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SURROGACY IN CALIFORNIA – A PRIMER FOR AUSTRALIAN PRACTITIONERS

As opportunities for creating families have expanded with the advancement of assisted reproductive technology (ART), the number of intended parents from all over the world coming to California for surrogacy has grown exponentially. Often the biggest obstacles encountered by intended parents are created by the specific requirements of the laws governing assisted reproduction and establishment of parental rights, either in the country where the intended parents reside or in the country where their surrogate resides.

Because laws governing ART vary widely from country to country, State to State, and because local laws are rarely up-to-date with the rapidly changing technology, it is essential that intended parents understand what steps they need to take in order to ensure their babies are legal citizens of the country in which they will reside and that they are legally recognised as their babies' parents. Although every family's situation is unique, there are issues to consider and steps that can be taken to make the process of securing a family as easy and trouble-free as possible. This article summarises the legal steps and the law involved in a gestational surrogacy in California.

OVERVIEW OF THE LEGAL STEPS INVOLVED IN GESTATIONAL SURROGACY IN CALIFORNIA

Expert ART attorneys are needed to guide intended parents through the legal complexities of family formation through assisted reproduction

It is essential that any intended parent talk to a lawyer before beginning any ART process; their family's future security is at stake. Most attorneys specialising in assisted reproductive technology in California will offer a free initial consultation to orient the intended parents to the ART process, the recommended legal services, and payment options.

For intended parents who reside in Australia, or anywhere outside of the United States, court judgments, a birth certificate listing the intended parents, and a United States passport for the newborn are needed in order for parents and child to travel home, for intended parents to be legally recognised as the baby's parents, and to have the baby recognised as a legal citizen of Australia. For that reason it is essential that intended parents also retain (or at least speak to) an immigration and family lawyer in Australia, who will work with their ART legal team in the United States to properly coordinate the acquisition of all required documents.

Surrogate/donor selection

Most intended parents will work with a licensed, qualified agency or fertility clinic to help identify and retain a surrogate and/or egg, embryo or sperm donor. Laws governing surrogacy and donors vary from State to State within the United States. For that reason, it is important that the intended parents' surrogate/donor agency and legal team are familiar with any legal restrictions that may impact their surrogate or donor selection. An experienced ART attorney will prepare proper donor or surrogate agreements in accordance with the State in which the surrogate or donor resides (see more below about the laws in California). And the IVF physicians in California will not begin the medical cycle (or allow the surrogate or donor to begin hormone medications or injections) until they have received the properly executed legal agreements.

Court order for parental establishment

In most States of the United States, including California, a court order is necessary to establish and confirm parental rights to a child born via surrogacy. In California the intended parents, through their attorney, can petition the court prior to the birth for a court order which legally establishes them as the

legal parents immediately upon birth and directs that their names (and not the surrogate's name) be placed on the child's birth certificate. In some States, the parental establishment petition cannot be filed until after birth, and a different process will be followed. In California, the parental establishment petition can also be filed after birth, but this would be an exception to the general practice.

Estate planning documents to protect the family

With perseverance and a little luck, your clients will be getting pregnant and creating families, so you should be discussing estate planning documents to help protect the new families. Such family planning documents can help provide clear instructions of the intended parents' wishes regarding the care and custody of their child(ren), their healthcare, and other general expressions of authority if something should happen to them.

Same-sex couples in particular do not have the automatic protections (ie fully recognised legal rights) afforded to married couples, and even if they can be legally married in one State or country, their rights may not be recognised in other jurisdictions. Therefore, in the absence of fully legislated and automatic protections, these documents, which are clear, written expressions of the couple's authority, are all the more important. For single intended parents, having estate/family planning documents is also critical because there is not a second parent to immediately step in if the single parent is suddenly unable to care for the child(ren) due to death or incapacity. A brief summary of the family planning documents to be considered is below.

