to the intended parent. Unless there is a known donor, donation in Australia will be by a de-identified donor, whose identity the child can find out after 18.

A failure to identify the donor does not mean that surrogacy cannot occur but is a matter that should be considered in the checklist.

MANDATORY REQUIREMENTS

Regulation 6 of the *Surrogacy Regulations 2020* (SA) sets out the prescribed requirements for part 3, which cannot be dispensed with under section 18(7), as set out in Table 2.

Table 2 – Prescribed Requirements under regulation 6 for section 18(7)

No.	Section	Requirement
1.	10(3)(a)	The surrogate mother was 25 plus at the date of signing the lawful surrogacy agreement
2.	10(3)(b)	The surrogate mother did not have impaired decision-making capacity when entering the lawful surrogacy agreement
3.	10(3)(c)	The surrogate mother was an Australian citizen or permanent resident when entering the lawful surrogacy agreement
4.	10(3)(d)	The surrogate mother was not pregnant when entering into the lawful surrogacy agreement
5.	10(3)(e)	The surrogate mother must before entering the lawful surrogacy agreement had counselling under section 14(6)
6.	10(3)(f)	The surrogate mother provided a criminal history report within 12 months to the intended parents prior to entering into the lawful surrogacy agreement
7.	10(4)(a)	Each intended parent was 25 plus when entering into the lawful surrogacy agreement
8.	10(4)(b)	Each intended parent did not have impaired decision-making capacity when entering into the lawful surrogacy agreement
9.	10(4)(c)	Each intended parent is an Australian citizen or permanent resident
10.	10(4)(d)	One or both intended parents are domiciled in South Australia when entering into the lawful surrogacy agreement
11.	10(4)(e)	Each intended parent must have had counselling under section 14 before entering into the lawful surrogacy agreement
12.	10(4)(g)	Criminal history of each intended parent is supplied within 12 months prior to entering the lawful surrogacy agreement to the surrogate mother
13.	10(5)(a)	The lawful surrogacy is in agreement is in writing. The requirement that it is in a form that complies with the regulations is not relevant as the regulations are silent
14.	10(5)(b)	Each lawyer's certificate is contained for the surrogate mother and each intended parent

No.	Section	Requirement
15.	10(5)(c)	The counselling certificate is contained in the lawful surrogacy agreement
16.	10(5)(d)	There are payment provisions for the surrogate mother's reasonable surrogacy costs in the lawful surrogacy agreement

What is not prescribed for section 18(7) are these matters, set out in Table 3.:

Table 3 – Matters not prescribed for section 18(7)

No.	Section	Requirement
1.	10(4)(f)	Medical or social need
2.	10(4)(h)	Other requirement set out in the regulations. That requirement is not prescribed
3.	10(5)(e)	The proposed court order is set out in the lawful agreement

The court may appoint a separate representative: section 20.

THE FORMS

The forms for the applications can be found at the court's administration authority:

https://www.courts.sa.gov.au/downloads/court-forms-yc-surrogacy/

- Form S1 – application for order of the court
- Form S2 - application to revoke order
- Form S3 – application for leave to intervene
- Form S4 – response to application to revoke order
- Form S5 – interlocutory application
- Form S6 – affidavit
- Form S7 – order
- Form S8 – notice to Births, Deaths and Marriages

In the ordinary course of events, the only forms that you would use:

- Form S1 – application for order of the court

- Form S6 – affidavit
- Form S7 – order – so that you have a minute of order to provide to the court.

Court records are sealed: section 22.

Once the order is made

On the making of the order, the intended parents are the parents. They are recognised for all purposes in Australia as the parents: see Table 1. However, this is subject to the possibility that if the surrogate's partner is a parent under the *Family Law Act*, and the partner's position as parent has been removed without procedural fairness to the partner, that the order may not have effect.

