



DISCUSSION PAPER

SURROGACY IN
TASMANIA:
A LEGAL
PERSPECTIVE

83 Davey Street
Hobart Tasmania Australia 7000
GPO Box 405
Hobart Tasmania Australia 7001

Phone 03 6223 8955
Facsimile 03 6234 9640
Email info@abetzcurtis.com.au
Web www.abetzcurtis.com.au



It is vital that you seek independent legal advice prior to reaching any agreement in relation to surrogacy.

1. BACKGROUND

- 1.1. Prior to the introduction of the *Surrogacy Act 2012* ('Act') in 2012, surrogacy was not legal in Tasmania.¹
- 1.2. However, changing attitudes and needs within society² presented an opportunity for the State Government to pass legislation (i.e. the Act) to ensure that where parties entered into a surrogacy arrangement, they would do so fully informed and with the benefit of considerable legal and psychological support. Other features of the legislation include:
 - (a) prohibition on commercial surrogacy;
 - (b) requirement for parentage orders, thus completing the surrogacy; and
 - (c) ensuring that the best interests of the child or children must be met.
- 1.3. The introduction of the Act has also brought Tasmania into line with Victoria, New South Wales, Queensland, Western Australia, South Australia and the ACT.
- 1.4. The first surrogacy arrangement in Tasmania was successfully completed in early 2015.³

2. WHAT IS A SURROGACY?

- 2.1. The Act defines a *surrogacy arrangement* as an arrangement for:⁴
 - (a) a female person (the '**birth mother**') to seek to become pregnant and give birth to a child; and
 - (b) the child to be treated as the child of a person or persons other than the birth mother (the '**intended parent**' or '**intended parents**').

¹ The *Surrogacy Contracts Act 1993* (Tas) prescribed that "*a person must not make or receive, or agree to make or receive, a payment or reward in relation to a surrogacy contract*". As for altruistic surrogacy, a birth mother was the mother of a child even if the child was not biologically hers, so in order to complete a surrogacy arrangement, the child would need to be adopted and "private adoption arrangements" were prohibited at law.

² Including the wider acceptance of same-sex and single parent families, and the development of assisted reproductive technologies.

³<http://www.abc.net.au/news/2015-03-29/parents-of-tasmania27s-first-surrogate-baby-call-for-more-sup/6355392>

⁴ s 5(1)(a)-(b), Act.



- 2.2. Whilst legislation prohibits commercial surrogacy⁵ in all states and territories of Australia⁶, the Act now enables altruistic surrogacy in Tasmania. This means that people who previously have not been able to carry a child, can now enter into an arrangement with another party in Tasmania to carry their baby. Legal parentage of that child is then transferred from the birth mother, to the intended parent or parents.
- 2.3. The Act does not discriminate in relation to the intended parent or parents, which means they are not be restricted based on their marital status, gender or sexual orientation.

3. IS A SURROGACY ARRANGEMENT ENFORCEABLE?

- 3.1. NO, a surrogacy arrangement made pursuant to the Act, is not enforceable.⁷
- 3.2. This means the birth mother is not compelled at law to “give up” the child if she decides she wants to keep it, despite a surrogacy arrangement being entered into by the parties in accordance with the Act.

4. ARE THE COSTS OF A SURROGACY ARRANGEMENT ENFORCEABLE?

- 4.1. YES, the obligation to pay or reimburse the birth parent’s surrogacy costs under a surrogacy arrangement is enforceable but only in the following situations:
 - (a) the birth mother has tried to become pregnant for the purposes of the surrogacy arrangement, but no child is born as a result of the surrogacy arrangement;
 - (b) the birth mother has become pregnant for the purposes of the surrogacy arrangement but the pregnancy ceases for a *relevant reason*;⁸
 - (c) a child is born as a result of the surrogacy arrangement – though there is an exception to this:

⁵ Commercial surrogacy is surrogacy for payment, and can be enforced under contract law.

⁶ The common law still regulates surrogacy arrangements in the Northern Territory. This means that whilst commercial surrogacy is not outlawed, parties to an arrangement need to be aware that in circumstances where a party wishes to back out of a commercial arrangement, the other party cannot have it enforced by the courts. Also, IVF clinics would refuse clients in a commercial arrangement.

⁷ See: s. 10(1), Act.

⁸ The Act, s. 10(3) prescribes that a birth mother’s pregnancy ceases for a ‘relevant reason’ only if: the pregnancy has miscarried; terminated because the child was likely to be affected by a genetic condition or genetic disorder, or unlikely to survive the pregnancy or its birth, or the health of the child was likely to be significantly affected by the pregnancy or birth.



