Surrogacy and in Vitro Fertilisation

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Introduction

Altruistic surrogacy arrangements are lawful in Queensland according to the *Surrogacy Act 2010* (Qld) (Surrogacy Act). Commercial surrogacy, where a payment or other material benefit is made for entering into a surrogacy arrangement, remains unlawful (s 56 Surrogacy Act). This is the case whether the commercial surrogacy arrangement is made within Queensland or in another jurisdiction including an overseas jurisdiction (s 54 Surrogacy Act). The paramount guiding principle underpinning the Surrogacy Act is that of the wellbeing and best interests of a child born as a result of surrogacy.

The procedures of artificial insemination or in vitro fertilisation (IVF) in Queensland and the presumptions of parentage as a result are set out in the *Status of Children Act 1978* (Qld). These provisions apply to married couples, a man and a woman living in a genuine domestic relationship and female same-sex de facto couples.

Altruistic Surrogacy

The Surrogacy Act allows a single person (male or female) or a couple (heterosexual or same sex) to enter into an agreement with a woman (the birth mother) and her partner (if she has one) to become pregnant with the intention that the child will be relinquished to the intended parent(s).

For the purposes of the Surrogacy Act, it does not matter how the child is conceived or if the child is genetically related to the parties. There are no restrictions placed on the birth mother in terms of how she manages her pregnancy. Although she cannot profit from the surrogacy arrangement, the birth mother is entitled to the reimbursement of the surrogacy costs (outlined in s 11 of the Surrogacy Act). These include for example:

- reasonable medical costs related to the pregnancy and birth of the child
- counselling and legal costs associated with the surrogacy arrangement
- actual lost earnings because of leave taken during pregnancy or following birth
- reasonable travel expenses incurred.

The surrogacy arrangement is not legally enforceable; however, obligations to pay a birth mother's surrogacy costs are enforceable unless she chooses not to relinquish the child to the intending parents.

Persons who engage in commercial surrogacy arrangements may be liable to a fine and/or imprisonment.

Surrogacy Parentage Orders

At law, the birth mother and her partner, if she has one, are the legal parents of the child. The Surrogacy Act provides a mechanism for transferring parentage so the intended parents become legally recognised as parents of the child born as a result of the surrogacy arrangement. Under the legislation, a parentage order may be sought from the court with the consent of all parties. The effect of a parentage order is that the child becomes a child of the intended parent(s) and parentage of the child is removed from the birth parent(s).

The intended parent(s) may apply to the Childrens Court for a parentage order once the child is between 28 days and 6 months old, or at a later time with the court's leave (s 21(1) Surrogacy Act). The child must:

- be residing with the intended parent(s)
- have been residing with the intended parent(s) for 28 days prior to the application being made
- be residing with the intended parent(s) at the time of the hearing (s 22 Surrogacy Act).

To grant a parentage order, the court must be satisfied that the order will be for the wellbeing and in the best interests of the child (see s 22 of the Surrogacy Act for a list of matters of which the court must be satisfied before a parentage order may be made). As part of the application, sworn affidavits from all the parties, legal advisors, medical practitioners and counsellors demonstrating that the requirements of the Surrogacy Act have been satisfied, must be provided to the court (ss 25–31 Surrogacy Act). In addition, a surrogacy guidance report must be provided by an independent counsellor who interviews the parties for the purposes of the application (s 32 Surrogacy Act). The counsellor must form an opinion about the parties' understanding of the implications of the proposed parentage order and, having regard to the care arrangements proposed, whether the order would be for the wellbeing and in the best interests of the child.

If any of the requirements outlined in s 22 of the Surrogacy Act cannot be satisfied because, for example, the surrogacy arrangement is commercial, the court cannot make a parentage order. In such cases, the intended parents may seek a parenting order under the *Family Law Act 1975* (Cth). While a parenting order may confer parental responsibility on the intended parents, it does not transfer parentage.

There have been a number of cases involving surrogacy arrangements where the Family Court has made parenting orders in favour of intended parents. For some examples see *Fisher-Oakley v Kittur* [2014] FamCA 123, *Ellison and Anor & Karnchanit* [2012] FamCA 602 or *Dennis and Anor & Pradchaphet* [2011] FamCA 123.

In Ellison and Anor & Karnchanit, the court made parental responsibility orders for twins born as a result of a commercial surrogacy arrangement in Thailand. The surrogacy arrangement was illegal under Queensland legislation at the time as it would be under the current legislation (s 56 Surrogacy Act). The applicant intended parents were potentially liable to prosecution and imprisonment for up to three years. The court had to balance the illegality of the commercial surrogacy arrangement and the welfare of the children which would not be met if their parents were imprisoned. In the course of her judgment, Her Honour Justice Ryan noted the potential emotional and psychological harm the applicants' imprisonment would have upon the children. While the orders sought by the applicants were granted, the case illustrates the difficulties potentially faced by intended parents who enter into commercial surrogacy arrangements and the competing interests the court must address.

The legislation provides that applications can be made for an order to discharge a parentage order if:

- the order was obtained by fraud, duress or other improper means

- any consent provided was not given or given for commercial gain (other than the birth mother's surrogacy costs)
- there is an exceptional reason for a discharge order to be made (pt 4 Surrogacy Act).

