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WHO'S MY DADDY AND WHY DO I HAVE TWO MUMMIES?

Negotiating the *Surrogacy Act 2010*

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Family Law Stream

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The Surrogacy Act commenced in Queensland on 1 June 2010, allowing non-commercial Surrogacy Agreements in Queensland for the first time. The Act allows male same-sex couples and eligible female same-sex couples, as well as singles and heterosexual couples, to become parents under surrogacy arrangements. But to what end?

The non-commercial model adopted in the legislation is based on trust and cooperation between birth parents and intended parents. As long as everyone gets along, the Act allows the parentage of the intended parents to be legally recognised.

However, most of the steps in the process are unenforceable by law. The process allows birth parents to keep a child of which there is no genetic relationship, and intended parents to change their mind after the child's birth for any reason including the child having a disability or health condition.

If everyone always "got along" then there would be no need for family law or family lawyers. Therefore an understanding of the process and the long list of what could go wrong is of critical significance to all parties and advisors involved.

By examining the surrogacy process set out in the legislation, this paper explores the requirements for the making of a Parentage Order for a child born under a surrogacy arrangement and the matters which lawyers will need to advise both birth parents and intended parents alike. The obligations on lawyers extend beyond the provisions of the Surrogacy Act and extend to understanding what might go wrong and what remedies under other laws such as the *Family Law Act* and in equity may be available if parties seek to enforce obligations under a Surrogacy Agreement that are specifically unenforceable under the Surrogacy Act itself.

WHO'S WHO?

As a starting point, it is helpful to understand the terminology used in the Act for describing various parties.

Birth Parents

The Birth Parents are the female who becomes pregnant under the surrogacy arrangement and her spouse (if any)[1].

Intended Parents

The Intended Parents are the couple (or a single person) who wish for the child carried by the Birth Mother to become their legal child after the birth pursuant to a surrogacy arrangement.

All Birth Parents and Intended Parents must be 25 years of age or older.

Intended Parents must also be either:

[1] s8 *Surrogacy Act 2010*

- A man and an eligible woman;
- Two men;
- Two eligible women;
- A single eligible woman; or
- A single man.

Intended Parents under a surrogacy arrangement must be able to show "medical or social need for the surrogacy arrangement". S14(1)(a) expressly states that there is a medical or social need for the surrogacy arrangement if there is one Intended Parent who is a single man or a single eligible woman. This means male Applicants do not need to demonstrate or lead evidence of not wanting to conceive a child naturally with a woman because of sexual preference.

"Eligible woman" means a woman who is unable to conceive. The definition also covers women that if able to conceive, are unlikely to be able to carry a child to term or survive without their health being significantly affected or is likely to be able to conceive the child who is unable to survive because, for example the child is affected by a genetic disorder[2].

PROCESS

Step 1 - Couples reach a decision to investigate surrogacy.

Presumably, most couples would only do this after receiving medical advice, including medical advice that the woman in a couple, or alternatively in the case of a female same sex couple, both women are eligible women under the Act. Presumably, they will reach this point after attempting artificial insemination, IVF or other assisted reproductive technologies.

Step 2 - Independent legal advice.

Both the Birth Mother and her spouse (if any) and the Intended Parent/s must receive separate independent legal advice **before** entering into a surrogacy arrangement.

Step 3 - Counselling.

Both the Birth Mother and her spouse (if any) and the other Intended Parent/s must receive counselling **before** entering into the surrogacy arrangement.

Step 4 – surrogacy arrangement

The Birth Mother and her spouse (if any) and the Intended Parent/s enter into a surrogacy arrangement which should be formalised in writing and signed by all parties after receiving separate independent legal advice and counselling. It is

[2] s14(2) *Surrogacy Act 2010*

unlawful for a person to enter into a commercial surrogacy arrangement where there is payment, reward or any other material benefit to any of the parties. However, the Birth Mother is entitled to be reimbursed or paid for her reasonable expenses associated with the surrogacy such as medical, legal and counselling costs.

Step 5 – Child is Conceived

There are no restrictions in the Act about how this should occur. Conception does not have to occur using medical intervention and therefore conception could occur by sexual intercourse between any of the parties of appropriate gender.

Parentage Orders can be made regardless or the origin of genetic material used to conceive the child. Therefore, arguably the Birth Parents could conceive a child naturally and that child could be genetically the child of both Birth Parents, but still become the child of the Intended Parents under a surrogacy arrangement.

Step 6 – Child

The child is born. The Birth Mother has the same rights to manage her pregnancy and the birth of any other pregnant woman[3]. After the birth, the Birth Mother and her spouse (if any) are legally parents of the child until a Parentage Order is made, deeming the Intended Parent/s the child's parent/s.

