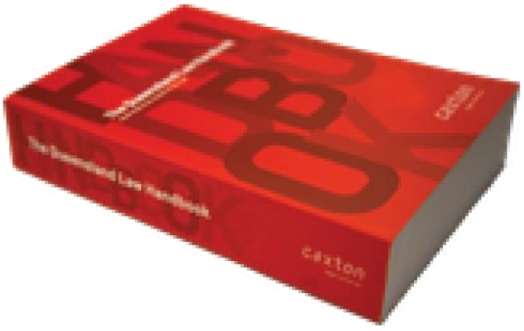

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Surrogacy and In Vitro Fertilisation

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INTRODUCTION

Altruistic surrogacy arrangements are lawful in Queensland according to the *Surrogacy Act 2010* (Qld) (Surrogacy Act). Commercial surrogacy, where a payment or other material benefit is made for entering into a surrogacy arrangement, remains unlawful (s 56 Surrogacy Act). This is the case whether the commercial surrogacy arrangement is made within Queensland or in another jurisdiction including an overseas jurisdiction (s 54 Surrogacy Act). The paramount guiding principle underpinning the Surrogacy Act is that of the wellbeing and best interests of a child born as a result of surrogacy.

The procedures of artificial insemination or in vitro fertilisation (IVF) in Queensland and the presumptions of parentage as a result are set out in the *Status of Children Act 1978* (Qld). These provisions apply to married couples, a man and a woman living in a genuine domestic relationship and female same-sex de facto couples.

ALTRUISTIC SURROGACY

The Surrogacy Act allows a single person (male or female) or a couple (heterosexual or same sex) to enter into an agreement with a woman (the birth mother) and her partner (if she has one) to become pregnant with the intention that the child will be relinquished to the intended parent(s).

For the purposes of the Surrogacy Act, it does not matter how the child is conceived or if the child is genetically related to the parties. There are no restrictions placed on the birth mother in terms of how she manages her pregnancy. Although she cannot profit from the surrogacy arrangement, the birth mother is entitled to the reimbursement of the surrogacy costs (outlined in s 11 of the Surrogacy Act). These include for example:

- reasonable medical costs related to the pregnancy and birth of the child
- counselling and legal costs associated with the surrogacy arrangement
- actual lost earnings because of leave taken during pregnancy or following birth
- reasonable travel expenses incurred.

The surrogacy arrangement is not legally enforceable; however, obligations to pay a birth mother's surrogacy costs are enforceable unless she chooses not to relinquish the child to the intended parents.

Persons who engage in commercial surrogacy arrangements may be liable to a fine and/or imprisonment.

SURROGACY PARENTAGE ORDERS

At law, the birth mother and her partner, if she has one, are the legal parents of the child. The Surrogacy Act provides a mechanism for transferring parentage so the intended parents become legally recognised as parents of the child born as a result of the surrogacy arrangement. Under the legislation, a parentage order may be sought from the court with the consent of all parties. The effect of a parentage order is that the child becomes a child of the intended parent(s) and parentage of the child is removed from the birth parent(s).

The intended parent(s) may apply to the Childrens Court for a parentage order once the child is between 28 days and six months old, or at a later time with the court's leave (s 21(1) Surrogacy Act). The child must:

- be residing with the intended parent(s)
- have been residing with the intended parent(s) for 28 days prior to the application being made
- be residing with the intended parent(s) at the time of the hearing (s 22 Surrogacy Act).

To grant a parentage order, the court must be satisfied that the order will be for the wellbeing and in the best interests of the child (see s 22 of the Surrogacy Act for a list of matters of which the court must be satisfied before a parentage order may be made). Importantly, it is a requirement that the respective parties to a surrogacy arrangement obtain independent legal advice prior to entering such an arrangement. As part of the application, sworn affidavits from all the parties, legal advisors, medical practitioners and counsellors demonstrating that the requirements of the Surrogacy Act have been satisfied, must be provided to the court (ss 25–31 Surrogacy Act).

In addition, a surrogacy guidance report must be provided by an independent counsellor who interviews the parties for the purposes of the application (s 32 Surrogacy Act). The counsellor must form an opinion about the parties' understanding of the implications of the proposed parentage order and, having regard to the care arrangements proposed, whether the order would be for the wellbeing and in the best interests of the child.

The court may dispense with some but not all (see s 23 Surrogacy Act) of the requirements outlined in s 22 of the Surrogacy Act. For example, if the Surrogacy Act cannot be satisfied because the surrogacy arrangement is commercial, the court cannot make a parentage order, which means that the legal parentage of the child cannot be transferred from the surrogate mother (and, if relevant, her partner) to the intended parents. In such cases, the intended parents may seek a

parenting order under the *Family Law Act 1975* (Cth). While a parenting order may confer parental responsibility on the intended parents, it does not transfer legal parentage.