- (i) parentage orders are made, despite the birth parent or birth parents not consenting to the making of those parentage orders;⁹ or
 - (ii) parentage orders are not made, and this will remain the case unless the birth parent or birth parents consent.¹⁰
- (d) a child is born as a result of the surrogacy arrangement and:
- (i) no intended parent has made an application for parentage orders¹¹ in relation to the child within 6 months after the child is born;
 - (ii) all applications made for parentage orders in relation to the child have been withdrawn;
 - (iii) no intended parent consents to the making of a parentage order in respect of the child.

4.2. Please note that Medicare does not reimburse the cost of IVF for surrogacy.

5. WHAT IS THE LEGAL PROCESS?

5.1. The relevant steps are as follows:

- (a) **Step 1:** the intended parent or parents, and birth mother (and birth mother's spouse, if any), should each seek independent legal advice before any arrangement is reached in relation to surrogacy.
- (b) **Step 2:** the parties should then seek counselling from a counsellor accredited in surrogacy matters.¹²
- (c) **Step 3:** Once the counselling is complete, the parties should instruct their lawyers to draft a surrogacy agreement.
- (d) **Step 4:** The parties apply to the Court for a parentage order, which will name the intended parent or parents as the legal parents. This application must be made not less

⁹ See: s. 10(2)(c)(i), Act. Furthermore, it is relevant to note that s. 16(4)(c)(i) of the Act prescribes that the Court does not require the consent of the birth parent or birth parents to make a parentage order in the circumstances set out in s. 16(4) of the Act.

¹⁰ See: s. 10(2)(c)(ii), Act.

¹¹ See: s. 13 & s. 20, Act.

¹² http://www.justice.tas.gov.au/bdm/births/surrogacy/accredited_surrogacy_counsellors.



than 30 days and not more than 6 months after the birth of the child;¹³ or at a later date with leave from the Court, subject to certain conditions.¹⁴

- 5.2. The Court may make a parentage order in favour of the intended parent or parents only if it is satisfied as to all of the following matters:¹⁵
- (a) The parties sought legal advice and entered into a written, altruistic agreement;
 - (b) the intended parents are over 21 and the birth mother over 25 years old;
 - (c) the birth mother has previously given birth to a live child;
 - (d) all relevant parties sought counselling from an accredited counsellor;
 - (e) the parties have shown a medical or social need for the arrangement;
 - (f) all necessary parties have been served with the parentage order;
 - (g) the child is living with the intended parents;
 - (h) the intended parents are Tasmanian residents;
 - (i) all parties to the parentage order consent to the transfer of parentage; and,
 - (j) the transfer is in the best interests of the child.¹⁶
- 5.3. However, it should be noted that the Act prescribes that the Court may make a parentage order in circumstances where they are satisfied it is in the best interests of the child to do so.¹⁷
- 5.4. To “complete” the surrogacy, a child must be born and the Court must order the child’s parentage to be transferred from the birth parent or parents, to the intended parent or parents.¹⁸

¹³ See: s. 15(1)(a), Act.

¹⁴ The Act, s. 15(1)(c) prescribes that the Court must accept that there were exceptional circumstances behind the delay, and that granting leave is in the best interests of the child.

¹⁵ See: s. 16(2), Act.

¹⁶ See our paper ‘Parental rights and the Best Interests of the Child’, dated 20 June 2014 for a discussion on what the Australian courts have said best interests of the child means.

¹⁷ See: s. 16(3), Act.

¹⁸ See: s. 16, Act.



6. WHAT ARE THE NON-LEGAL REQUIREMENTS?

- 6.1. In addition to what is prescribed in the Act, the assisted reproductive technology provider may have other requirements that must be satisfied before the birth mother undergoes treatment, including internal policies and ethical limitations. **It is important that you make enquiries of your provider prior to the initial meeting with your lawyer.**

7. CLOSING COMMENTS

- 7.1. It is the intention of Parliament that all parties involved approach surrogacy and its effect on each (including extended families) having fully considered the social and psychological implications.
- 7.2. Before parties agree to a surrogacy arrangement, they should inform themselves of the financial costs, as well as become familiar with the legal process.
- 7.3. Where they plan to rely upon assisted reproductive technology, they should familiarise themselves with their chosen provider, who may not be in Tasmania; and the non-legal requirements of their chosen provider.
- 7.4. The providers in Tasmania are:
- (a) Tas IVF (www.tasivf.com.au), located in Hobart, Launceston and Devonport.
 - (b) Fertility Tasmania (<http://fertilitytasmania.com.au>), located in Hobart.

For further information in relation to the issues discussed in this paper, please contact Fiona Davis.

The contents of this publication, current at the date of publication set out above, are for reference purposes only. They do not constitute legal advice and should not be relied upon as such. Specific legal advice about your specific circumstances should always be sought separately before taking any action based on this publication.