

# Surrogacy Act 2010 No 102

[2010-102]



New South Wales

## Status Information

### Currency of version

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### Provisions in force

The provisions displayed in this version of the legislation have all commenced.

### Notes—

- **See also**

[Equality Legislation Amendment \(LGBTIQA+\) Bill 2023](#) [Non-government Bill— Mr A H Greenwich, MP]

### Authorisation

This version of the legislation is compiled and maintained in a database of legislation by the Parliamentary Counsel's Office and published on the NSW legislation website, and is certified as the form of that legislation that is correct under section 45C of the [Interpretation Act 1987](#).

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# Surrogacy Act 2010 No 102



New South Wales

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# Surrogacy Act 2010 No 102



New South Wales

An Act to recognise certain surrogacy arrangements, to prohibit commercial surrogacy arrangements and to provide for the status of children of surrogacy arrangements, and to make related amendments to other Acts.

## Part 1 Preliminary

### 1 Name of Act

This Act is the *Surrogacy Act 2010*.

### 2 Commencement

This Act commences on a day or days to be appointed by proclamation.

### 3 Guiding principle

This Act is to be administered by reference to the principle that, in relation to any surrogacy arrangement, the best interests of the child of the surrogacy arrangement are paramount.

### 4 Definitions

(1) In this Act:

**affected party**, in relation to a surrogacy arrangement, means each of the following persons:

- (a) the birth mother,
- (b) a birth mother's partner (if any),
- (c) another birth parent (if any),
- (d) the intended parents.

**birth mother**—see section 5.

**birth mother's partner** means a birth mother's spouse or de facto partner at the time when the birth mother enters into a surrogacy arrangement but, if more than one

person would qualify as the birth mother's partner, means only the last person to so qualify.

**Note—**

Section 21C of the *Interpretation Act 1987* defines **de facto partner**.

**birth mother's surrogacy costs**—see section 7.

**birth parent**, of a child, means a person (other than an intended parent) who is recognised at law as being a parent of the child at the time when the child is born.

**commercial surrogacy arrangement**—see section 9.

**consent** means informed consent freely and voluntarily given by a person with capacity to give the consent.

**Court** means the Supreme Court of New South Wales.

**intended parent**—see section 5.

**Interstate parentage order** means an order under an Interstate surrogacy law that corresponds to a parentage order and includes an order of a kind declared by the regulations to be an Interstate parentage order.

**Interstate surrogacy law** means a law of another State or a Territory that corresponds to this Act, and includes any law declared by the regulations to be an Interstate surrogacy law.

**parentage order** means an order made by the Court under this Act for the transfer of the parentage of a child.

**parental responsibility**, in relation to a child, means all the duties, powers, responsibilities and authority which, by law, parents have in relation to children.

**post-conception surrogacy arrangement**—see section 5.

**pre-commencement surrogacy arrangement**—see section 15.

**pre-conception surrogacy arrangement**—see section 5.

**qualified counsellor** means a person who has the experience or qualifications (or both) of a kind required by the regulations to exercise the functions of a counsellor under this Act.

**surrogacy arrangement**—see section 5.

- (2) In this Act, a reference to a child of a surrogacy arrangement is a reference to a child born as a result of a surrogacy arrangement or who is the subject of a surrogacy arrangement.

(3) Notes included in this Act do not form part of this Act.

## 5 Surrogacy arrangement—meaning

(1) For the purposes of this Act, a **surrogacy arrangement** means:

(a) an arrangement under which a woman agrees to become or to try to become pregnant with a child, and that the parentage of the child born as a result of the pregnancy is to be transferred to another person or persons (a **pre-conception surrogacy arrangement**), or

(b) an arrangement under which a pregnant woman agrees that the parentage of a child born as a result of the pregnancy is to be transferred to another person or persons (a **post-conception surrogacy arrangement**).

(2) An agreement that the parentage of a child is to be transferred to another person is an agreement to the following effect (however expressed):

(a) an agreement to consent to a parentage order or an Interstate parentage order being made in respect of the child so as to transfer parentage of the child to another person,

(b) an agreement that the child is to be treated as the child of another person (and not of the woman who gives birth to the child),

(c) an agreement that the custody of, or parental responsibility for, a child is to be transferred to another person,

(d) an agreement that the right to care for a child is to be permanently surrendered to another person.

(3) Other matters may be dealt with in a surrogacy arrangement.

(4) A variation to a pre-conception surrogacy arrangement that is made after a woman who agrees to become pregnant or to try to become pregnant under the arrangement becomes pregnant is considered to be a part of the pre-conception surrogacy arrangement.

### Note—

A parentage order can be made under this Act in respect of a surrogacy arrangement only if the arrangement is a pre-conception surrogacy arrangement. There are additional preconditions to the making of a parentage order. These are set out in Part 3.

