

Family Law Legal Update

Surrogacy Arrangements

There has been a lot of press recently in the Queensland media about surrogacy arrangements given that Queensland's first surrogacy baby, Connor, turned 1 recently. Press attention has also centred on Queensland's first surrogacy twins, Saskia and Amelia, who also became the children of their intended parents pursuant to a Surrogacy Agreement, when a Parentage Order was made on 12 May 2011.

It is important to remember in the case of Queensland's first Surrogacy baby, Connor, a lot of the legislative safeguards such as mandatory counselling and legal advice were not followed as the child was conceived before the *Surrogacy Act* was passed. The absence of these legislative safeguards may explain some of the concerns that have received press attention surrounding Connor's birth mother's statements that she regrets the decision to consent to a Parentage Order being made which resulted in her no longer being Connor's legal parent.

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.

In a Surrogacy Arrangement, the birth parents are the woman who agrees to carry the child and her spouse. The intended parents are the couple or single person who intend to become the child's legal parents after the birth. Any female intended parent must also satisfy the definition of "eligible woman" which in general terms means woman who is unable to conceive, or is unlikely to be able to safely carry a healthy child to term.

Process

The process to become parents under a surrogacy arrangement is as follows:-

1. Parties reach a decision to investigate surrogacy. Female intended parents must be able to prove they meet the definition of eligible woman for infertility reasons.
2. All birth parents and intended parents obtain legal advice.
3. All birth parents and intended parents obtain counselling.
4. Written Surrogacy Agreement is prepared and signed.
5. Child is conceived – birth mother has same rights to manage her pregnancy as any other woman.
6. Child is born – child is legally the child of the birth mother and her spouse. The birth parents must register the child's birth.
7. A counselling report, called a Surrogacy Guidance Report is obtained.
8. Intended Parents make Application to the

Children's Court for the parentage of the child to be transferred. Upon the making of this order, the intended parents become the child's legal parents regardless of the way in which the child was conceived or the genetic material used to conceive the child.

Who can be a birth parent?

It is 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. For this reason, it is anticipated that birth mothers are likely to be sisters, family members or close friends of people who are otherwise unable to have a child.

Whilst there can be no payment made to the Birth Mother, she can be reimbursed for her reasonable expenses associated with the surrogacy such as medical, legal and counselling costs.

Risks and Benefits

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. However, the legislative model adopted in Queensland relies on cooperation and trust between the birth parents and intended parents.

The Act provides that nothing in a Surrogacy Agreement is enforceable, but for the payment of the birth mother's costs. This means that intended parents can not force birth parents to hand over the child after the birth, even if the child is genetically theirs. It also means that the intended parents can not be forced to proceed with a Parentage Order which could leave the birth parents with a child they never anticipated would be their responsibility.

Where the trust and cooperation endures between all parties, then infertile couples are likely to get their happily ever after. However, the list of things that could go wrong is extensive and couples considering surrogacy should obtain independent legal advice before proceeding.

Contact:

Sarah Minnery
Partner
Accredited Family Law Specialist

T: +61 7 3002 8714

F: +61 7 3221 3068

E: sarahm@hemhart.com.au

Debra Effeney
Senior Associate

T: +61 7 3002 8745

F: +61 7 3221 3068

E: debrae@hemhart.com.au

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