

SURROGACY AGREEMENTS IN AUSTRALIA



Surry Hills Office: Upper Ground, 55 Brisbane Street, Surry Hills, NSW 2010.

t [+612 8218 2116](tel:+61282182116) **f** [+612 8588 1203](tel:+61285881203) **e** surryhills@sbfamilylawyers.com.au

Parramatta Office: Suite 7, 5 Macquarie Street, Parramatta, NSW 2150.

t [+612 9633 1088](tel:+61296331088) **f** [+612 9633 4244](tel:+61296334244) **e** parramatta@sbfamilylawyers.com.au

Crows Nest: Also available, by appointment, at 133 Alexander Street, Crows Nest, NSW 2065.

ALTRUISTIC SURROGACY

- Altruism refers to *selflessness*.
- It follows that altruistic surrogacy refers to surrogacy arrangements where the surrogate does not receive any financial benefit.
- Conversely, commercial surrogacy refers to arrangements where the surrogate gives birth for the purpose of deriving financial gain. Commercial surrogacy arrangements are uniformly prohibited under each Australian State's legislation.
- Importantly, a potential surrogacy agreement is not held to be 'commercial' for the purposes of legislation if the surrogate receives reimbursement for any 'surrogacy costs.'

WHO ARE THE PARENTS?

- The current common law presumption in Australia is that the biological parents are the ‘legal parents.’ As a result, the biological parents are often placed on the birth certificate by default.
- Recent legal developments within the majority of Australian states have allowed for the rebuttal of this presumption through the use of Parentage Orders.
- An application for a Parentage Order can be made, seeking to have a court order that the intended parents be listed on the child’s birth certificate, and therefore assume legal responsibility for the child.
- This process is similar in each state, however there are notable differences between them. Sarah Bevan Family Lawyers are specialists based in Sydney, with extensive surrogacy experience across Australia.

SURROGACY ARRANGEMENT

A surrogacy arrangement is a formal agreement between the intended parents and the surrogate mother, whereby following the birth of the child, the surrogate mother agrees to relinquish any rights pertaining to the child to the intended parents. Importantly, these are not legally binding but are the precursor for applying for a Parentage Order. Surrogacy arrangements typically stipulate:

- The parties to the agreement and relevant information.
- The nature of the agreement as altruistic and pre-conception.
- The various costs associated with giving birth, including medical expenses, and who will bare them.
- That the parties have received independent legal advice and counselling.
- What will happen in the event of death of one or both of the intended parents.

TRADITIONAL & GESTATIONAL SURROGACY

Some Australian states distinguish between traditional and gestational surrogacy in determining whether a surrogacy agreement is valid for the purposes of attaining a Parentage Order.

In a traditional surrogacy, the surrogate mother's own egg is artificially inseminated. Consequently, the surrogate mother is a 'genetic parent' of the birth child.

Conversely, a gestational surrogacy features the use of *in vitro fertilisation (IVF)* to create the embryo. In this case, both the egg and the sperm are provided by donors. The embryo is then implanted in the surrogate mother, who will carry the child until birth.

Many IVF clinics around Australia are reluctant to participate in traditional surrogacy agreements due to the perception that there is an increased likelihood that the birth mother will form a connection.

PARENTAGE ORDERS IN NEW SOUTH WALES

Surrogacy agreements and Parentage Orders are governed by the *Surrogacy Act 2010 (NSW)*. This act lists the general requirements for a Parentage Order to be made. These are:

- The surrogacy arrangement must be altruistic.
- The surrogacy arrangement must be pre-conception.
- The birth mother must be at least 25 years old when the surrogacy arrangement is made.
- The intended parents must be at least 18 years old when the surrogacy arrangement is made.
- The intended parents must be residents in New South Wales at the time of the hearing.
- The child must be living with the intended parents at the time of the hearing
- Both parties must obtain legal advice and counselling in relation to the surrogacy arrangement, prior to entering in to the arrangement.
- An application should be made no less than 30 days and no later than 6 months after the day the child is born.

PARENTAGE ORDERS IN QUEENSLAND

In Queensland, Parentage Orders are governed by the *Surrogacy Act 2010* (QLD). The general requirements are:

- The surrogacy arrangement must be altruistic
- The birth mother and her spouse (if any) be at least 25 years old when the surrogacy arrangement was made.
- The intended parents are at least 25 years old and are residents in Queensland.
- The birth child has resided with the intended parents for at least 28 consecutive days prior to the application being made. The child must continue to reside with the intended parents, at the time the application is made and at the time of the hearing.
- Both the intended parents and the birth mother and spouse (if any) obtained legal advice and counselling prior to the day the surrogacy arrangement was made.
- An application should be made no less than 28 days and no later than 6 months after the day the child is born.

PARENTAGE ORDERS IN TASMANIA

Parentage Orders in Tasmania are governed by the *Surrogacy Act 2012 (TAS)*. The general requirements are:

- The surrogacy arrangement must be altruistic.
- The birth mother was at least 25 years old when the surrogacy arrangement was made.
- The birth mother has previously given birth to a live child.
- The intended parents were at least 21 years old when the surrogacy arrangement was made.
- Both the intended parents and the birth mother were residents of Tasmania at the time the surrogacy arrangement was made.
- The child be living with the intended parents at the time of the hearing.
- Both parties must obtain legal advice and counselling in relation to the surrogacy arrangement, prior to entering in to the arrangement
- An application must be made no less than 30 days and no later than 6 months after the day the child is born.