Step 7 – Registration of birth

The Birth Mother and her spouse (if any) are required to register the birth of the child and they will be the parents named in the Birth Certificate. The Birth Certificate can be changed after a Parentage Order is made in favour of the Intended Parent/s.

Step 8 - Surrogacy Guidance Report

Both the Birth Mother and her spouse (if any) and the Intended Parent/s must consult with a counsellor for the purpose of obtaining a Surrogacy Guidance Report which is required if making an Application for a Parentage Order. The counsellor who prepares the Surrogacy Guidance Report must be a different counsellor to the counsellor that the parties consulted prior to entering the surrogacy arrangement. The Surrogacy Guidance Report must address:

(a) the reasons the counsellor is an independent and appropriately qualified counsellor;

(b) that, for the application, the counsellor interviewed the Birth Mother, the Birth Mother's spouse (if any), another Birth Parent (if any) and the Applicant, or joint applicants, (the relevant persons);

(c) the date or dates of the interviews;

(d) the counsellor's opinion formed as a result of the interviews relevant to the application for a Parentage Order including, for example, about the following matters:

[3] s16 *Surrogacy Act 2010*

(i) each relevant person's understanding of:

(A) the social and psychological implications of the making of a Parentage Order on the child and relevant persons;

(B) openness and honesty about the child's Birth Parentage being for the wellbeing, and in the best interests, of the child;

(ii) the care arrangements that the Applicant, or joint Applicants, have proposed for the child;

(iii) whether the making of a Parentage Order would be for the wellbeing, and in the best interests, of the child.

Step 9 - Application for Parentage Order

The Intended Parent/s must make an Application for a Parentage Order between 28 days and six months after the child's birth. The child must have lived with the Intended Parent/s for at least 28 consecutive days prior to the making of the Application and the child must be living with the Intended Parent/s at the time of the Application and Hearing.

GRANTING OF A PARENTAGE ORDER

The Application for a Parentage Order is made to the Children's Court. If granted, the Intended Parent/s become the legal parent/s of the child and their details can be recorded on the child's Birth Certificate as parents of the child. Under s41D(3) of the *Registration of Births Deaths & Marriages Act 2003*, the Registrar must close the child's birth entry and record the new parentage entry and those details can only be accessed by the child once he or she reaches 18 years of age. A birth parent or an intended parent can access the information in the closed entry at any time and therefore the child could be provided with the information before they reach 18 years of age with the consent of a birth parent or an intended parent[4].

ONCE THE CHILD IS BORN

Unless and until a Parentage Order can be made, the parentage presumptions under the *Status of Children Act 1978* apply. That is, the Birth Mother and her spouse (if any) are presumed to be the parent/s of the child until a Parentage Order is made[5].

The Birth Parent/s must register the birth of the child and the Birth Mother and the Birth Mother's spouse (if any) will be registered as the child's parent until a Parentage Order is made.

An Application for a Parentage Order must be made not less than 28 days and not more than six months after the child's birth (unless leave of the Court is obtained)

[4] s44(13)(a),(b) and (c).
[5] s7 Surrogacy Act 2010

the child must have lived with the Intended Parent/s for at least 28 consecutive days and be living with the Intended Parent/s at the time of an Application for parentage and Hearing. Presumably, therefore children who are born in hospital will leave the hospital with the Intended Parent/s rather than the Birth Parent/s in most instances.

If there are two Intended Parents under the surrogacy arrangement, both must apply for a Parentage Order unless they are no longer a couple or one of them has died[6].

APPLICATION FOR PARENTAGE ORDER

The matters to which the Court must be satisfied before making a Parentage Order are set out in s22 of the Act. There are mandatory requirements and discretionary requirements. This is because s23 enables the Court to dispense with some of the formal requirements in s22 if there are exceptional circumstances for giving the dispensation and the dispensation will be for the wellbeing and in the best interests of the child. This is clearly intended to overcome technical non-compliance issues and to ensure a Parentage Order can still be made in the event all of the technical requirements in s22 are not met.

The mandatory requirements, that is the requirements that the Court cannot dispense with, are:

- that the proposed Order is for the wellbeing an in the best interests of the child – s22(a).
- the surrogacy arrangement was made with the consent of the Birth Mother, the Birth Mother's spouse (if any) and the Applicant, or joint Applicants – s22(e)(iii).
- the surrogacy arrangement was made before the child was conceived – s22(e)(iv).
- that the surrogacy arrangement is not a commercial arrangement – s22(e)(vi).

It is important to note that the surrogacy arrangement must be made before the child was conceived, but does not necessarily have to be in writing before the child was conceived. This is because the requirement that the surrogacy arrangement be in writing is set out in paragraph 22(2)(e)(v), which is a requirement that the Court can dispense with if it is satisfied there are exceptional circumstances and the dispensation will be for the wellbeing and in the best interest of the child.

