

Surrogacy Law in Australia



This fact sheet summarises the Ask LOIS webinar on this topic, presented Mari Vagg, Lawyer, Women's Legal Service NSW on 24 March 2016.

This webinar can be viewed for free at www.asklois.org.au/webinars/past-webinars.

This factsheet looks at:

What types of surrogacy are legal in Australia, which are illegal?

Who can be a surrogate?

Who is the legal parent of the child?

What are the rights of the surrogate mother?

How is parentage transferred?

What happens when surrogacy is commercial?

What is surrogacy?

Section 5 of the *Surrogacy Act 2010* (NSW) says:

A surrogacy arrangement means:

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

Essentially, surrogacy is when there is an understanding or agreement that a woman will bear a child for another person or a couple. Surrogacy arrangements can take a variety of different forms, and a child born from a surrogacy arrangement may be genetically related to both, one, or neither of the intended parent/s.

'Partial' or 'Genetic surrogacy', also known as 'traditional surrogacy' is not a new phenomenon. It involves the surrogate providing her own egg. She is inseminated with sperm (usually provided by the intended father), carries the foetus through the gestation period and after the birth gives the child to the intended parents. Since this process can take place without the assistance of a fertility clinic it is possible for genetic surrogacy to occur at home.

'Full' or 'Gestational surrogacy' involves the use of a donor egg, so the surrogate mother is not the biological mother of the child. The egg may be provided by the intended mother or by a donor. Usually the intended father's sperm is used. This is now the more common form of surrogacy preferred by Australians

Terminology

Reproductive technologies have enabled the separation of genetic, gestational and social aspects of reproduction and child rearing so more specific terms are necessary.

Surrogate mother/Birth mother/gestational carrier are all used to describe the woman who becomes pregnant and gives the child to the

Intended parents/intending parents/commissioning parents

Gametes Donor is a sperm donor or an egg donor

Genetic parents are the parents whose eggs or sperm are used in the creation of a child.

This may be through sexual intercourse, through self-insemination (as in private arrangements between a woman or a lesbian couple with a known sperm donor), or through the use of a form of reproductive



technology. This term has largely replaced the terms ‘**natural parents**’ and ‘**biological parents**’ as these terms are quite ambiguous (there are different kinds of biological parents – genetic and gestational)

Legal parents are the people who have the legal status of parent in relation to a child. A legal parent could be almost any of the above people. It might be an adoptive parent, a genetic parent, a surrogate mother. It is not the necessarily same thing as being a biological parent.

Surrogacy in Australia

Legislation in each state of Australia except Northern Territory
Some federal laws are relevant eg. *Family Law Act 1975* (Cth)

The **only** kind of surrogacy that is legal in Australia is **altruistic surrogacy**. This means that no payment can be made or accepted other than for expenses such as:

- medical;
- travel; and
- accommodation costs.

An agreement for altruistic surrogacy **cannot** be legally enforced.

Commercial surrogacy is a surrogacy arrangement that includes payment other than for expenses incurred. It is illegal under Australian law to enter into a commercial surrogacy arrangement even if that occurs overseas. The maximum penalty for entering into, or offering to enter into, a commercial surrogacy arrangement, is a fine of \$110,000 and/or imprisonment for two years.

It is also an offense to publish **advertising** about surrogacy, unless you are advertising about altruistic surrogacy and you **do not pay** for the advertisement. The maximum penalty for paying to advertise an altruistic surrogacy arrangement is a fine of \$11,000. Paying to advertise for a commercial surrogacy arrangement will constitute offering to enter into a commercial surrogacy arrangement and is subject to the maximum penalty of \$110,000 and/or imprisonment for two years.

The Surrogacy Act 2010 (NSW)

The *Surrogacy Act 2010* (NSW) creates a process for transferring legal parentage from the surrogate mother (and her partner if she has one) to the intended parents by an application for a parentage order, and sets out the requirements that must be met in order to obtain a parentage order.

A parentage order can only be made where there was a ‘pre-conception’ surrogacy arrangement, not an agreement made after the birth mother is pregnant.

If the parentage order is made the intended parents will be recognised as the child’s legal parents.

Legal Parents

Legal parents are the people who have all the legal responsibilities and entitlements for the child. It’s also a permanent relationship that continues past childhood, as compared with parental responsibility, which gives a person (who could be an aunt or uncle or an older sibling) all the decision-making responsibilities while the child is under 18 y.o., but doesn’t make them a parent.