There have been a number of cases involving overseas commercial surrogacy arrangements where the Family Court has made parenting orders in favour of intended parents. For some examples see *Batkin v Bagri* [2019] FamCA 979, *Fisher-Oakley v Kittur* [2014] FamCA 123, *Ellison and Anor & Karnchanit* [2012] FamCA 602 or *Dennis and Anor & Pradchaphet* [2011] FamCA 123.

In Ellison and Anor & Karnchanit, the court made parental responsibility orders for twins born as a result of a commercial surrogacy arrangement in Thailand. The surrogacy arrangement was illegal under Queensland legislation at the time as it would be under the current legislation (s 56 Surrogacy Act). The applicant intended parents were potentially liable to prosecution and imprisonment for up to three years. The court had to balance the illegality of the commercial surrogacy arrangement and the welfare of the children, which would not be met if their parents were imprisoned. In the course of her judgment, Her Honour Justice Ryan noted the potential emotional and psychological harm the applicants' imprisonment would have upon the children. While the orders sought by the applicants were granted, the case illustrates the difficulties potentially faced by intended parents who enter into overseas commercial surrogacy arrangements and the competing interests the court must address.

The legislation provides that applications can be made for an order to discharge a parentage order if:

- the order was obtained by fraud, duress or other improper means
- any consent provided was not given or given for commercial gain (other than the birth mother's surrogacy costs)
- there is an exceptional reason for a discharge order to be made (pt 4 Surrogacy Act).

Rights of appeal are dealt with under ch 3 pt 5 of the Surrogacy Act and any issues relating to privacy under ch 3 pt 6.

STATUTORY REGULATION OF ASSISTED REPRODUCTIVE TECHNOLOGY SERVICES IN QUEENSLAND

Assisted Reproductive Technology (ART) services are now regulated by legislation in Queensland, following the enactment of the *Assisted Reproductive Technology Act 2024* (Qld) (ART Act). The statutory framework requires ART

service providers to be licensed and sets out key obligations that must be met concerning the provision of ART services. The legislation regulates other specific matters such as non-medical sex selection and posthumous reproduction (where a partner of a deceased person wishes to retrieve gametes from their deceased or dying partner for later use in an ART procedure). The ART Act also establishes a donor-conception information register to ensure that persons conceived using donated gametes or embryos, as well as donors, have the option to access specific information as outlined in s 48 of the Act. The main aims of the ART Act are to:

- protect the welfare and interests of persons who use ART services and persons who are born as a result of such services
- regulate the use of ART
- provide and regulate access to information for persons born as a result of ART.

The legislation states that the welfare and interests of people who are born as a result of ART are, throughout their lives, of paramount importance in the administration and operation of the ART Act (s 3 ART Act).

Offences are created under the legislation for persons who provide ART services without a licence, or for those who advertise that they are licensed ART service providers when they are not. It is also a requirement that ART services are provided by, or under the supervision of, a medical practitioner.

Fertility clinics in Queensland are not permitted to refuse to provide ART services based on the relationship status or sexuality of those seeking such services.

CONSENT AND COUSELLING REQUIREMENTS FOR ASSISTED REPRODUCTIVE TECHNOLOGY SERVICES

The ART Act requires written consent of persons undergoing ART services, as well as written consent from persons who provide or donate gametes for use in an ART procedure (ss 16–21 ART Act). Persons undergoing such services have the right to vary or withdraw their consent except in specific circumstances such as where gametes have been placed into a person's body, or gametes have been used to create an embryo that has been implanted into a person's body (s 20 ART Act). ART service providers must also disclose/provide specific information to participants or persons donating gametes/embryos (s 14 ART Act). When disclosing the information specified in the ART Act, the ART service provider is obliged to inform persons that counselling services are available. Those involved in practices that involve donated gametes or embryos (including donors and an intended parent in a surrogate arrangement) must receive counselling services.

This reflects the position that in circumstances where donated gametes/embryos are used, there is an obligation to provide the relevant parties with detailed information about the consequences of the decision, particularly information relating to the rights of donor-conceived children to access information (including information about the donor), and the rights of donors to obtain information about children conceived from their gametes.