In Queensland's first surrogacy case *BLH & MH v SJW & MW* [2010] QDC 439, the parties had entered into an oral Surrogacy Agreement before the commencement of the *Surrogacy Act*, but in contemplation of the commencement of the Act. They did not have a written agreement prior to conception but all signed a written Surrogacy Agreement after the birth of the child, Connor. Irwin DCJ dispensed with a number of technical requirements, including the requirement under s22(2)(e)(v) that the Surrogacy Agreement is in writing and signed by the Birth Mother, the Birth Mother's spouse and the Applicant or joint Applicants. This sub-section combined with

[6] s21(4) & (5) *Surrogacy Act 2010*

22(2)(e)(iv) (that the surrogacy arrangement was made before the child was conceived) usually means that written Surrogacy Agreements are required prior to the conception of the child.

- the discretionary requirements are:
    - 22(2)(b) the child has resided with the Applicant or joint Applicants for at least 28 consecutive days before the day the Application was made and is residing with the Applicant or joint Applicants when the Application is made and at the time of the Hearing.
    - 22(2)(c) the Applicant or joint Applicants are entitled to apply under s21 (i.e. the Application has been made between 28 days and 6 months after the birth of the child, the Application is made jointly by the Intended Parents if they are a couple, or by one Intended Parent if they are no longer a couple, or if one of them has died).
    - 22(2)(d) there is evidence of medical or social need for the Surrogacy Agreement – this is the requirement that parties be able to satisfy the provisions of s14 namely that if there is one Intended Parent, that parent is either a man or an eligible woman or alternatively if there are two Intended Parents, that the couple is either a man and an eligible woman, two men or two eligible women. The definition of eligible women is set out as above, unable to give birth, unable to survive pregnancy, likely to have health significantly affected by pregnancy, if likely to conceive a child be affected by a genetic condition or unlikely to survive the pregnancy or birth or the child's health is likely to be significantly affected by the pregnancy or birth.
    - 22(2)(e)(i) the Surrogacy Agreement was made after both the Birth Parents (either jointly or separately) and the Applicants (either jointly or separately) obtained independent legal advice about the surrogacy arrangements and its implications.
    - 22(2)(e)(ii) the surrogacy arrangement was made after the Birth Mother, the Birth Mother's spouse, the Applicant or joint Applicants obtain counselling from an appropriately qualified counsellor about the surrogacy arrangement and its social and psychological implications. An appropriately qualified counsellor is defined in s19 and essentially means a counsellor with appropriate experience who is a member of various recognised professional bodies of Psychologists, Psychiatrists and Social Workers in Australia set out in 19(a)(i).
    - 22(2)(e)(v) The surrogacy arrangement is in writing and is signed by the Birth Mother, the Birth Mother's spouse, the Applicant or joint Applicants.
    - 22(2)(g) the Applicant or each of the joint Applicants were at least 25 years old and are resident in Queensland.
    - 22(2)(i) a Surrogacy Guidance Report under s32 supports the making of the proposed Order. A Surrogacy Guidance Report is a report to be prepared by an appropriately qualified Counsellor (who must be a different counsellor than

any counsellor who provided initial counselling to either the Birth Parents or Intended Parents) and which must address the matters in s32(1) namely:

(a) The reason the Counsellor is an independent and appropriately qualified Counsellor.

(b) That for the Application, the Counsellor interviewed the Birth Mother, the Birth Mother's spouse, another Birth Parent (if any) and the Applicant or joint Applicants ("the relevant persons").

(c) The date or dates of the interviews.

(d) The Counsellor's opinion formed as a result of the interviews relevant to the Application for a Parentage Order, including, for example, about the following matters:

(i) Each relevant persons understanding of:

A. The social and psychological implications of the making of the Parentage Order on the child and relevant persons.

B. Openness and honesty about the child's birth parentage being for the wellbeing and in the best interest of the child.

(ii) The care arrangements that the Applicant or joint Applicants have for the proposed child.

(iii) Whether the making of the Parentage Order would be for the wellbeing, and in the best interests of the child.

- S22(2)(h) the Birth Mother, the Birth Mother's spouse (if any), another Birth Parent (if any) and the Applicant or joint Applicants consent to the making of the Parentage Order at the time of the Hearing.

  22(2)(h) is a little unusual, as it is not a mandatory requirement of s22 in that it can be waived, but it is also different to the other mandatory requirements in that there are special rules for how it can be waived.