Surrogate's temporary designations, powers of attorney, and authorisation for intended parents to consent to medical treatment

In California, the pre-birth court orders of parentage become effective immediately at birth (if they were obtained pre-birth) or on the date the order is signed if the application is made after birth. Having the surrogate sign a temporary guardianship designation, power of attorney, and authorisation for the intended parents to consent to medical treatment for the child(ren) will help provide some measure of protection for your clients' rights during the surrogacy and up until the court order becomes effective. This temporary but formal document assigns guardianship rights to the intended parents (with rights of custody and authority to care for the child(ren) in utero and after birth) until their rights are effective under the court order(s). This document also designates the intended parents' backup guardians – persons with authority to make these decisions for the intended parents in the event that they become incapacitated or die during the surrogacy. The surrogacy contract touches on these issues by expressing the intent of the parties that the intended parents will ultimately have all the legal rights to their child(ren), but the contract itself does not and cannot grant or create parental rights; only the court order or parentage certifications can do that. The surrogate's guardianship designations, therefore, help bridge the gap between the surrogacy agreement and the time the final court orders are issued. These surrogate designations may also be required by a hospital to discharge the child into the care of intended parents.

Intended parents' guardianship designations

The surrogacy agreement establishes who the surrogate is to call and turn the child(ren) over to in the event that the intended parents die before the birth, but this contractual provision does not and cannot establish a formal guardianship designation. If anything should happen to the intended parents during the surrogacy process, or after birth, proper guardianship designations will ensure that their children are under the care of someone trusted. Such documents give the intended parents piece of mind that their child(ren) will be placed with and taken care of by a person or persons of their choice. Such guardianship designations are permanent and remain in effect both before and after the court(s) issue the final order(s) of parentage – unless and until the intended parent wishes to revise or revoke them. These documents also correlate with the named guardians who are listed as backup guardians (after the intended parents) in the surrogate's guardianship designation described above.

Confer with birth hospital

Prior to the baby's birth, intended parents will need to meet with the hospital social worker to ensure they are recognised (and treated and respected) as the baby's parent when the birth occurs. It is also advisable that the intended parents submit a "delivery plan" to the hospital in this regard. As part of

the meeting(s) with the hospital staff, it will be important to make sure the hospital staff is prepared to complete the associated paperwork in accordance with the court order.

Birth certificate

Parents living in the United States typically receive their baby's official birth certificate by mail approximately six to eight weeks following the birth. However, parents who reside in another country are usually not able to wait that long to return home with their baby. In that case, the United States ART legal team will need to work with hospital staff and the California Vital Records office to obtain an expedited birth certificate, usually within about two weeks. Once the birth certificate is in hand, parents can obtain a passport for their baby and return home.

Newborn passports

Once the intended parents have received the birth certificate, they will need to apply for a United States passport for the child in order to travel home. This application can be completed online or downloaded and printed from the United States Department of State's website (http://www.travel.state.gov/passport/forms/ds11/ds11_842.html). Typically the passport will be received within two weeks.

If the intended parents' plans require them to return home sooner, an experienced ART attorney will be able to help them obtain an expedited passport, usually with the support of a passport expediting service. An expedited passport will typically be received within three to five days.

Alternatively, if intended parents plan to return home in less than two weeks, they can schedule an in-person appointment at a regional passport office of the United States State Department (check the State Department website for a listing of these regional offices – http://travel.state.gov/passport/npic/agencies/agencies_913.html). An appointment to receive an expedited passport may be scheduled by calling 1 (877) 487-2778. An additional fee will apply, and intended parents will likely be asked to provide proof of their return travel plans to show they are returning to Australia in less than two weeks from the date of the appointment. Note: Their travel itinerary must list the newborn child, so the parents will need to call their airline after birth to add the child to the itinerary. By applying in-person for an expedited passport, intended parents may be able to obtain the passport in as little as one to two days.

CASE LAW: THE INTENDED PARENTAGE DOCTRINE

Since 1993, the courts in California have recognised that intended parents of children produced through surrogacy are the legal parents. In 1993, the California Supreme Court decided in *Johnson v Calvert* 5 Cal 4th 84 (Cal 1993) that an intended mother who provided her own egg for gestation by a surrogate should be considered the natural mother because she had the intent to procreate.

Under this doctrine, even where there is no genetic relationship between the intended parents and the child produced through a surrogate, the intended parents are the lawful parents of the child when a married couple intended to procreate using a non-genetically related embryo implanted into a surrogate (*In re Marriage of Buzzanca* 61 Cal App 4th 1410 (1998)).