Form of order

The form of order is set out in section 18(1):

> *"(a) An order declaring –*
>
> *(i) that the relationship between the child and the intended parent or parents is as specified in the order; and*
>
> *(ii) that the relationship between the child and the surrogate mother is as specified in the order; and*
>
> *(iii) that the relationships of all other persons to the child are to be determined according to the operation and effect of the preceding subparagraphs.*
>
> *(b) An order declaring that the name of the child will be as specified in the order;*
>
> *(c) Such consequential or ancillary orders as the Court considers appropriate."*

Once an order is made, then the Registrar of the Court notifies the Registrar of Births, Deaths and Marriages, in section 21:

> *"The Registrar of the Court must, as soon as is reasonably practicable after the Court makes an order under section 18 or 19 relating to a child, give to the Registrar of Births, Deaths and Marriages written notice of the following matters:*
>
> *(a) the date of the order;*
>
> *(b) the full name, address and occupation of the birth mother of the child;*
>
> *(c) the full name, address and occupation of the intended parent or parents of the child under the relevant lawful surrogacy agreement;*
>
> *(d) the name by which the child is known before, and is to be known after, the order becomes effective;*
>
> *(e) details of the date and place of birth of the child;*

(f) the terms of any relevant consequential or ancillary orders made;

(g) if known, the identity of the donor of any human reproductive material used in relation to the relevant lawful surrogacy agreement and resulting in the birth of a child (being a donor who is not the birth mother or an intended parent);

(h) if known, such other information as may be reasonably required by the Registrar of Births, Deaths and Marriages for the purposes of registration of the birth of the child to whom the order relates."

On receipt of the notice under the *Surrogacy Act*, the Registrar of Births, Deaths and Marriages then needs to take action under section 22A of the *Births, Deaths and Marriages Registration Act (1996)* (SA):

"(1) On receipt of a notice under section 21 of the Surrogacy Act 2019 in relation to the making or revocation of a surrogacy order about a child whose birth is registered in this State, the particulars provided in the notice must be registered by the Registrar in relation to the registration of the child's birth and the child's name.

(2) Without limiting subsection (1), the Registrar must, in relation to the Register, make such entries and alterations as are necessary to give effect to the operation of the orders made by the Court under section 18(1) or 19(3) of the Surrogacy Act 2019 (as the case requires).

(3) Subject to subsection (4), a certificate issued by the Registrar after the registration of the particulars provided in a notice under section 21 of the Surrogacy Act 2019—

(a) must only disclose and certify up-to-date particulars contained in an entry; and

(b) must not provide any information disclosing a change in a parent or parents of the relevant child, or a change in the name of the child (including by disclosing the name of, or information about, any birth parent who is no longer considered as a parent of the child).

(4) A person—

(a) who is the subject of a surrogacy order and who has attained the age of 18 years; or

(b) who is a party to the surrogacy agreement that gave rise to a surrogacy order, is entitled to a certificate certifying all relevant entries in the Register.

(5) On the receipt of a notice under section 21 of the Surrogacy Act 2019 in relation to the making or revocation of a surrogacy order about a child whose birth is

registered in another State, the Registrar must send a copy of the notice to the relevant registering authority."

All of the children who are birth siblings should be the subject of the same order unless it is not in the best interests of a child to do so: section 18(4).

OFFENCES

There are four offences under the Act which are contained in sections 23-26.

Section 23 provides:

"(1) A person who enters, or purports to enter, a commercial surrogacy agreement is guilty of an offence.

Maximum penalty: Imprisonment for 12 months.

(2) In proceedings for an offence against this section, the prosecution need not prove that a woman became pregnant, or a child was or is to be born, pursuant to the commercial surrogacy agreement.

(3) For the purposes of this section, a reference to a payment will be taken not to include a reference to a payment of reasonable surrogacy costs.

(4) In this section—

"commercial surrogacy agreement" means a surrogacy agreement that provides for, or purports to provide for, a person to receive payment for any of the following:

(a) entering, or agreeing to enter, the surrogacy agreement; or

(b) giving up a child, or any rights in respect of a child, born as a result of the surrogacy agreement; or

(c) consenting to the making of an order under this Act relating to a child born as a result of the surrogacy arrangement."

The definition of commercial surrogacy agreement is copied from the Queensland and NSW *Surrogacy Acts*. It has three steps and an exception:

Step 1

There must be a surrogacy agreement. This is defined in section 4 as meaning:

"an agreement (whether a lawful surrogacy agreement or otherwise) under which—

(a) a woman agrees to—

(i) become pregnant or attempt to become pregnant; and

(ii) surrender parentage or custody of, or rights in relation to, a child born as a result of the pregnancy to another person or persons; or

(b) a pregnant woman agrees to surrender parentage or custody of, or rights in relation to, a child born as a result of the pregnancy."

A concern about (b) is that there may be crossover for an offence under ss 28 and 29 *Adoption Act 1988* (SA).