  This requirement can only be waived if s23(2) applies. The discretion of the Court as to whether there are exceptional circumstances (such that the Court should exercise its discretion to waive compliance with s22(2)(h)) is materially limited. The Court can only dispense with the requirement under s22(2)(h) for a person to consent to the making of the parenting order if the person has died or is not a person with capacity to give consent or an Applicant cannot locate the person after making all reasonable enquires.

This is an interesting provision because the section requires the consent of all parties. Therefore, in the event that Intended Parents separate between the making of the Surrogacy Agreement and the making of the Parentage Order, one Intended Parent's consent would be sufficient and the Parentage Order could be

made. Arguably however both (now separated) intended parents could apply separately for Parentage of the same child.

The same barrier does not arise when a Birth Mother separates and re-partners during the pregnancy. The consent of the new partner is not required as the Birth Mother's spouse is defined in s8(2) to be the spouse of the Birth Mother at the time the surrogacy arrangement was entered into. However, s22(2)(h) would still require the (now) ex-spouse's consent before the Court could make a Parentage Order as that partner is the child's parent under the parenting presumptions in the *Status of Children Act 1978.*

MULITPLE BIRTHS

If there are multiple births, s24 requires that the same Parentage Order be made about all of the children, i.e. different Parentage Orders cannot be made about different twins, triplets or other multiples.

DOCUMENTS TO BE FILED WITH APPLICATION FOR PARENTAGE ORDER

The documents to be produced to the Court in support of an Application for a Parentage Order are lengthy. There are essentially eight Affidavits to be sworn by:

(a) The Applicants (s25(1)(c)) with the content of that Affidavit to include the matters set out in s26.

(b) The Birth Mother (s25(1)(d)) with the content of that Affidavit to include the matters set out in s27.

(c) The Birth Mother's spouse (s25(1)(e)) with the content of that Affidavit to include the matters set out in s28.

(d) Another Birth Parent, if any (s25(1)(f)) with the content of that Affidavit to include the matters set out in s29.

(e) For each of the joint Applicants, Birth Mother and Birth Mother's spouse, an Affidavit to be sworn by the lawyer who gave legal advice to the person before the Surrogacy Agreement was made (s25(1)(g)) with the matters to be covered in that Affidavit set out in s30.

(f) The Counsellor who gave counselling to the Birth Mother, the Birth Mother's spouse and Applicant or joint Applicants before the surrogacy arrangement was made (s25(1)(h)) with the content of that Affidavit to include the matters set out in s31.

(g) The Counsellor who prepared the Surrogacy Guidance Report verifying the report (s25(1)(i)).

(h) For each Applicant who is a woman, an Affidavit from an appropriately qualified medical practitioner verifying a report prepared by that medal practitioner as to why that Applicant is an eligible woman (s25(1)(j)).

It is acceptable that the Birth Parents provide a joint Affidavit provided that it satisfies the requirements in s27 to s29 (which are the requirements as to what should be set out in the Affidavit).

It is also acceptable for a lawyer to swear one Affidavit for giving legal advice to both Birth Parents or both Intended Parents provided that that advice was given jointly. The Birth Parents and Intended Parents must receive separate advice.

Also, if the same Counsellor provided counselling to all parties before the Surrogacy Agreement was entered into, they can swear one Affidavit for all parties, although if the parties had attended separate counsellors, separate Affidavits are needed.

DISCHARGING A PARENTAGE ORDER

The Parentage Order can be discharged if:

- the Parentage Order was obtained by fraud, duress or other improper means; or
- consent for the Order was not given or was given for payment, reward or other material benefit or disadvantage (other than the Birth Mother's surrogacy costs); or
- there is an exceptional reason why the Parentage Order should be discharged.

It seems that the job of policing whether Intended Parents and Birth Parents in fact enter into commercial Surrogacy Agreements and is left to the Attorney General. A A Discharge Order can be sought by an "interested person" which is defined in s45 of the Act as the child, if the child is over 18 years or more, each of the child's Birth Parents and Intended Parents or the Attorney General. Presumably, if the Birth Parents and Intended Parents had in fact reached an agreement that there will be a commercial element to the Surrogacy Agreement, they will not be bringing an Application to discharge a Parentage Order. It seems therefore that the only third party in the transaction (assuming the child is under 18 years of age) will be the Attorney General.

Applications to discharge Parenting Orders must be served on the Attorney General[7]. The child must also be served if the Court considers it is appropriate having regard to the age of the child.

Similarly, presumably the only party that will be asserting that a Parentage Order was obtained by fraud, duress or other improper means would be the Birth Parents seeking to discharge a Parenting Order for change of mind reasons after the Parentage Order was made.