Applying this doctrine to same-sex intended parent couples, in 2005 the California Supreme Court decided three companion cases involving lesbian couples who had children via surrogacy, *Elisa B v Superior Court* 37 Cal 4th 108 (Cal 2005), *Kristine H v Lisa R Court* 37 Cal 4th 156 (Cal 2005) and *KM v EG* 37 Cal 4th 130 (Cal 2005), ruling that when a same-sex couple has a child through assisted reproduction, both partners are legal parents, regardless of their gender, sexual orientation, or marital status.

Note that many other States in the United States have followed in California's footsteps in whole or in part, but many States apply different approaches, and it is important to understand these other approaches to parental establishment before anyone is matched with a surrogate from any State.

STATUTORY LAW IN CALIFORNIA REGARDING GESTATIONAL SURROGACY

California already has perhaps the best and most well-established body of case law in the United States for surrogacy. But with the passage of *California Assembly Bill 1217*, California now has new

and improved – surrogacy friendly – legislation which went into effect on 1 January 2013. The very strong case law in California (which is surrogacy friendly and considered by many to be the strongest law in the country) remains unchanged.

The previously existing legislation in California under the *Uniform Parentage Act* defined the parent-child relationship as the legal relationship existing between a child and the child's parents, and it governs proceedings to establish that relationship. Legislation in existence prior to 1 January 2013 also provided that a party to an assisted reproduction agreement may bring an action under the *Uniform Parentage Act* at any time to establish a parent and child relationship consistent with the intent expressed in the gestational surrogacy agreement. Previously existing statutory law in California also regulated the practice of surrogacy facilitators in assisted reproduction agreements, including surrogacy agreements.

The new legislation, however, provides additional guidance relating to items that are now required to be included in gestational surrogacy agreements, the manner in which surrogacy agreements must be executed, when medical procedures can be commenced, and where parental establishment cases may be filed. Although some of the procedures outlined in the Bill were already utilised by experienced assisted reproduction practitioners, they were not required by law. So, in essence, the new law creates clear guidance and codifies some best practices for the benefit of all involved. There may well be more we can do in California to further codify best practices, but the provisions outlined in the new law clarify for courts what constitutes a properly executed surrogacy agreement, and they help protect all parties to the agreement – surrogate, intended parents and child – from potential exploitation.

In relation to gestational surrogacy *agreements*, the new law:

- requires that intended parents and a surrogate be represented by separate legal counsel;
- requires notarisation of gestational surrogacy agreements;
- requires the execution and notarisation of an agreement *prior* to the administration of medications used in assisted reproduction or any embryo transfer procedure;
- requires the parties to a gestational surrogacy agreement to attest, under penalty of perjury as to their compliance with these provisions;
- provides that a gestational surrogacy agreement executed in accordance with these provisions is presumptively valid.

In relation to *establishing legal parentage* between intended parents and the resulting child, the new law:

- permits intended parents to establish parentage prior to the child's birth;
- permits the filing of the parentage action in the county where the child is anticipated to be born, the county where the surrogate or intended parents reside, the county where the agreement was executed, or the county where the medical procedures were performed;
- requires that a copy of the gestational surrogacy agreement be filed with the court as part of the parentage action;
- seals records of the agreement to all parties except the intended parents, surrogate, their attorneys and the State Department of Social Services.

CONCLUSION

Apart from having a healthy, happy baby or babies, nothing is more important to families than the knowledge that they are legally recognised as a family in their home country. Retaining the services of an attorney who is experienced in ART and family formation law is an investment in a family's future security and peace of mind. Even though the law in California is extremely surrogacy and intended parent friendly, it continues to evolve and change. Undoubtedly, new statutory provisions will emerge over time in California, and local practices will vary from one California county to another when it comes to filing the parentage petition, so it is essential to engage the services of an experienced ART practitioner to guide the intended parents every step of the way.

ART cases may seem daunting, especially when your clients' surrogacy arrangements require you to be knowledgeable on an array of legal issues from different perspectives and to take into account

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the laws of several different jurisdictions. But in the end such cases offer a chance to participate in an extraordinary event in your clients' lives – the formation of their family. With the right tools and information to guide your clients from intended parents to legal parents, you will find that advising clients who are becoming parents via surrogacy is especially rewarding and meaningful.

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