PARENTAGE ORDERS IN WESTERN AUSTRALIA

Parentage Orders in Western Australia are governed by the *Surrogacy Act 2008 (WA)*. The general requirements are:

- The surrogacy Arrangement must be altruistic.
- The birth mother was at least 25 years old when the surrogacy arrangement was made.
- The intended parents are residents in Western Australia, with one parent being at least 25 years old when the surrogacy arrangement was made.
- The intended parents are an *eligible couple**
- Both parties must obtain legal advice and counselling in relation to the surrogacy arrangement, prior to entering in to the arrangement.
- An application must be made no less than 28 days and no later than 6 months after the day the child is born.

*An *eligible couple* refers to a heterosexual couple.

PARENTAGE ORDERS IN SOUTH AUSTRALIA

A 'Recognised Surrogacy Agreement' is term used in the *Family Relationships Act 1975 (SA)*. The general requirements are:

- The surrogacy agreement must be altruistic.
- Both the birth mother and the intended parents must be at least 18 years old.
- The intended parents must be residents in South Australia.
- The intended parents must be legally married or in a registered relationship, or have lived together in a marriage like relationship for a period of 3 years.
- Both parties must obtain legal advice and counselling in relation to the surrogacy arrangement, prior to entering in to the arrangement.
- An application must be made no less than 4 weeks (28 days) and no later than 6 months after the day the child is born.

PARENTAGE ORDERS IN VICTORIA

The governing legislation in Victoria is the *Assisted Reproductive Treatment Act 2008* (VIC). Under this Act, intending parents must satisfy the Patient Review Panel in order for a surrogacy arrangement to be accepted. Once the Patient Review Panel is satisfied, the intending parents may apply under the *Status of the Children Act 1974* (VIC) for a Substituted Parentage Order. The substantive requirements are similar and are as follows:

- The surrogacy arrangement must be altruistic.
- The birth mother must be at least 25 years old before the surrogacy arrangement will be approved.
- The birth mother has previously given birth to a live child.
- Both parties must obtain legal advice and counselling in relation to the surrogacy arrangement, prior to entering in to the arrangement.
- Both parties must satisfy the Panel that they are prepared if the arrangement does not proceed in accordance with their initial intentions.
- An application must be made no less than 28 days and no later than 6 months after the day the child is born.

PARENTAGE ORDERS IN THE AUSTRALIA CAPITAL TERRITORY

The governing legislation in the Australia Capital Territory is the *Parentage Act 2004* (ACT). Surrogacy arrangements fall under the definition of 'Substitute Parenting Agreement' for the purposes of the Act. The general requirements are:

- The surrogacy arrangement must be altruistic.
- At least one of the intended parents must be a *genetic* parent, having contributed to the gestation process.
- The intended parents must be residents in the Australian Capital Territory.
- The intended parents should be at least 18 years old (the court may take this into account.)
- Both parties must obtain legal advice and counselling in relation to the surrogacy arrangement, prior to entering in to the arrangement. (the court may take this into account.)
- An application must be made no less than 6 weeks and no later than 6 months after the day the child is born.

PARENTAGE ORDERS IN THE NORTHERN TERRITORY

There is currently no legislation in the Northern Territory pertaining to potential surrogacy arrangements and ensuing parenting orders. Consequently, all surrogacy arrangements are considered illegal.

COMMONALITY BETWEEN STATES

With the exception of the Northern Territory, the Australian states are similar despite have unique legislation. Points of commonality:

- All surrogacy arrangements within Australia must be altruistic.
- The paramount consideration in deciding whether or not to make a Parentage Order is if it would be in the best interests of the child to make such an order.
- All states require that intending parents be residents.
- All states place emphasis on the mental and legal autonomy of parties to surrogacy arrangements.

WHAT WE CAN DO FOR YOU

Sarah Bevan Family Lawyers are at the forefront of developing surrogacy laws in Australia. We obtained the first order in NSW allowing a same-sex couple to be the named parents on the birth certificate of a child who was born as a result of a surrogacy agreement.

We are specialists based in Sydney and have extensive experience in surrogacy matters; across Australia and internationally. We have had a firm focus on surrogacy since the commencement of the *Surrogacy Act 2010 (NSW)*, and have multi-step process designed to ensure the best outcome for a clients.

INITIAL CONSULTATION APPOINTMENT

Our initial consultation appointments are designed to identify what you need and implement a plan to get you there. Our appointments are typically 1 hour long, however we offer 30 minute appointments for progressed circumstances. In our initial appointments, we:

- Discuss the requirements for a valid surrogacy agreement and Parentage Order in the various states.
- Determine which state has jurisdiction and which of its laws are applicable.
- Provide legal advice in relation to surrogacy agreements and Parentage Orders both pre and post birth, including an potential future claims on estate.
- Offer a fixed-fee.

PRE-COMMENCEMENT OF SURROGACY

Entering into a surrogacy agreement can be a daunting process. Following our initial consultation appointment, we:

- Draft/advise on surrogacy agreements
- Work with both independent lawyers and counsellors and organise to have them approve and sign the surrogacy agreement.
- Liaise with the Ethics Panel from the relevant IVF clinic.
- Offer a fixed-fee, with exceptions.

POST-BIRTH AND PARENTAGE ORDERS

Post-birth is the most emotional and tumultuous period in relation to surrogacy agreements. We will:

- Liaise with parties during third trimester.
- Prepare and file the appropriate court documents, including Application for Parentage Orders and accompanying affidavits.
- Assist you with liaising with the independent counsellors post-birth.
- Apply, and if required appear, for hearing of Parentage Order application.
- Assist you with liaising with the Registry of Births.
- Assist you with change of birth certificate and re-issue.
- Offer a fixed-fee, with exceptions.