In NSW, when an altruistic surrogacy arrangement is entered into, the surrogate and their partner (married or de facto) are presumed to be the legal parents of the child. This will be the case even where the child does not have the DNA of the surrogate couple. The intended parents will not have parental responsibility for the child and cannot legally make decisions about the child.

If a parentage order is made, the intended couple or individual will be recognised as the child's legal parent/s and have parental responsibility for the child. The child will no longer be the legal child of the birth parent/s. The child's birth certificate can be amended to reflect the intended couple's parental status.

Post-birth transfer vs pre-birth transfer

Australia has a post-birth transfer system, outlined above. Some jurisdictions abroad have a pre-birth contractual model of surrogacy in which the surrogate mother enters into a legal contract with the intending parents, which can later be enforced by a court. The Australian model allows for such factors as:

- Surrogate's right to manage her pregnancy and birth process
- Change of mind
- Scrutiny of the parties consent, which must be informed and continuing
- Assessment of the best interests of the child after the child actually exists

It avoids problems such as the intended parents making medical decisions during the pregnancy (such as screenings or terminations), or caesarean sections being scheduled to suit the travel arrangements of intended parents.

How parentage is transferred

Intended parents apply to the Supreme Court of NSW for a parentage order, which transfers parental responsibility to the intended couple or individual.

Application for the parentage order must be made between 30 days and six months after the child's birth.

If the Supreme Court refuses to make a parentage order, the intending parents have a **right of appeal** to the NSW Court of Appeals.

Preconditions for parentage transfer

There are numerous **mandatory conditions** that must be met before the court will grant a parentage order. They cannot be waived by the court. They are:

- Best interests of child are paramount
- Surrogacy arrangement must be altruistic
- Pre-conception surrogacy arrangement
- Intended parent/s must be single person or member of a couple
- Birth mother must be at least 18
- Intended parents must be at least 18 years

There are also **non-mandatory conditions**. A parentage order can be granted if a non-mandatory condition has not been met but only in **exceptional circumstances**. They are:

- Medical or social need for surrogacy
- Consent of all parties
- Intended parents must reside in NSW
- Child living with intended parents



- Birth mother must be at least 25
- Intended parents must be at least 25 years or demonstrate maturity

- Surrogacy arrangement in writing
- Counselling has been obtained
- Legal advice has been obtained
- Information must be provided for inclusion in central register
- Birth of child registered

Counselling

Each of the parties must have received counselling about the social and psychological implications of the surrogacy arrangement (This is a precondition). In addition, the surrogate and their partner (if any) must receive further counselling after the child's birth and before consenting to the parentage order.

The application must be supported by a report prepared by an independent counsellor on whether the proposed parentage order is in the best interests of the child and provide reasons for that opinion. The report must be by a separate counsellor from the one who counselled any of the parties to meet a precondition. And they can't be connected with a medical practitioner involved in the child's conception.

A report by an independent counsellor must be filed containing the counsellor's assessment of:

- Each party's understanding of the implications of the making of a parentage order;
- Each party's understanding of the principle that openness and honesty about a child's birth parentage is in the best interests of the child;
- The care arrangements proposed by the intended parents in relation to the child;
- Any contact arrangements proposed in relation to the child and their birth parents;
- The parenting capacity of the intended couple or individual; and
- Whether any consent given by the birth parents is informed consent, freely and voluntarily given.]

Legal Advice

Legal advice must be obtained by the surrogate (and partner) and the intended parents. They must obtain separate advice from two separate, independent lawyers.

An affidavit sworn by each of the legal practitioners who gave advice must accompany an application for a parentage order. Each affidavit must include:

- The name of the affected party to whom the advice was given;
- The role of the affected party;
- The date the advice was given;
- A statement that independent legal advice was given to that person; and
- The practitioner's belief that the person appeared to understand the legal advice given.

What if the surrogate doesn't consent?

Because surrogacy arrangements are not legally enforceable, a birth parent cannot be forced to surrender a child to an intended couple or individual.

If that happens, the only option available to the intended parents would be to apply to the Family Law Courts for parenting orders as a person with an interest in the care, welfare and development of the child. The intended parents may be able to obtain parenting orders for parental responsibility or shared parental responsibility for a child, or that the child is to live with, spend time with or communicate with them.



When determining what parenting orders to make, a court's paramount consideration is the best interests of the child. The *Family Law Act* provides that a primary consideration of a court must be the benefit to a child of having a meaningful relationship with both of their legal parents. However, a court is also required to consider the nature of a child's relationship with a non-parent, and the capacity of a non-parent to provide for the needs of the child.