Step 2

There must be provision for payment. In other words, the offence is still committed if the agreement is entered into but no payment has been made. Payment is defined in s.4 as meaning money or other consideration. A promise of the supply of sperm might be sufficient: *Application MJC and CSC; re EMC* [2012] NSWSC 1626. Payment would be either to the surrogate or her partner or both.

Step 3

Payment is for one of the stated reasons:

(a) entering, or agreeing to enter, the surrogacy agreement; or

(b) giving up a child, or any rights in respect of a child, born as a result of the surrogacy agreement; or

(c) consenting to the making of an order under this Act relating to a child born as a result of the surrogacy arrangement.

Giving up a child would not merely be the handing over of the child but giving up parental responsibility for the child, which parents otherwise have under the Family Law Act, s.61C.

The exception

If the provision is only for the payment of the reasonable surrogacy costs, then the offence is not made out.

Section 24 provides:

"(1) A person who, for valuable consideration—

(a) negotiates, or arranges or obtains the benefit of, a surrogacy agreement on behalf of another; or

(b) offers to negotiate, or arrange or obtain the benefit of a surrogacy agreement on behalf of another; or

(c) arranges, or offers to arrange, introductions between people seeking to enter a surrogacy agreement,

is guilty of an offence.

Maximum penalty: Imprisonment for 12 months.

(2) Subsection (1) does not apply to—

(a) the negotiation, or arranging or obtaining the benefit of, a lawful surrogacy agreement by an intended parent on behalf of another intended parent under the lawful surrogacy agreement; or

(b) any other act, or act of a kind, prescribed by the regulations.

(3) In proceedings for an offence against this section, the prosecution need not prove that—

(a) a surrogacy agreement was, in fact, entered; or

(b) a woman became pregnant, or a child was or is to be born, pursuant to the surrogacy agreement."

Reg. 7 provides:

"For the purposes of section 24(2)(b) of the Act, the following acts are prescribed:

(a) a legal practitioner negotiating, or arranging or obtaining the benefit of, a lawful surrogacy agreement on behalf of an intended parent or a birth mother;

(b) a legal practitioner or an accredited counsellor acting in accordance with the requirements of the Act;

(c) a person registered under the Assisted Reproductive Treatment Act 1988 for the provision or proposed provision of assisted reproductive treatment in accordance with that Act."

South Australian practitioners must be very wary of this section. On the face of the section, the regulation is to allow lawyers to do their job in representing clients- and negotiating a deal. However, that is only for *lawful surrogacy agreements*. As I said earlier, interstate surrogacy laws have not been prescribed. Then unless the interstate surrogacy arrangement complies with South Australian law, it is an offence for a South Australian resident lawyer, for valuable consideration, to negotiate or arrange the benefit of a surrogacy agreement on behalf of a client. It is almost certain that the interstate surrogacy arrangement will not be a *lawful surrogacy arrangement*, if only because of the requirement that one of the intended parents must be domiciled in South Australia: s.10(4)(d).

Section 25 provides:

"(1) A person who, by threat of harm, or by dishonesty or undue influence, induces another to enter a surrogacy agreement is guilty of an offence.

Maximum penalty: Imprisonment for 5 years.

(2) A person who, for valuable consideration, induces another to enter into a surrogacy agreement is guilty of an offence.

Maximum penalty: Imprisonment for 2 years.

(3) In proceedings for an offence against this section, the prosecution need not prove that a woman became pregnant, or a child was or is to be born, pursuant to the surrogacy agreement."

Section 26 provides:

"(1) A person must not publish an advertisement, statement, notice or other material that—

(a) seeks, or purports to seek, the agreement of a person to act as a surrogate mother for valuable consideration; or

(b) states, or implies, that a person is willing to act as a surrogate mother for valuable consideration.

Maximum penalty: $10 000.

(2) In proceedings for an offence against this section, it is not necessary for the prosecution to prove that a person did, in fact, as a surrogate mother, or that a surrogacy agreement (whether a lawful surrogacy agreement or otherwise) was, in fact, entered.

(3) In this section—

"publish" means to disseminate or provide access, by any means, to the public or a section of the public."

A question that arises is whether these offences apply overseas. SALRI noted in its report that there is specific extraterritorial application of surrogacy offences in Queensland, New South Wales and the ACT. SALRI then considered and rejected having an extraterritorial offence. I raised concern in the submissions to SALRI that the effect of section 5G of the *Criminal Law Consolidation Act 1935* (SA) was a longarm law that applied to surrogacy, and therefore the offence might be committed overseas or interstate. Section 5G provides:

"(1) An offence against a law of this State is committed if—

(a) all elements necessary to constitute the offence (disregarding territorial considerations) exist; and

(b) the necessary territorial nexus exists.

