



Surrogacy
+
Estate Planning



HAVEN
LEGAL CO.

Why is Surrogacy important to us?

*-A little note by Adelle Jones-
Principal Lawyer of Haven Legal Co.*

I am the mother of a beautiful boy named Lincoln. He was conceived naturally after 2.5 years of trying to get pregnant and 6 months before my husband and I were going to begin IVF treatment.



*I had a traumatic birth
which led to life-saving
bowel surgery and
extensive internal
abdominal adhesions.*

*Whilst I am still able to
conceive naturally, due to the internal damage the doctors can not
guarantee that I would survive another pregnancy.*

*Before my son's birth, surrogacy was not a household term. Now, it is
our only option to safely become a family of four. Because I am not able
to separate 'Adelle the person' from 'Adelle the lawyer', my interest in
surrogacy also morphed in to where surrogacy fits in Estate Planning.*

Protecting your children BEFORE they are born

The term 'surrogacy' conjures up a multitude of emotions. It is an exciting and stressful time for the Surrogate, the Intended Parents and their respective families. There are many people who come together in order to bring life into the world, creating a new, or extended family for the Intended Parents.

As parents, it is only natural we want to ensure from the beginning that the life we imagine for our children is realised. Everything from the Pinterest board you design for the nursery to the school you intend to send your baby to. This 'plan' also needs to include protecting them, even before they are born.

In the world of Surrogacy, when it comes to Wills and Estate Planning, there can be unexpected results.

Definitions to Remember

- *Intended Parent(s)* – this is the person/people who are entering into the Surrogacy Arrangement with the intention of being the parent of a child.
- *Biological Parent* – this is the person who provides the genetic material (sperm, egg) for the creation of the child. Often one of the intended parents is also to be the Biological parent but this is not always possible.
- *Surrogate* – is the women who carries and gives birth to the child. Sometimes the Surrogate is also a Biological Parent to the child.

PARENTAGE

Surrogacy arrangements in Victoria

A Surrogate who gives birth to a baby in the state of Victoria is initially *legally* recognised as the child's mother and is recorded on the birth certificate as being so. If the Surrogate has a partner, the partner is also recorded on the birth certificate as the father or other parent.

In Victoria, the parties involved in the surrogacy must make an application for a substitute parentage order to the Supreme or County Court no less than 28 days and no more than six months after the child is born. During this time the Intended Parents are *not legally* recognised as the child's parents and from an Estate Planning perspective this could be disastrous if the parties expressed their intentions in their Wills.

Please note: As the legal requirements vary from state to state, you should refer to the legislation in the State that the Intended Parents live to understand the requirements that apply to you.



The Surrogate and her Partner

More often than not, parents will have a clause in their Wills which leaves their estate to "their children".

In the unlikely event a Surrogate was to die during child birth, the Surrogate Child may be legally classed as a child of the Surrogate. This means that the child becomes a beneficiary of the Surrogate's estate.

This entitlement may even extend beyond the future transfer of parentage to the Intended Parents as that child remains a child of the Surrogate at the time the Surrogate's Estate is administered.

The same is true for the Surrogate's partner who is legally the other parent of the child at birth.

It is **essential** that a Surrogate and her partner have a Will that accurately reflects who they consider to be their children and also their intentions regarding any child born under the surrogacy arrangement.

Into the future, Surrogates also need to ensure that they advise their Estate lawyer that they previously had a child as part of a surrogacy arrangement. This is important even if parentage has been transferred, so that proper protections are in place.

This is particularly important if the Surrogate has donated genetic material and is therefore biologically connected to the Child.

The Intended Parents

The Intended Parents are not *legally* considered the parents of the Surrogate Child until **after** a parentage transfer occurs.

If the Intended Parents' uses the term "*my children*" in their Will, it may not include their Surrogate Child, particularly if there is no biological connection between the Intended Parent and the child.

A carefully prepared and current Will is a **must** for all parties entering into a Surrogacy Arrangement. At the very least, the Intended Parents' Wills should include the following:

1. Clear reference to any child born of a Surrogacy Arrangement;
2. Appoint who is to administer of any interest/funds the child born of the Surrogacy Arrangement is to receive;
3. Appoint a guardian for the child, to assist that person's standing to make an application to the Family Court of Australia if required.



Donating Genetic Material to Conceive a Child

Australian law presumes that **the legal parent of a child is the biological parent of the child.**

However, the *Family Law Act 1975* (Cth), in conjunction with State and Territory legislation, also provides for persons who are not the biological parents of child to have parental responsibility for a child. For example, often assisted reproductive procedures are undertaken with the express intention that one or both of the biological parents (i.e. the donor or provider of genetic material) will **not** in fact be the legal parents of a child once the child is born.

Whilst it is illegal in Australia, we are seeing a rise in Australians travelling overseas to engage in commercial surrogacy. This is where a surrogate receives a financial benefit in exchange for carrying a child. Once a child born under commercial surrogacy arrangements overseas is brought home to Australia, there is the potential for family law legal issues to arise regarding parentage and care of the child.

Many overseas countries, including the USA and Canada, require that in the course of preparation of the Surrogacy Agreement, the Intended Parents also have a lawyer in their home country draft a Will and an Enduring Power of Attorney. These documents are to include specifically crafted clauses to ensure that the Intended Parents are deemed to be the parents of any child

born of a surrogacy arrangement whether they are genetically related to the child or not.

During pregnancy and post-birth, for a period of time, the child may have legal parents, biological parents and Intended Parents and may also have entitlements to the Estates of each of them in the event of a death!

Therefore when considering entering in to a Surrogacy Arrangement whether as a Surrogate, the partner of a Surrogate, the person providing genetic material, or the Intended Parents– it is important to make sure your Estate Planning is up to date so that your wishes are carried out now and in the future.

*Create your
Estate Plan
with Haven
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