[7] s46(3) Surrogacy Act 2010

PROVIDING ADVICE

- The first point of call for a lawyer providing advice under a surrogacy arrangement is to consider the matters in s30 which are the matters the lawyer will have to depose to in the event an Application for a Parentage Order is made after the conception of a child under a surrogacy arrangement.

- The lawyer must state the following:

  (a) separate and independent legal advice was given to the person before the surrogacy arrangement was made; and

  (b) the legal advice included advice about the following matters:

    (i) the unenforceable nature of the arrangement, other than as provided under s15;

    (ii) the person's legal obligations under the arrangement and this Act;

    (iii) the legal implications if the Birth Mother does not relinquish the child, including whether child support would be payable by the child's biological father under the *Child Support (Assessment) Act 1989* (Cth);

    (iv) the legal implications if, after the birth of the child, the Intended Parents do not want to be permanently responsible for the child's custody and guardianship;

    (v) the legal implications if, after the birth of the child, the Birth Mother, the Birth Mother's spouse (if any), another Birth Parent (if any) and the Intended Parents do not want to be permanently responsible for the child's custody and guardianship;

    (vi) the legal implications of the making of a Parentage Order;

    (vii) that Act promotes openness and honesty about the child's Birth Parentage. and

  (c) the lawyer's belief that the person appeared to understand the legal advice given.

Advising Birth Parents

By far, the biggest risk to Birth Parents under a Surrogacy Agreement is that after the child is conceived and born, the Intended Parents will no longer seek to proceed with an Application for a Parentage Order. Without their consent to a Parentage Application, the child will remain the child of the Birth Parents and as such the Birth Parents will be faced with a decision as to whether they keep the child and raise him/her as their own or make the child available for adoption. In this regard, it is important to remember the Queensland Department of Communities (Child Safety Services) policies on adoptions between related family members and it is unlikely to

be the case that the Queensland Department will support an application for an adoption of the child to relatives or friends of the Birth Parents.

Equally as significant is the risk to the health of the Birth Mother in bearing a child. In that regard, the enforceability of a provision of a Surrogacy Agreement which provides for the Intended Parents to pay for various insurances for the Birth Mother should be raised with the Birth Mother and strongly advised. Clients should also be advised to look into their current insurance arrangements as it may be (particularly as surrogacy becomes more frequent in Queensland) that insurers start to issue exclusions on private health insurance policies and life insurance polices in the event an insured person enters into a Surrogacy Agreement. On that basis, it will be important to advise clients that they need to make sure they are insured.

Birth Parents also need to be advised of the unenforceability of every aspect of the surrogacy arrangement, apart from the requirement that the Birth Mother's reasonable medical and legal costs will be paid. It should be clear to the parents that those costs are only paid in the event the child is provided to the Intended Parents after the birth.

Advice should also include the technical requirements which will need to be proven under s22 that need to occur before the conception, namely counselling and that both parties have legal advice and the preparation of a written Surrogacy Agreement. In this regard, it will be important to explain to both Birth Parents and Intended Parents the breadth of the definition of "payment, reward or other material benefit or advantage". Birth Parents need to understand that if the agreement has a commercial element , it is a basis to discharge a Parentage Order in the future. Birth Parents and Intended Parents alike need to understand that if they have reached a private arrangement unknown to their lawyers where there will be a payment, reward or other material benefit or advantage after the Parentage Order is made, that they risk the Parentage Order being set aside at a later date.

The Birth Parents also need to understand that the child is theirs until the Parentage Order is made. As such, they will have an obligation to register the child's birth and they will each have obligations to the child, including child support in the event they separate, unless and until a Parentage Order is made.

The Birth Mother also needs to be advised that she has the same rights to manage her pregnancy and birth as any other pregnant woman, despite anything the parties have agreed. This means that any provision in the Surrogacy Agreement, example that for example allows the Intended Parents to be present at the birth of a child is unenforceable. It also means the mother can elect to terminate the pregnancy for any reason, including medical advice that the pregnancy will be dangerous for her health. This also means that clauses in a Surrogacy Agreement which prohibit a Birth Mother from drinking alcohol or having caffeine during a pregnancy, for example, would also be unenforceable, as would attempts to prescribe what the Birth Mother may eat, where the baby will be born and choice of doctor and health care professionals etc.

Clauses in a Surrogacy Agreement which provide for the children to be delivered to the Intended Parents immediately after the birth and to leave the hospital with the Intended Parents are similarly unenforceable.

Advice to Birth Parents should also include the fact that the child will be legally their child for at least 28 days and possibly up to six months after the child's birth despite the fact that the child will likely be living with the Intended Parents for some of that time. That means they will probably need to assist the Intended Parents with arranging medical care and immunisations for the child after the birth in that period.

