

Surrogacy Arrangements



How to know if it's right for you



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1. SURROGACY ARRANGEMENTS – OVERVIEW

Have you been dreaming of a child of your own, but having a baby naturally is out of the question?

Are you considering entering into a surrogacy arrangement and need more information about what this involves?

If you answered yes to either of these questions, then this booklet is for you.

Having a child can be one of life's most rewarding experiences. On the other hand however, it can be an emotional roller coaster if you are trying to have a baby and nature is not on your side.

Whether you have been trying to conceive for a long time without success, have medical difficulties carrying a child to term, or are in a same sex relationship, surrogacy may be the answer you've been looking for.

Deciding to enter into a surrogacy arrangement is a life changing decision. It is imperative you are fully aware of your rights and obligations as well as the risks involved.

If you believe a surrogacy arrangement is the right option for you, Reaston Drummond Law will ensure you are guided through the legal process in a sensitive and caring manner. We can assist you develop a surrogacy agreement personal to your particular situation and work with you from your initial consultation through to obtaining a final parentage order.



2. WHAT IS A SURROGACY ARRANGEMENT?

Surrogacy is when a woman (the birth mother or the surrogate mother) carries and gives birth to a baby for another person or people (the intended parent/s), who then raise the child, as their own.

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There are 2 Types of Surrogacy Arrangements:

- Altruistic (non-commercial); and
- Commercial (where money changes hands).

In Queensland, only non-commercial surrogacy arrangements are legal. The Surrogacy Act 2010 (Qld) provides the guiding principles and key concepts of surrogacy arrangements and subsequent parentage orders in Queensland.

Commercial surrogacy arrangements are illegal. It is also illegal to:

- Advertise for any surrogacy arrangements – whether you are willing to be the birth mother or looking for someone to be a birth mother for you; or
- To receive any fees for arranging a surrogacy.

It is legal however, to pay or reimburse the birth mother's reasonable surrogacy costs. This includes medical costs (for birth mother and child), health or life insurance premiums, legal and counselling fees, court costs, and birth mother's loss of earnings for the period she is unable to work due to the pregnancy or birth.



3. ENFORCEABILITY OF SURROGACY ARRANGEMENTS

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It is important to know that pursuant to section 15 of the Surrogacy Act (Qld), Surrogacy agreements are not enforceable. If a dispute subsequently arises about who has custody of a child (prior to a parentage transfer order being made), the Family Law Courts will have to determine the dispute.

An obligation under a surrogacy arrangement to pay or reimburse the birth mother's reasonable costs is enforceable unless the birth mother does not relinquish the child or does not consent to the making of a parentage order in favour of the intended parents.



4. WHY CHOOSE A SURROGACY ARRANGEMENT?

People choose surrogacy for a variety of reasons, including:

- Infertility/ Inability to carry child safely to term;
- Failed IVF;
- Same sex relationship; or
- Being single.

The advantage of surrogacy arrangements over adoption is that surrogacy makes it possible for childless couples to have a child with genes from either one or both of them. Surrogacy is a viable option for couples when one is infertile, when the woman may be fertile but unable to bear a child, or for same-sex couples.



One of the disadvantages of surrogacy is the possible emotional toll it can take on all parties during the various stages of the process.

- First, the intended parents need to be in the financial position where they can afford to start the surrogacy process and pay for all related costs.
- Next, they need to find a surrogate willing and medically fit (physically and emotionally) to undertake the surrogacy process. In a surrogacy, one advantage is the intended parents can ensure the birth mother is a person with an exceptionally clean health history, who has prenatal care from day one with no substance abuse history. On the other hand, finding such a person may prove difficult.
- Thirdly, all parties need to ensure they fully understand the agreement they are entering into and obtain independent legal advice about the surrogacy arrangement and its implications. If anyone is unhappy with any part of the agreement, amendments may need to be made. All parties also need to undergo counselling with an appropriately qualified counsellor about the surrogacy arrangement and its social and psychological implications.
- Fourthly, the fertilization process occurs and the wait starts to see if the medical procedure has been successful. If unsuccessful, parties may agree to undergo subsequent procedures. The downside is that birth mother may be dealing with a lengthy and medical invasive process.
- With luck the next step will involve the birth of a healthy baby and the birth being registered, followed by an application for transfer of parentage.



As surrogacy agreements are not enforceable in their entirety, until such time as a parentage order is made, there is always a risk the birth mother may decide not to relinquish the child after its birth, or the intended parents may decide not to take the child(ren) born as a result.

Subsequent court proceedings may then occur.

The benefit of a successful surrogacy is the birth of a beautiful child and a lifetime bond can develop between the birth mother and intended parents.