(2) The necessary territorial nexus exists if—

(a) a relevant act occurred wholly or partly in this State; or

(b) it is not possible to establish whether any of the relevant acts giving rise to the alleged offence occurred within or outside this State but the alleged offence caused harm or a threat of harm in this State; or

(c) although no relevant act occurred in this State—

(i) the alleged offence caused harm or a threat of harm in this State and the relevant acts that gave rise to the alleged offence also gave rise to an offence against the law of a jurisdiction in which the relevant acts, or at least one of them, occurred; or

(ii) the alleged offence caused harm or a threat of harm in this State and the harm, or the threat, is sufficiently serious to justify the imposition of a criminal penalty under the law of this State; or

(iii) the relevant acts that gave rise to the alleged offence also gave rise to an offence against the law of a jurisdiction in which the relevant acts, or at least one of them, occurred and the alleged offender was in this State when the relevant acts, or at least one of them, occurred; or

(d) the alleged offence is a conspiracy to commit, an attempt to commit, or in some other way preparatory to the commission of another offence for which the necessary territorial nexus would exist under one or more of the above paragraphs if it (the other offence) were committed as contemplated."

The difficulty with a longarm law, like section 5G, is knowing how far it stretches. The first longarm law in Australia was in Queensland's *Criminal Code*, prepared by Sir Samuel Griffith. In a letter, he said:

> *"In consequence, perhaps, of the insular position of England, the common law appears to contain no provisions to the punishment of an offender in a case where several acts or events are necessary to constitute an offence, and where some only of these acts or events occur within the jurisdiction, the rest occurring out of the jurisdiction; such, for instance, as the case of a man who, standing in Queensland territory, shoots a man standing in New South Wales …"*

He went on to say that the *Criminal Code* was designed to cope with cases like that such as a man standing in one State who shoots somebody in another or in cases where somebody does something that has an effect in another State or vice versa.

The need for a longarm law is illustrated by its absence, in the Victorian case of *Ward v The Queen* (1980) 142 CLR 308. Mr Ward was standing on the top of the cliff overlooking the Murray River when he shot and killed Mr Reed, who was standing below him at the water's edge fishing.

Mr Ward was subsequently acquitted of murder in Victoria, because he was standing in Victoria, whereas Mr Reed was standing in New South Wales.

SALRI commented about the *Family Relationships Act* provisions concerning surrogacy:

> *"There is no such specific extraterritorial application in relation to South Australia's surrogacy offences."*[16]

It then goes on to say in its footnote[17]:

> *"Though there is an argument that, as Mr Page highlighted in consultation, the general State criminal laws which apply if there is 'sufficient territorial nexus' under section 5G of the Criminal Law Consolidation Act 1935 (SA) might apply to commercial international surrogacy undertaken by a party ordinarily resident in South Australia. See generally R v Winfield and Lipohar (1997) 70 SASR 300; Thai v DPP (No. 2) (2009) 196 A Crim R (Gray J). However, any such effect in relation to the commercial surrogacy offences is at odds with the Parliamentary intention. See South Australia, Parliamentary Debates, Legislative Council, 25 February 2015, 210-211 (John Dawkins)."*

What is singularly unclear following the enactment of the *Surrogacy Act* is whether the Parliament still intended that the offences are only to be committed within South Australia or are the subject of section 5G.

In my view, given that if you have a client who is considering undertaking surrogacy overseas, you must take a cautious approach, just in case.

Those who are considering undertaking surrogacy overseas not only might be committing offences under the *Surrogacy Act*, but also offences relating to commercial sperm or egg donation. These have penalties of up to 15 years imprisonment and are contained under *Prohibition of Human Cloning for Reproduction Act 2002* (Cth), section 21 (15 years imprisonment), section 24 (allowing for the operation of State laws), *Prohibition of Human Cloning for Reproduction Act 2003* (SA), section 16 (maximum penalty 15 years), and *Transplantation and Anatomy Act 1983* (SA), section 35 (maximum penalty $20,000). The South Australian laws are also subject to s.5G.

If the overseas form of surrogacy is that of adoption, care must be taken not to breach ss28 and 29 of the *Adoption Act 1988* (SA), when read with s.5G.