IN VITRO FERTILISATION—LIABILITIES AND RIGHTS OF PARENTS

When either married couples, a man and a woman living in a genuine domestic relationship or female same-sex de facto couples consent to artificial insemination or IVF procedures, they are presumed to be the legal parents of children born as a result of those procedures, regardless of the source of the ovum or semen that created the embryo. If donor ovum or semen are used in an IVF procedure resulting in the birth of a child, the donor is presumed not to be the legal parent.

Section 21 of the *Status of Children Act 1978* (Qld) provides that where a de facto or married woman, or a woman living in a same-sex relationship gives birth as a result of using artificial insemination without the consent of her partner, the donor of the semen used has no rights or liabilities in relation to the child born as a result of that procedure. This exclusion of liabilities and rights also applies to a man donating semen to a single woman. The man would have a father's rights or liabilities in relation to the child only if he later married the mother.

IN VITRO FERTILISATION DISPUTES

Internationally, there have been circumstances where the wrong gametes/embryos have been used in an ART procedure. In England in 2002, the wrong embryos were implanted in a woman (which became known at birth because of the racial descent of the children) and both the donor and birth parent claimed parental rights. The English court held that the donor was the legal father, but that the couple could have custody of the children. Cases that have appeared before the courts over the questions of who are the legal parents of a child or who should have parental responsibility for a child demonstrate that the best interests of the child is the paramount consideration.

COLLECTION, USE AND STORAGE OF GAMETES

Gametes and/or embryos can be stored (cryopreserved) for later use. The ART Act requires that the consent of gamete providers who are not donors of gametes or embryos, specifies the period for which an ART provider may store a gamete and/or embryo. Unlike the legislation in some other Australian jurisdictions, the

ART Act does not stipulate a limit on the period that gametes or embryos can be stored. However, the consent of a gamete provider for storage of such tissue will expire after five years if it is not renewed. In relation to donated gametes and embryos, the ART Act prohibits the use of donate gametes or embryos that were obtained/created more than 15 years ago.

Further difficult questions arise regarding the collection and use of gametes, the selection of embryos based on genetic characteristics and the status of embryos being held for future IVF procedures.

In Australia, there have been numerous Supreme Court cases concerning attempts by a living partner to harvest and store gametes from a recently deceased partner (or dying partner) for later use in an ART procedure. Most recently in Queensland, the decision of *Re Cresswell* [2019] 1 QD R 403; [2018] QSC 142 resulted in the Supreme Court authorising the retrieval of gametes from a deceased person and justifying this retrieval under the human tissue legislation (the *Transplantation and Anatomy Act 1979* (Qld)—an Act that governs the donation and retrieval of tissue from living and deceased persons). The court held that the use of gametes, once lawfully retrieved, was a matter to be determined by ART service providers in accordance with the National Health and Medical Research Council's *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research 2017*.

Despite the decision in *Cresswell*, the ART Act now explicitly addresses posthumous conception including when gametes may be retrieved and the circumstances in which they may be used in an ART procedure. In relation to the retrieval of gametes from deceased or unresponsive persons, s 32 of the ART Act excludes the operation of the *Transplantation and Anatomy Act 1979* (Qld), meaning that the retrieval of such tissue is only permitted in accordance with the provisions of the ART Act.

Section 29 of the ART Act states that a '… gamete may be retrieved from a deceased or an unresponsive person by, or under the supervision of, a medical practitioner for use in an ART procedure for the person's spouse'. The ART Act further states that such a retrieval is only authorised if there is evidence that '… the [deceased or unresponsive] person had consented to the retrieval of their gametes for use in an ART procedure for their spouse …', *or* where the person '… had not expressly objected to the posthumous use of their gametes for use in an ART procedure for their spouse …' and they would have likely '… supported the posthumous use of their gametes for that purpose'.

Importantly, this allows retrieval of gametes from a deceased or unresponsive person even in circumstances where there is no prior written consent to authorise such, as long as there is at least no known objection to the retrieval of their

gametes for use posthumously. Under s 30 of the ART Act, a request to retrieve gametes from a deceased or unresponsive person can be made by a person's spouse or, in exceptional cases, by either a member of the family of the deceased or unresponsive person, or a member of the family of the spouse (exceptional circumstances might include where the spouse is incapacitated and cannot make an informed decision about retrieval of the gametes or cannot be contacted despite reasonable attempts to contact them).

The ART Act also specifies that an independent review body must authorise the use of gametes retrieved from a deceased or unresponsive person. According to s 31(3) of the ART Act, the independent review body is required to consider:

- whether the spouse has the capacity to consent to the procedure
- whether the spouse has undertaken appropriate counselling
- the best interests of any child born as a result of the procedure, including:
    - whether the spouse has the capacity to provide for the child's emotional, intellectual and other needs
    - whether the child is likely to have safe and stable living arrangements
- any other matter the independent review body considers appropriate.