5. 10 STEPS TO A SUCCESSFUL SURROGACY ARRANGEMENT

STEP 1: Decision made to consider a surrogacy arrangement. Intended parents can be same sex or a heterosexual couple where there is medical or social need for the surrogacy arrangement.

STEP 2: Potential birth mother located and rough agreement drafted. This will include the reasonable expenses that will be paid for the birth mother.

STEP 3: All parties have counselling about the social and psychological implications of the surrogacy agreement.

STEP 4: All parties obtain independent legal advice about the effect of the surrogacy arrangement and its implications.

STEP 5: Agreement signed.

STEP 6: Medical procedure undertaken. If unsuccessful, further attempts may be contemplated.

STEP 7: Baby born and birth registered with Registry of Births Deaths and Marriages.

STEP 8: Parties are interviewed by an appropriately qualified counsellor and a surrogacy guidance report is prepared.

STEP 9: At least 28 days after baby's birth and prior to 6 months, application is made to Children's Court to transfer parentage from birth mother to intended parents (Parentage Order).

STEP 10: Updated birth details registered with the Registry of Births Deaths & Marriages.



Legal Advice - The requirements for intended parent/s and birth mothers to successfully enter and complete a legal and legitimate surrogacy arrangement in Queensland are onerous.

It is important that any individual considering entering into a surrogacy arrangement seeks legal advice as soon as they begin considering their options. Each party must have obtained independent legal advice prior to entering into a surrogacy arrangement if they want a parentage order to ultimately be made.

Counselling - The birth mother and the intended parent/s must also obtain counselling about the surrogacy arrangement and its social and psychological implications, prior to the pregnancy. If you require assistance in this regard, our family lawyers at Reaston Drummond Law can recommend reputable counsellors who have experience in this area.

Prior to any parentage order being made, the parties will be interviewed by a separate counsellor and a surrogacy guidance report prepared about whether the making of a parentage order would be for the wellbeing of the child.

Medical Process - From a medical perspective, the process of surrogacy will involve the following steps:



- The intended parents (or individual) and birth mother attend a consultation with a fertility specialist;
- The medical practitioner may require the birth mother and the intended parents to undergo independent obstetric and psychiatric assessments;
- Any genetic issues will be identified;
- Doctors will generally ask for a certificate confirming both parties have seen a lawyer and have been advised on their rights and obligations;
- If the intended parent is using her own eggs, they will be collected after an IVF treatment cycle and fertilised with her partner's (or donor) sperm. The embryo will then be transferred into the birth mother;
- Once pregnancy is confirmed, a counsellor may continue to discuss and confirm plans for delivery.



Registration of Birth – The birth of the child must be registered with the Registry of Births, Deaths and Marriages. The birth parent(s) will appear on the certificate as the child's parent/s until the intended parent/s:

- Obtain an order from the court to transfer the child's parentage; and
- Register the parentage order with the Registry of Births, Deaths and Marriages.

Effecting the Transfer of Parentage - After 28 days following the birth of a child and before 6 months, the intended parent/s can apply to the Children's Court for a parentage order. This order transfers parentage from the birth mother (and her spouse, if applicable) to the intended parent/s and enables the intended parent/s to register the child, as if the child was their own. The Court must be satisfied of various matters including that the proposed order will be for the wellbeing, and in the best interests, of the child. The child must have also resided with the intended parents for at least 28 consecutive days before the application was made.

A parentage order will only be made with the consent of the intended parent/s and the birth mother. In addition, there are a number of onerous procedural and other requirements (including the preparation of a surrogacy guidance report) which must be fulfilled prior to a parentage order being made.

If a parentage order is made, the child is considered to be the child of the intended parent/s for the purposes of the Family Law Act.



6. WHO CAN BE A PARTY TO A SURROGACY ARRANGEMENT?

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Who can be a surrogate mother?

- Any consenting woman over the age of 25 years (regardless of whether you are married, de-facto or single).

It is also beneficial to be a woman who:

- Has already had children (indicative of being fertile);
- Has had reasonably straight forward prior pregnancies and births; and
- Now wants to help people, who are not so fortunate.

Who can be intended parents?

- Any person or couple, including same sex couples, provided he/she is over the age of 25 years and have a medical or social need to enter a surrogacy arrangements to become a parent; and
- Is resident in Queensland; and
- Any female intended parent must satisfy eligibility criteria, relating to a difficulty to conceive, carry and/or give birth.



7. BIRTH MOTHER'S RIGHTS

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The birth mother has the right to manage her pregnancy as any other pregnant woman, despite what has been agreed to in the surrogacy agreement.

If you are an intended parent who likes to have a lot of control over a situation, it is important you are very aware of this before entering a surrogacy agreement.



8. WHAT ARE THE COSTS ASSOCIATED WITH A SURROGACY ARRANGEMENT?

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Generally, it will be the intended parents that will pay the birth mother's reasonable costs associated with a surrogacy arrangement.