Realistically, the extent of the time the court will order is likely to largely depend upon whether or not there is a biological relationship between the intended parents and the child.

International commercial surrogacy

Despite laws in several states criminalising commercial surrogacy, it hasn't stopped many Australians from going overseas and engaging in paid surrogacy arrangements.

In the last couple of years there have been numerous cases involving commercial surrogacy arrangements meaning the parties have not been able to rely on parentage transfer provisions in state legislation. The applications to the Family Law Courts have sought orders for parental responsibility and in many cases the applicants were clear that they were seeking family law orders in order to assist them in immigration applications because the surrogacy arrangements had taken place overseas.

Family Law Courts have struggled with the position they find themselves in: on the one hand having to decide what is in the best interests of a child who may end up as a stateless orphan if the orders sought are not made and on the other, a clear policy position from parliaments across the country against commercial surrogacy. Ultimately Judges have to **prioritise best interests of the child**. This usually means awarding parental responsibility to the intended parents.

Case example

Dennis & Pradchaphet [2011] FamCA 123,
Dudley & Chedi [2011] FamCA 502

- 2 eggs provided by anonymous donors
- Intended father's sperm
- Implanted in 2 surrogate mothers in Thailand
- 3 children born on the same day to 2 different surrogate mothers

Dennis & Pradchaphet was heard by Stevenson J. She made orders for the applicants to have equal shared parental responsibility and for the child to live with them.

As Mr Dennis and the child had undergone DNA testing she was satisfied that he was the biological father of the child. This, together with the fact that he was named on the Thai birth certificate was enough to satisfy her that he was a "parent". However, she explicitly stated that this finding was 'to have no wider implications'.

Dudley & Chedi was heard by Watts J. This application concerned the twins.

At that time under Queensland law it was illegal for Queensland residents to engage in surrogacy arrangements.

Watts J commented on the deficiency of the material before him, which lacked details about the nature of the surrogacy arrangement and the financial arrangements. He had no evidence as to what, if any, safeguards were in place to protect the surrogate mother. He noted that the new *Surrogacy Act 2010* (Qld) put in place protections around the surrogacy process.



He noted that Stevenson J had made orders that the biological father was a 'parent', however, Watts J declined to make a finding that the male applicant was the father.

Watts J found that it was in the children's best interests to make the orders sought, as the children needed to be cared for by someone and the evidence was that the applicants would do so very well. However, he also referred the matter to the Queensland Director of Public Prosecutions for consideration of whether a prosecution should be instituted against the applicants under s 3 *Surrogate Parenthood Act 1988* (Qld).

It is significant that the two judges took such different courses when the evidence before them is likely to have been the same, given the same law firm prepared both applications.

It's now more settled that the intended father cannot be declared a parent.



Family Law Rules 2004

Division 4.2.8--Children born under surrogacy arrangements

- [4.32.](#) Application of Division 4.2.8
- [4.33.](#) Evidence supporting application--general
- [4.34.](#) Evidence from applicant and surrogate mother
- [4.35.](#) Evidence about child's identity
- [4.36.](#) Evidence about relevant law in child's birth country
- [4.37.](#) Procedure on first hearing date

Parliamentary inquiry

The House of Representatives Standing Committee on Social Policy and Legal Affairs will inquire and report into the regulatory and legislative aspects of international and domestic surrogacy arrangements, with a focus on:

1. the role and responsibility of states and territories to regulate surrogacy, both international and domestic, and differences in existing legislative arrangements
2. medical and welfare aspects for all parties involved, including regulatory requirements for intending parents and the role of health care providers, welfare services and other service providers
3. issues arising regarding informed consent, exploitation, compensatory payments, rights and protections for all parties involved, including children
4. relevant Commonwealth laws, policies and practices (including family law, immigration, citizenship, passports, child support and privacy) and improvements that could be made to enable the Commonwealth to respond appropriately to this issue (including consistency between laws where appropriate and desirable) to better protect children and others affected by such arrangements
5. Australia's international obligations
6. the adequacy of the information currently available to interested parties to surrogacy arrangements (including the child) on risks, rights and protections
7. information sharing between the Commonwealth and states and territories, and the laws, policies and practices of other countries that impact upon international surrogacy, particularly those relating to immigration and citizenship.

Resources

- Inner City Legal Centre, *Talking Turkey*: www.iclc.org.au/talking-turkey/
- Family Law Council, *Report on Parentage and the Family Law Act (2013)*
- Previous Ask LOIS webinars:
 - Same-sex relationships and family law
 - Changing children's names & legal issues around birth certificates