The meaning of 'spouse' is not defined in the ART Act itself. Hence it would fall to the *Acts Interpretation Act 1954* (Qld) where sch 1 of this Act states that 'spouse' includes de facto partner and civil partner.

DONOR-CONCEPTION REGISTER AND ACCESS TO INFORMATION REGARDING DONOR CONCEPTION

One of the key reasons for the enactment of ART legislation in Queensland is to ensure that there is the creation of a central donor-conception information register, which has been established under the legislation. Section 45 of the ART Act imposes obligations on ART service providers to provide mandatory information to the registrar, such as information regarding the birth of a donor-conceived person as a result of a donor-conception ART procedure, and historical information concerning the birth of donor-conceived persons (born before the commencement of this part of the ART Act). The ART Act also allows for the voluntary provision of information by parties involved in private donor-conception procedures (s 47). Section 48 of the ART Act outlines the information that can be obtained by persons involved in donor conception by applying to the registrar for information held in the register. Donor-conceived persons who are 16 years or older (or a parent of/person with parental responsibility for a donor-conceived person under 16 years of age) can obtain:

- identifying or non-identifying information about their donor and, if the donor consents, contact information about the donor
- identifying information or contact information about a donor-conceived sibling (if the sibling has consented)
- non-identifying information about a donor-conceived sibling (including the number of donor-conceived siblings of the applicant).

In addition, the ART Act provides that a donor can obtain non-identifying information about their donor-conceived offspring and, with the consent of their offspring, identifying information or contact information about a donor-conceived child. Section 48 also provides that others can access specific information (as outlined in the legislation) from the donor-conception information register, including:

- descendants of donor-conceived persons (aged 16 years or older)
- a donor's child(ren) who are 16 years or older and are not themselves donor-conceived (they can obtain specific information regarding their siblings)
- interstate donor-conceived persons who are 16 years or older (they can obtain specific information regarding their siblings).

As ART providers are required to provide both prospective and historical information to the registrar, this, in principle, allows for those involved with donor-conception practices to obtain access to such information on a historical basis (subject to the need for consent from the person to whom the information relates for release of certain identifying or personal information). However, this does not guarantee that donor-conceived persons, who were conceived before the commencement date of the relevant provisions establishing the register, will have access to all information as this will depend on whether the ART provider or medical practitioner has retained the relevant records (although, if such records have been retained, the ART service provider or practitioner is obliged to provide them to the registrar for inclusion in the donor-conception information register).

IN VITRO FERTILISATION—OTHER LEGAL ISSUES

Pre-implantation genetic diagnosis

Other legal issues can arise as a result of using assisted reproductive technology services. The law currently permits a couple with numerous embryos to have them screened for certain genetic disorders. This screening process is known as pre-implantation genetic diagnosis (PGD) or pre-implantation genetic testing (PGT). Such testing could, theoretically, be used to facilitate sex selection of embryos. However, the ART Act prohibits the use of ART services to produce a child of a

particular sex, except in circumstances where '... it is necessary for a child to be of a particular sex so as to reduce the risk of the transmission of a genetic abnormality or genetic disease to the child ...' (s 24 ART Act).

Ownership of embryos after separation

Disputes sometimes arise about the ownership of frozen embryos where a couple either separate or divorce. Usually, an agreement would have been made about the future use of the embryos, where the couple determine, at the time they seek ART services, what should be done with embryos in such situations.

Clinics are required to ask participants to stipulate, at the time they give consent to assisted reproductive treatments, what should be done with frozen embryos should the couple separate. Section 20 of the ART Act stipulates that a gamete provider can withdraw or vary their consent at any time unless an embryo (created from the gametes of the person wishing to revoke consent) has been implanted into another person's body. If consent is revoked or varied prior to the implantation of an embryo, this would prevent another party from using the embryo(s).

This means that stored (frozen) embryos cannot be used for reproductive purposes unless both partners agree. It also likely means that the stored gametes/embryo(s) must be removed from storage should one party wish to revoke their consent to use and storage of them. However, cases have arisen in other countries where women have sought to use embryos that were created with a partner's sperm, following the couple's separation and where the former partner withdraws consent. In one English case, frozen embryos were created with the former male partner's sperm, and the use of those embryos represented the woman's only remaining opportunity to have her own biologically related child. This argument was not successful in persuading the court to give the woman permission to use the frozen embryo(s) in an IVF procedure.

LEGAL NOTICES

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