Section 11 of the Surrogacy Act says that:

*“(1) A **birth mother's surrogacy costs** are the birth mother's reasonable costs associated with any of the following matters —*

(a) becoming or trying to become pregnant;

(b) a pregnancy or a birth;

(c) the birth mother and the birth mother's spouse (if any) being a party to a surrogacy arrangement or proceedings in relation to a parentage order.



(2) Without limiting subsection (1), the following amounts are a birth mother's surrogacy costs

—

(a) a reasonable medical cost for the birth mother associated with any of the matters mentioned in subsection (1);

Example of a reasonable medical cost for paragraph (a)— a cost incurred before conception if the birth mother consults a medical practitioner to find out if she is capable of carrying a pregnancy before undergoing a fertilisation procedure.

(b) a reasonable cost, including a reasonable medical cost, for a child born as a result of the surrogacy arrangement;

(c) a premium payable for health, disability or life insurance that would not have been obtained by the birth mother if the surrogacy arrangement had not been entered into;

(d) a reasonable cost of counselling associated with any of the matters mentioned in subsection (1), including—

(i) the cost of counselling obtained by the birth mother or the birth mother's spouse (if any) before or after entering into the surrogacy arrangement; or

(ii) the cost relating to the preparation of a surrogacy guidance report under section 32;

(e) a reasonable legal cost for the birth mother and the birth arrangement and the transfer of parentage;

(f) the value of the birth mother's actual lost earnings because of leave taken —

(i) for a period of not more than 2 months during which a birth happened or was expected to happen; or

(ii) for any other period during the pregnancy when the birth mother was unable to work on medical grounds;

(g) another reasonable cost associated with the surrogacy arrangement or the making of the order transferring parentage.



Examples of other reasonable costs for paragraph (g) —

- travel and accommodation costs for a birth mother who lives interstate and travels to Queensland to undertake a fertility treatment, to consult with an obstetrician or to give birth;
- travel and accommodation costs associated with a birth mother's attendance at a court hearing about an application for a parentage order if the birth mother does not live near the court.

(3) *In this section —*

legal cost *includes fees for obtaining legal advice and legal representation, court fees, and registry fees associated with registration of a birth and transfer of parentage.*

medical cost *means a medical cost to the extent that it is not recoverable under Medicare or any health insurance or other scheme."*

In almost all matters the costs to the intended parents will include:

- a) Obtaining legal advice for the birth mother and intended parents (including having surrogacy agreement drawn up and subsequent application for a parentage order);
- b) Counselling for both birth mother and intended parents;
- c) All medical and hospital costs (for birth mother and baby) agreed to be paid;
- d) Cost of the Surrogacy Guidance Report; and
- e) Any other reasonable costs agreed to be paid such as health insurance, lost income etc.



9. WHAT ARE THE RISKS OF ENTERING INTO A SURROGACY ARRANGEMENT?

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As outlined previously, one of the main risks associated with a surrogacy agreement in Queensland is that the agreements are not enforceable. If a dispute arises prior to a parentage transfer order being made, parties may need to file an application in a Family Law Court to resolve their dispute.

Other matters to consider include:

- Things may not turn out as you had hoped. For example, there may be more than one baby or the baby may have a disability;
- The birth mother may be very unwell after the birth;
- A party may die or become extremely unwell to the extent they are unable to care for the child.

This is a relatively new area of law and the case law to date is limited and in some cases inconsistent. Accordingly, it is difficult to advise with any certainty, what may happen if a matter ends up in the Family Court.

WHAT NEXT?

You're now at the point where you probably have more questions than when you started.

It's important that you understand your rights and obligations so you can make the decisions that are best for your future. All information in this booklet is of a general nature only and is not intended to be relied upon as, nor to be a substitute for, specific legal professional advice.

After reading this booklet, we recommend you contact us for an **initial consultation** so we can discuss your personal situation. The appointment runs for up to an hour and during this time you will be able to ask as many questions as you like. During your appointment, you will get a very good understanding of your situation and your desired result. You will leave the meeting better informed and you will have a better understanding of what you should do next.

If you have difficulty getting to our office, we can conduct appointments over the phone or by skype. If business hours are a problem, ask us about our out of hours, appointments.

The cost is \$330 and payments can be made pay by cash, credit card, EFTPOS or electronic transfer.

Spending time with experienced family lawyers will remove the confusion or conflicting stories you may be hearing from others. After your initial consultation, there is absolutely no obligation for you to retain us as your solicitor or go ahead with a surrogacy arrangement.

To make an initial consultation simply call us on **40311044**
or email us at info@rdlawcairns.com.au

We hope you do. We looking forward to assisting you.



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