IF INTENDED PARENTS GO OVERSEAS FOR SURROGACY, ARE THEY PARENTS?

The simple answer is that for many intended parents who go overseas, they will, as a result of a fact-based inquiry, consistent with that laid down by the High Court in *Masson v Parsons* [2019] HCA 21, come to the conclusion that at least the genetic intended father will be a parent, and in many cases both intended parents are the parents.

The status of the other parent is not always so clear. Similarly, it may be less clear if there is no genetic connection.

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[16] At [12.1.1].

[17] Footnote 409.

Recognition of parentage under the *Family Law Act* for foreign surrogacy journeys will depend in part on:

- foreign law as to who is recognised under the foreign law as a parent,
- whether the foreign law is recognised here, and
- whether an order was made by an overseas court (compare *Carlton & Bissett* [2013] FamCA 143 where Ryan J held that a man who ordinarily resided overseas was entitled to rely on the comity principle for recognition in Australia of his overseas parentage) or there was some other method of establishing parenthood.

I set out below some of the scenarios.

Court orders are made in a number of overseas jurisdictions recognising both intended parents as the parents, and making it plain that the surrogate (and sometimes her partner) are not the parents, for example:

- USA
- Canada
- Greece
- UK
- South Africa
- some Mexican states
- Buenos Aires capital district.

In some jurisdictions establishment of parentage is achieved by adoption, which means that the adoptive parent is a parent under the *Family Law Act*: s.4, for example:

- New Zealand
- Nigeria
- Ghana
- Kenya
- In some cases: Florida, Hawaii, Minnesota.

In some jurisdictions, establishment of parentage occurs by virtue of operation of law, for example:

- Ukraine
- Russia

- Georgia
- Kazakhstan
- British Columbia, Manitoba, Ontario (when there is not a court order)
- Illinois, Pennsylvania (when there is not a court order).

In some jurisdictions, the surrogate remains as a parent, along with the genetic intended father, for example:

- Colombia, if she is not removed as a parent by subsequent order there
- some Mexican states
- Thailand
- Malaysia

In some jurisdictions, parenthood was obtained by contract, in the absence of statute, case law or court order, for example:

- India
- Iran

In some jurisdictions, there is a gap in the law, so that surrogacy is not permitted, but the birth certificate says that the intended parents are the parents, for example:

- China

As these examples attest, the world is complex. Different laws overseas may make a difference here about establishing parental recognition. The law remains new and uncertain.

THE REALITY TEST

Sadly, for every child born in Australia via surrogacy, about four are born overseas. I have managed as best I can to glean this data from Australian surrogacy births through gestational surrogacy, reported by IVF clinics to the Australia New Zealand Assisted Reproductive Database (ANZARD) held by the University of New South Wales, and undertaking freedom of information searches of the Department of Home Affairs concerning children applying for Australian citizenship by descent who were born overseas through surrogacy.

Roughly 200 plus children are born every year via surrogacy overseas. They are born in the usual current surrogacy destinations (most popular being the United States). More Australian children are born via surrogacy in the US than in Australia.

The two principal reasons why Australians undertake surrogacy overseas are:

1. The failure to find a local egg donor. In rough terms, of my large cohort of clients, about half are gay couples and about half are heterosexual couples. About three-quarters of my

clients undertaking surrogacy journeys need an egg donor, being all the gay couples, all the single men, most of the single women and about half of the heterosexual couples.

2. The failure to find a local surrogate.

Whilst Australia has excellent IVF clinics, marvellous human rights protections and judicial oversight, and has one of the world's lowest maternal death rates, women will not volunteer to be surrogates unless they know the intended parents and have a commitment to them, or have a commitment to the process of surrogacy generally, unless they are paid for their efforts when everyone else is getting paid (the judge, the doctor, the lawyer, the counsellor, the nurse and the embryologist). When the person taking the risk of death is not being paid and will endure injections ahead of becoming pregnant, with possibly 9 months of morning sickness, and the pain of childbirth, it is not a surprise that we have a shortage.

THE FUTURE

South Australia should be proud of continuing to innovate with surrogacy. There is a review scheduled of the *Surrogacy Act* between 2024 and 2025.

A House of Representatives Inquiry in 2016 recommended national non-discriminatory surrogacy laws – but no substantive change has resulted.

I am not optimistic of substantive change occurring in the short to medium term.

11 September 2023

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