Rights of appeal are dealt with under pt 5 of the Surrogacy Act and any issues relating to privacy under pt 6.

In Vitro Fertilisation—Liabilities and Rights of Parents

When married couples, a man and a woman living in a genuine domestic relationship, and female same-sex de facto couples consent to artificial insemination or IVF procedures, they are presumed to be the parents of children born as a result of those procedures, regardless of the source of the ovum or semen that created the embryo.

Section 21 of the *Status of Children Act 1978* (Qld) provides that where a de facto or married woman, or a woman in a same-sex relationship, gives birth as a result of using artificial insemination without the consent of her partner, the donor of the semen used has no rights or liabilities in relation to the child born as a result of that procedure. This exclusion of liabilities and rights also applies to a man donating semen to a single woman. The man would have a father's rights or liabilities only if he later married the mother.

In Vitro Fertilisation Disputes

If the procedure is being carried out through a clinic, privacy protections that are in place for donors would make it unlikely that a dispute would arise between a donor and the parent. However, in England in 2002, the wrong embryos were implanted in a woman (which became known at birth because of the racial descent of the children), and both the donor and birth parent claimed parental rights. The English court held that the donor was the legal father, but that the couple could have custody of the children. Cases that have appeared before the courts over the questions of who are the legal parents of a child or who should have parental responsibility for a child demonstrate that the best interests of the child is the paramount consideration.

There has also been a trend towards children of donated ova and semen seeking information about their biological parents. In this regard, legislative presumptions as to parenthood may need to be reconsidered in light of the technology. The National Health and Medical Research Council's *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research* (ART guidelines) require clinics to keep appropriate records of the use of donated gametes (ova and sperm) and embryos. This is intended to facilitate the exchange of information between ova and sperm donors, recipients and persons conceived as a result of donated gametes and embryos.

Fertility clinics in Queensland can (but are not required to) refuse to provide assisted reproductive technology services based on the relationship status or sexuality of those seeking such services. The *Anti-Discrimination Act 1991* (Qld) does not apply to assisted reproductive technology services. Such discrimination is not permitted in other states.

Collection and Use of Gametes

Further difficult questions arise regarding the collection and use of gametes, the selection of embryos based on genetic characteristics and guardianship of embryos being held for future IVF procedures.

Since 2000, there have been a number of Supreme Court cases concerning attempts by a living spouse to harvest and store gametes from a recently deceased spouse for later use in IVF procedures. These cases have had conflicting results, and no clear principles have been decided on this issue. It may be possible for a man who is critically or terminally ill to have his sperm stored so that his partner can later use it in an IVF procedure. But, according to the National Health and Medical Research Council's ART guidelines, a clinic can only agree to this process where the man has given clearly expressed and witnessed directions consenting to the use of his sperm, the prospective mother has received counselling about the consequences of such use, and the use does not diminish the fulfilment of the right of any child who may be born to knowledge of their biological parents.

A man who is suffering from cancer, who receives intensive treatment that may consequently damage his testicles or his ability to reproduce, may be able to have his sperm stored indefinitely before undertaking radiation treatment; but its use for fertility treatment at a later date needs to be the subject of clear, written directions. For example, in circumstances where a man dies suddenly or has been in an unconscious state for a period of time prior to dying, and has not provided such directions, the ART guidelines suggest that his gametes should not be used in an attempt to achieve a pregnancy. Nevertheless, there have been a number of recent decisions from other Australian jurisdictions that have adopted a wide interpretation of the term 'clearly expressed and witnessed directions', enabling the posthumous use of the gametes in circumstances where the deceased had, prior to death, indicated an intention to start a family (see *RE H, AE (No 3)* [2013] SASC 196).

In Vitro Fertilisation—Other Legal Issues

Pre-implantation genetic diagnosis

Other legal issues can arise as a result of using assisted reproductive technology services. The law currently permits a couple with numerous embryos to have them screened for certain genetic disorders. This screening process is known as pre-implantation genetic diagnosis (PGD). This diagnosis is technically available to facilitate sex selection of embryos, meaning that people could choose for a woman to be implanted with male or female embryos for reasons of family balancing. Australian IVF providers are extremely unlikely to provide such a service, based on the fact that the National Health and Medical Research Council's ART guidelines prohibit this practice except in cases of serious genetic gender-linked conditions. To some extent, this may have contributed to fertility tourism, where people travel to other countries where PGD for non-medical sex selection is performed.

Ownership of embryos after separation

Disputes sometimes arise about the ownership of frozen embryos where a couple either separate or divorce. Usually, an agreement would have been made about the future use of the embryos, where the couple determine what should be done with embryos in such situations. Clinics are required to ask

participants to stipulate, at the time they give consent to assisted reproductive treatments, what should be done with frozen embryos should the couple separate.

In most cases, the frozen embryos cannot be used for reproductive purposes unless both partners agree. This is reinforced by the ART guidelines that state that consent should be provided by all parties involved, for each procedure. However, cases have arisen in other countries where women have sought to use embryos that were created with a partner's sperm, following the couple's separation and where the former partner withdraws consent. In one English case, frozen embryos were created with the former male partner's sperm, and the use of those embryos represented the woman's only remaining opportunity to have her own biologically related child. This argument was not successful in persuading the court to give the woman permission to use the frozen embryo(s) in an IVF procedure.

Legal Notices

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