



RECENT CHANGES TO SURROGACY LAW IN VICTORIA

Surrogacy is a form of Assisted Reproductive Treatment that can assist a person or a couple, who have been unable to conceive naturally, to have a child.

For many people, much of what they know about surrogacy will largely be based on what they have seen on television shows, in movies and what they have read in magazines in relation to celebrities having children using a surrogate. There are however important differences between the surrogacy laws in other countries and the law in Australia. In fact, the laws in relation to surrogacy actually differ from State to State in Australia, so much so that entering into a surrogacy arrangement is actually illegal in some States of Australia.

As recently as last year there were significant changes to Victorian Law in relation to surrogacy. The *Assisted Reproductive Treatment (ART) Act 2008* ("ART") came into effect on 1 January 2010. It governs the provision of assisted reproductive treatment and provides clarification of parental status.

Prior to ART, surrogacy was legal in Victoria, but the previous legislation made it virtually impossible for people to undertake surrogacy arrangements in Victoria. As a result, many Victorians were compelled to travel to other States such as New South Wales and the ACT in order to use the available technology.

The new legislation has also removed some of the previous hurdles and also any discrimination in relation to accessing in-vitro fertilisation (IVF) and artificial insemination (AI) services. Also, it aims to secure the legal status of children with same-sex parents.

Under the current law in Victoria a surrogacy arrangement may be considered in several different circumstances. These include:

- When a woman is unable to physically become pregnant and/or carry a child to term, if she has a health condition which would make pregnancy dangerous, or if the woman is at risk of transmitting a genetic abnormality or genetic disease to the child.
- When couple in a male same-sex relationship wish to have a child using their sperm.
- When a man wishes to have a child but has no partner.
- When a woman, who has embryos in storage with her male partner, dies and the male partner wishes to use the embryos to have a child.

In Victoria there are several registered Assisted Reproductive Treatment providers. Those providers may only carry out a treatment procedure on a woman under a surrogacy arrangement if the surrogacy arrangement has been approved by a specialist panel known as the Patient Review Panel.

In determining whether parties are suitable to enter into a surrogacy arrangement the Patient Review Panel will consider the following:

- The person or persons who enter into the surrogacy arrangement for a woman to carry a child for them and who will ultimately be the child's parent's are referred to as the **commissioning parent(s)**. The commissioning parent(s) must meet the following criteria:

- They must reside in Victoria and the Assisted Reproductive Procedure must take place in Victoria.
- Before they can enter into a surrogacy arrangement a doctor must have formed the opinion that if the commissioning parent is a woman, it is unlikely that she (or her partner) will become pregnant, be able to carry a pregnancy or give birth; or that she is likely to place her life or health, or that of the baby, at risk if she becomes pregnant, carries a pregnancy or gives birth.
- The surrogate's egg may not be used in the procedure and therefore a donor egg and donor sperm, or a donor embryo must be available for the procedure.
- Prior to implantation taking place, the commissioning parents must have undertaken counseling and obtained independent legal advice in relation to the surrogacy arrangement.
- The **surrogate** is a woman who has agreed to become pregnant, with the intention that the child born as a result of the pregnancy is to be surrendered to and be treated as the child of the commissioning parent(s). The Patient Review Panel will need to be satisfied of the following in relation to the surrogate:
 - That the surrogate is at least 25 years of age and has previously carried a pregnancy and given birth to a live child.
 - That the surrogate is entering into the agreement freely and will not receive any material gain from acting as a surrogate, however, the commissioning parent/s may cover all of the expenses associated with the pregnancy and the birth.
 - That prior to implantation taking place, the surrogate has undertaken the required counselling and obtained independent legal advice in relation to the surrogacy arrangement.

It is mandatory that both the surrogate and the commissioning parent(s) receive independent legal advice prior to entering into a surrogacy arrangement. A surrogacy arrangement is **not** legally binding and therefore before entering into such an arrangement the parties need to be fully aware of their legal rights.

