**Family & Relationship Law eBulletin – 23 July 2013**

Surrogacy

Commercial surrogacy is prohibited in Australia, meaning that it is illegal to pay or advertise for a surrogate.  Instead, people usually approach a close friend or relative - however finding a surrogate can be a difficult process.

By law, surrogates must be 25 years or older and must have previously given birth.  Importantly, the surrogate’s own genetic material must not be used in the conception.

Once you do find a surrogate, it is prudent to get a formal agreement in writing as to the surrogate mother’s future interest in your child’s life.  Although any written agreement will not be legally binding, it will be considered by a Court as indicative of the parties’ intentions if a dispute were to arise at some later stage.

The intended parents, together with their surrogate, must submit to police checks, child protection order checks and attend counselling.  The surrogacy arrangement must also be approved by the Patient Review Board, which was established by the *Assisted Reproductive Treatment Act*.

Under the *Family Law Act* *1975*(Cth) when the child is born, the woman who gives birth (ie the surrogate mother), and her current partner are legally presumed to be the child’s parents and they will be named on the child’s birth certificate.

The intended parents must apply to the County or Supreme Court of Victoria for a *Substitute Parentage Order* to have their names included on the child’s birth certificate.

We recommend that the intended parents also obtain Parenting Orders from the Family Court to confirm each of their status as a parent of that child. This is to ensure that the intended parents are legally recognised as having parental responsibility for their child, including the right to make important decisions, such as schooling, health, religion, and other decisions like overseas travel.

 [^ top](http://www.landers.com.au/Publications/Familylaw/Publicationdetail/tabid/331/ArticleID/340/Default.aspx#top)

In an effort to protect sperm donors from financial and other responsibilities, the law does not recognise donors as parents.  This applies despite any intentions to the contrary by the parties involved, and has implications for couples who use a surrogate to carry their child.

For example, the Family Court of Australia was asked to rule on a case in 2009, in which a child was born as a result of a family surrogacy arrangement where a mother offered to carry her daughter’s child for her.

The mother underwent an IVF procedure using her daughter’s husband’s sperm and a donor egg from an unknown third party. When the child was born, the mother and her daughter’s husband (ie the sperm donor), were listed on the child’s birth certificate.  The mother then gave the child to her daughter and son in law.

However by law, the mother and her de facto partner were presumed to be the child’s parents because she was the person who had actually given birth to the child. This is despite the fact that the daughter’s husband was named on the birth certificate as the father.

The Court ruled that under current Australian law, the surrogate mother’s de facto partner was legally considered to be the child’s father - not the child’s biological father as the parties involved had obviously intended.  Therefore, legally, neither the daughter nor her husband was considered to be the child’s parent.

The Court did note that further changes in the law were needed to avoid similar situations occurring.

Commercial surrogacy is legal in some overseas jurisdictions, including some states in the USA and India, and many Australian couples are choosing this option.  However, citizenship regulations differ from country to country and it is important, should you take this route, that you know how to obtain Australian citizenship for your child.

A number of Australian states have enacted legislation imposing criminal sanctions on residents who enter into commercial agreements overseas, being NSW, ACT and Queensland.  Residents of these states who commission a surrogate overseas may be fined up to $110,000 or jailed for up to two years.

It is still not certain whether other States will also criminalise Australians entering into commercial surrogacy arrangements overseas.  It also remains to be seen how such a law will be enforced and what will happen to the child if parents are charged or convicted of an offence.

This is an evolving area of law and it is likely that there will be more changes to both state and federal laws.