Both sets of parents also need to be advised of the process that will happen after the chid is born, including the preparation of a Surrogacy Guidance Report.

The Birth Parents also need to be advised that in the event they do not hand over the child, the Intended Parents may still have rights against the Birth Parents under the *Family Law Act* as whilst they will not be parents, they would probably have standing to apply for orders to spend time with the child and arguably have parental responsibility for the child or live with the child under Part VII of the *Family Law Act*. Whilst it is important to advise parents of this possibility, it is impossible to provide advice on prospects of a likely application under the *Family Law Act* for time in such circumstances as it would largely depend on what transpires after the birth, including who the child lived with once the child was discharged from hospital.

The Birth Parents also need to be given legal advice about the basis upon which a Parentage Order can be discharged because from the perspective of the Birth Parents if the Parentage Order is discharged they will again become the legal parents of the child. Again, it is important that they understand that if the consent for the making of the surrogacy arrangement was given for payment, reward or other material benefit or advantage, that is a basis to discharge a Parentage Order.

It is also important that Birth Parents understand that (despite the obligation that the parties be provided with legal advice that "the act promotes openness and honesty about a child's birth parentage") that if the child's birth parentage is kept a secret from the child, that the child will be able to obtain those details when they are 18 years of age. The child can access the closed record section of their Birth Certificate before they are 18 years of age if a Birth Parent or an Intended Parent give their consent. Once the child is 18 years of age, they can obtain a copy of their Birth Certificate where they will be notified that there is a closed entry to their Birth Certificate which advises there is additional information about their birth which they can obtain from the closed register. Therefore, once the child is 18 years of age they can find out the details of their Birth Parents despite any agreements made between the Birth Parents and the Intended Parents before then.

The other important issue in advising Birth Parents is making sure the reasonable surrogacy costs defined in the Agreement are wide enough to include all costs which might be payable. In my submission, the definition should include:

1. The costs of private health insurance that the Birth Mother would not have entered into but for the arrangement;

2. The costs of total and permanent disability and life insurance that the Birth Mother would not have entered into but for the arrangement;

3. The costs associated with the pregnancy for the particular hospital including the costs of a private room and costs of the private doctor;

4. Travelling costs including parking fees and reimbursement for petrol expenses for any consultations with respect to the pregnancy and the arrangement including consultations with medical practitioners and specialists and consultations with counsellors and solicitors.

5. The costs of regular counselling during and after the birth of the child with respect to the arrangement and pregnancy. Birth parents could require ongoing counselling after the birth of the child, particularly if things don't go to plan, and these expenses should be covered.

6. In the event of the death of the child, the reasonable funeral expenses for the child. The child will be deemed to be the Birth Parents child even if stillborn prior to a Parentage Order being made. A Parentage Order will not be made in the event of the death of a child. The Birth Parents would then need to organise the funeral.

7. The costs of any Birth Certificate or Death Certificate for the child.

8. Any medication prescribed or otherwise taken before or after the birth as a result of the pregnancy.

9. Any gap payment between the medical expense and the refund from Medicare or private health fund.

10. Any medical procedures required to be undergone by the Birth Mother after the birth including cosmetic procedures. For example, procedures to reduce surgical scarring, stretch marks or varicose veins caused as a result of the pregnancy.

11. The medical costs associated with any treatment of any illness, condition or disability caused to the Birth Mother as a result of the pregnancy. For example, pregnancy can cause diabetes in some women and this may be a condition you will need to have treated either during or after the pregnancy.

12. Birth Mother's actual lost earnings as provided for in s11(1)(f).

Also, the obligation on lawyers in paragraph 30(i)(c) is important. Not only must the advice be given, but the lawyer must depose to their belief that the client appeared to understand that advice. It is therefore prudent, not only that the advice be provided in writing, but for there then to be a follow up meeting with the client so that a lawyer is able to assess their level of understanding given they must depose to the fact that they have concluded that the clients appeared to have understood their advice.

Advising Intended Parents

Much of the advice to be provided to Birth Parents is also as applies to Intended Parents. However, the risks for Intended Parents are obviously different, the biggest risk being that the Birth Parents elect not to relinquish custody of the child once the child is born. This would leave the Intended Parents in a position where the Birth Parents are raising a child probably conceived with the genetic material of the Intended Parents. In such circumstances, the only recourse for the Intended Parents

would be parenting applications under Part VII of the *Family Law Act*. If the Birth Parents never relinquish control of the child such that the child never lived with the Intended Parents and the Birth Parents essentially prevented any access to the child such that there was no relationship between the Intended Parents and the child, they may be able to successfully oppose any order for time in the Family Court.