The commissioning parent(s) and the surrogate will be advised of the following:

- Upon the child's birth, the commissioning parent(s) will not be the child's legal parent/s.
- The surrogate mother (and if the surrogate mother is married or in a de facto relationship, the surrogate mother's husband or partner) will be named as the child's legal parent/s on the child's birth certificate. Until a Substitute Parentage Order is made the surrogate and her husband/partner will remain the legal parents of the child.
- With the surrogate's agreement and co-operation, the commissioning parent/s can have the full time care of the child immediately after the child's birth.
- If the commissioning parents have the full time care of the child after the child's birth, they have the legal right to make an application for the surrogate to pay Child Support in relation to the child.
- After 28 days and within six months of the child's birth, the commissioning parent/s can apply for a "Substitute Parentage Order" (SPO) to become the legal parent/s of the child

and be registered as the child's parent/s on the birth certificate. The surrogate (and her husband/partner) will be required to provide their consent for the Order to be made.

Potential problems which arise and would no doubt be at the back of the minds of those considering entering into surrogacy arrangements are:

- What happens after the birth of the child if:
 - The surrogate changes her mind and is no longer willing to give up the child as agreed; or
 - The commissioning parent(s) decide they no longer wish to care for the child and become the child's legal parents, or if during the pregnancy something happens to the commissioning parent(s).

Both situations pose difficulties given that surrogacy arrangements are not legally binding:

- If a surrogate changes her mind and is not willing to give up the child after the birth and/or will not agree to a SPO, the commissioning parent(s) would need to apply to the Family Court for parenting orders. There is no guarantee however that such an application would be successful or entirely satisfactory.

A written Surrogacy Agreement may be used in the Court as evidence as to what was intended by the commissioning parents and the surrogate, but it would not override the power of the Court to make decisions based on what it considers to be a child's best interest.

- If the commissioning parent(s) change their minds and refuse to accept the child, the surrogate cannot force them to accept the child and therefore the surrogate (and her husband/defacto) would remain the child's legal parents and would remain legally responsible for the child. It would be up to the surrogate as to whether they keep the child or put the child up for adoption.

By requiring the parties to undertake counselling and obtain independent legal advice prior to any surrogacy arrangement being entered, it is hoped that the above circumstances will be avoided and the commissioning parent(s) will become the legal parents of the child upon a SPO being granted.

The commissioning parent(s) must wait until 28 days after the birth of the child before an Application for a SPO can be made. After the 28 days have elapsed, the Application must be made within 6 months of the birth of the child (unless leave of the Court is obtained).

In order for a Substitute Parentage Order to be granted:

- The child must have been conceived as a result of a procedure carried out in Victoria;
- The commissioning parent(s) must live in Victoria at the time of making the application;
- It must be in the best interests of the child to make the Order;
- The Surrogacy Arrangement must have been commissioned with the assistance of a registered ART provider and the Patient Review Panel must have approved the surrogacy arrangement before it was entered into;
- The child is living with the commissioning parent(s) at the time the application was made;
- The surrogate mother and/or her spouse/partner have not received any benefit or advantage from the surrogacy arrangement; and

- The surrogate mother freely consents to the making of the Order. (The Court may also take into account if the surrogate mother has a spouse/partner that the spouse/partner also freely consents to the making of the Order.)

Under normal circumstances where these criteria are met, the result of the SPO will be to make the commissioning parent(s) the child's legal parents and the child's birth certificate at this point is altered to reflect this change.

As previously mentioned, depending on which state in Australia you reside in, the laws may vary and so each party will need to fully understand their rights and obligations fully before starting down this process.

Ultimately each person will make their own mind up on whether they believe surrogacy to be a useful option for them, or alternatively an inappropriate one for them, but at least the legislation in Victoria now provides an opportunity for people who may otherwise not be able to do so, to become parents using Assisted Reproductive Technology.

If you would like further information with respect to surrogacy you should contact:

1. Your doctor;
2. An IVF Clinic in your State or Territory;
3. Victorian Assisted Reproductive Treatment Authority.



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