The second biggest risk factor for Intended Parents is probably decisions made during the pregnancy that may impact upon the health of the child by the Birth Mother. Again, any provision in a Surrogacy Agreement which provides for the consent of the Intended Parents to be obtained or for the Intended Parents to be consulted about medical decisions during the pregnancy would be completely unenforceable.

A third risk factor for Intended Parents is that if the Birth Parents separate before the Parentage Order is made and one Birth Parent does not then give their consent to the Parentage Order, the application cannot proceed.

Insurance concerns are just as relevant for Intended Parents. It may be that normal private health insurance policies and Medicare rebates are not available under Surrogacy Agreements at some time in the future. The Intended Parents would be responsible for any other insurance policy costs. Just as insurance for obstetrics and gynaecology is very expensive for those doctors, one anticipates that the insurance for a Birth Mother under a Surrogacy Agreement would also be expensive. This is an expense against a background of Intended Parents having to pay all of the costs of pregnancy, costs of the Birth Mother's lost wages and probably expensive IVF or artificial insemination costs. Adopting a cost of $7,000 on average for each cycle of IVF, the cost of obtaining a child through a surrogacy arrangement could easily be in excess of $50,000 when all these factors are taken into account.

SO WHAT COULD GO WRONG?

Surrogacy is a difficult issue that has implications far broader than legal ones. Undoubtedly, it was difficult for Parliament to decide whether there should be commercial surrogacy arrangements, and if so, what protections should be in place. However, the model decided upon, is only successful while everybody gets along. As family lawyers, we are employed because we know people cannot always get along and if the relationship between Birth Parents and Intended Parents deteriorates, the consequences can be dire for all involved.

One questions the wisdom of the legislative decision to make the part of the Surrogacy Agreement that compels the Birth Parents to deliver the child to the Intended Parents unenforceable. As family lawyers we could be asked to find ways to either enforce the obligation to hand over the child, or alternatively to oppose such an application. In these cases, the law of equity may provide additional relief for parties. Obviously however, all equitable remedies remain untested.

Human factors could intervene which are not adequately addressed in the legislation, which may prevent a Parentage Order being made despite a child's best interests. These factors include:

1. The Intended Parents separating before a Parentage Order is made;

2. The Birth Parents separating before a Parentage Order is made;

3. The child not being relinquished by the Birth Parents to the Intended Parents;

4. The Intended Parents changing their mind about making an Application for a Parentage Order for the child. This could especially be the case if the child is born with a significant disability or illness or indeed the discovery that twins, triplets(or even more) are to be born and all must be subject to an Application.

5. Decisions being made during the pregnancy that are opposed by the Intended Parents;

6. Difficulties with the Birth Mother being reimbursed for medical and legal costs if no child is actually conceived despite best efforts.

Separation of Birth Parents

As set out above, if the Birth Parents separate, provided both still consent to the making of a Parentage Order, the Parentage Order can go ahead. However, there is a risk that that consent may be withheld by one of the Birth Parents as some kind of leverage in parenting or property settlement matters between the Birth Parents. If the assumption that people who agree to enter into surrogacy arrangements as Birth Parents are doing so for close friends or relatives, then the birth spouse who does not have the close connection with the Intended Parents could certainly use their consent as significant leverage for their own ends.

Separation of Intended Parents

If Intended Parents separate, the risk is that they both seek that the surrogacy arrangement go through and they make competing separate applications. Section 21(4) requires that an Application for a Parentage Order be made by two Intended Parents jointly, however if one of the parents has died or they are no longer a couple, one of the Intended Parents may apply for a Parentage Order. Time will tell as to how the Children's Court will determine such an Application between competing, but separated Intended Parents. Undoubtedly, if a Parentage Order was made in favour of one of those parents, the Intended Parents would then end up in the Family Court seeking parenting orders under Part VII of the *Family Law Act*.

The legislation as drafted contains no specific provisions which oust the jurisdiction of the *Family Law Act* or other laws such as the law of equity.

Orders for delivery of child

Again, whilst it is untested, it could be the case that there is an injunction brought in the Family Court for the Birth Parents to deliver the child to the Intended Parents. Given the Parentage Order would not in fact be made without the consent of the Birth Parents, the Application may be for sole parental responsibility of the child and for the child to live with the Intended Parents. Such Applications are likely to be difficult for the Court to resolve and are likely to turn on their individual facts.

Injunctions against Birth Mother during pregnancy

Perhaps the most controversial of possible adverse outcomes would be Intended Parents relying upon the jurisdiction of the Family Court established in *F & F*[8] injuncting the Birth Mother during her pregnancy from certain treatments for the child, such as amniocentesis or even attempting to injunct the Birth Mother from terminating the pregnancy. In *F & F* the Family Court held that there was jurisdiction under s114 of the *Family Law Act* to grant an injunction to restrain a Mother from terminating a pregnancy, but in that case they elected not to do so. The jurisdiction is available and the success of the Application would turn on balance of convenience factors which are likely to be unique to the facts of each individual case.

Intended Parents – do not bring Parentage Application

Similarly, it may be that Intended Parents elect not to proceed with a Parentage Order under a surrogacy arrangement and that the Birth Parents have rights in equity against the Intended Parents in relation to their decision not to proceed with the Application for a Parentage Order. Specifically, the Birth Parents may have an action in estoppel and may be able to successfully argue that they acted upon a reliance of the Intended Parent's representation (that the Intended Parents would make an Application for a Parentage Order) to their detriment and as such the Birth Parents have suffered loss as a result. The loss of the Birth Parents may be the cost of raising the child for his or her entire life which may be significant if one of the reasons that the Intended Parents did not proceed with the Application for a Parentage Order is because of some severe disability or illness that the child has.

It will be interesting to see whether the provisions in the *Surrogacy Act* which provide that no provisions of a surrogacy arrangement are enforceable, but for the payment of the reasonable medical and legal costs of the Birth Mother, is sufficient to displace proving "a reliance" if proceedings were brought in the equitable jurisdiction of the Supreme Court. It is similarly interesting to consider whether damages in equity could be avoided by arguing that the Birth Parents could have made the child available for adoption.

I do not profess to express a view about whether such applications would be successful as they would all turn on the facts of each particular case. I simply raise it as something that may need to be explored in providing advice.

Enforcement of surrogacy costs

Whilst of much less significance, it may be that Intended Parents elect not to pay the Birth Mother's medical and legal costs if no child is conceived despite the best efforts of all involved. If the Surrogacy Agreement could be regarded as a contract, that part of the contract would be enforceable. However, we could see an argument run by Intended Parents opposing such an Application that s15 of the *Surrogacy Act* is a basis for them to argue there was no valid legal contract because of an absence of an intention to create legal relations. Whilst this may ultimately be an unsuccessful argument, the scope for angry, stressed, disappointed and emotional people to use the litigation system to try and enforce or avoid the common intentions between the parties, could create a lot of litigation for all involved.

[8] (1989) FLC 92.031

CONCLUSION

The *Surrogacy Act* is obviously good news for infertile couples and same sex male couples who do not wish to join the lengthy queue and procedural bureaucracy which are part of adoption systems. As long as Birth Parents and Intended Parents get along and there is a high degree of trust and cooperation, the *Surrogacy Act* is ultimately good news for those who fall with the definition of eligible women and men. However, simply making a legal provision for surrogacy to happen in Queensland is not sufficient. The model is potentially very wrong, particularly in relation to the unenforceability of the child actually being handed over to the Intended Parents after the birth and the unenforceability of key provisions of the surrogacy arrangement.

If the intention of Parliament was to make the *Surrogacy Act* a code such that other remedies in other areas of law could not be used to circumvent the aim of the *Surrogacy Act*, then in my submission they have failed to do so and equitable remedies, as well as relief under Part VII of the *Family Law Act* is arguably available should things not go according to the original plan between Birth Parents and Intended Parents. Whilst Queensland has already seen its first Parentage Order[9] made in September 2010, the reality is that Queensland's first babies born under the usual provisions[10] of the *Surrogacy Act* are due this month, as parents entering into surrogacy arrangements in June 2010 and having quickly conceived babies will be anticipating the birth of their children from March or April 2011.

The reality is however that there may not be any real impetus for law reform or formal consideration and evaluation of the *Surrogacy Act* given the anticipated relatively small numbers that will be affected by this legislation. There were approximately 65,000 babies born in Queensland in both 2009 and 2010[11]. If we assume that the numbers of babies born under surrogacy arrangements are less than 0.5% of all live births, then there is likely to be under 300 applications a year. Even that figure seems overly generous given the requirement that women satisfy the definition of eligible women and the fact that commercial surrogacy arrangements are prohibited. Part of assessing the success of the *Surrogacy Act* will actually be putting in place some sensible means by which to collate statistics of how many parentage applications are actually brought and it may be difficult to track surrogacy arrangements where Parentage Orders are not actually made.

Undoubtedly, the next few years will be interesting to watch. One hopes it is smooth sailing for all involved, however only time will tell.

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[9] *BLH & MH v SJW & MW* [2010] QDC 439

[10] As opposed to transitional provisions as was the case in *BLH & MH v SJW & MW*.

[11] Life event registration published by Department of Attorney-General, Queensland Government http://www.justice.qld.gov.au/justice-services/births-deaths-and-marriages/registration-certificates. In 2009, 65,921,and in 2010, 64,121.