(5) In this Act, a reference to the **birth mother**, in relation to a surrogacy arrangement, is a reference to the woman who agrees to become pregnant or to try to become pregnant with a child, or is pregnant with a child, under the surrogacy arrangement.

(6) In this Act, a reference to an **intended parent** is a reference to a person to whom it is agreed the parentage of a child is to be transferred under a surrogacy arrangement.

## Part 2 Surrogacy arrangements

### Division 1 Enforcement of surrogacy arrangements

#### 6 Enforcement

- (1) A surrogacy arrangement is not enforceable.
- (2) However, an obligation under a surrogacy arrangement to pay or reimburse the birth mother's surrogacy costs is enforceable, but only if the surrogacy arrangement is a pre-conception surrogacy arrangement.

#### 7 Birth mother's surrogacy costs—meaning

- (1) For the purposes of this Act, 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) entering into and giving effect to a surrogacy arrangement.
- (2) The reasonable costs associated with becoming or trying to become pregnant include any reasonable medical, travel or accommodation costs associated with becoming or trying to become pregnant.
- (3) The reasonable costs associated with a pregnancy or birth include the following:
  - (a) any reasonable medical costs associated with the pregnancy or birth (both pre-natal and post-natal),
  - (b) any reasonable travel or accommodation costs associated with the pregnancy or birth,
  - (c) any premium paid for health, disability or life insurance that would not have been obtained by the birth mother, had the surrogacy arrangement not been entered into,
  - (d) any reasonable costs, including reasonable medical costs, incurred in respect of a child (being the child of the surrogacy arrangement),
  - (e) the cost of reimbursing the birth mother for a loss of earnings as a result of unpaid leave taken by her, but only for the following periods:
    - (i) a period of not more than 2 months during which the birth happened or was expected to happen,
    - (ii) any other period during the pregnancy when the birth mother was unable to



work on medical grounds related to pregnancy or birth.

- (4) The reasonable costs associated with entering into and giving effect to a surrogacy arrangement include the following:
- (a) the reasonable costs associated with the birth mother and the birth mother's partner (if any) receiving counselling in relation to the surrogacy arrangement (whether before or after entry into the arrangement),
  - (b) the reasonable costs associated with the birth mother and the birth mother's partner (if any) receiving legal advice in relation to the surrogacy arrangement or a parentage order relating to the surrogacy arrangement,
  - (c) the reasonable costs associated with the birth mother and the birth mother's partner (if any) being a party to proceedings in relation to such a parentage order, including reasonable travel and accommodation costs.
- (5) A cost is reasonable only if:
- (a) the cost is actually incurred, and
  - (b) the amount of the cost can be verified by receipts or other documentation.

- (6) In this section:

**medical costs** does not include any costs that are recoverable under Medicare or any health insurance or other scheme.

## Division 2 Offences in relation to surrogacy arrangements

### 8 Commercial surrogacy arrangements prohibited

A person must not enter into, or offer to enter into, a commercial surrogacy arrangement.

Maximum penalty: 2,500 penalty units, in the case of a corporation, or 1,000 penalty units or imprisonment for 2 years (or both), in any other case.

### 9 Commercial surrogacy arrangement—meaning

- (1) For the purposes of this Act, a surrogacy arrangement is a **commercial surrogacy arrangement** if the arrangement involves the provision of a fee, reward or other material benefit or advantage to a person for the person or another person:
- (a) agreeing to enter into or entering into the surrogacy arrangement, or
  - (b) giving up a child of the surrogacy arrangement to be raised by the intended parent or intended parents, or
  - (c) consenting to the making of a parentage order in relation to a child of the surrogacy arrangement.

- (2) However, a surrogacy arrangement is not a commercial surrogacy arrangement if the only fee, reward or other material benefit or advantage provided for is the reimbursement of a birth mother's surrogacy costs.

## 10 Advertising of surrogacy arrangements prohibited

- (1) A person must not publish any advertisement, statement, notice or other material that:
- (a) states or implies that a person is willing to enter into, or arrange, a surrogacy arrangement, or
  - (b) seeks a person willing to act as a birth mother under a surrogacy arrangement, or
  - (c) states or implies that a person is willing to act as a birth mother under a surrogacy arrangement, or
  - (d) is intended, or is likely, to induce a person to act as a birth mother under a surrogacy arrangement.

Maximum penalty:

- (a) in the case of a commercial surrogacy arrangement—2,500 penalty units in the case of a corporation or 1,000 penalty units or imprisonment for 2 years (or both) in any other case, or
  - (b) in any other case—200 penalty units in the case of a corporation or 100 penalty units in any other case.
- (2) This section does not apply if:
- (a) the surrogacy arrangement is not a commercial surrogacy arrangement, and
  - (b) no fee has been paid for the advertisement, statement, notice or other material.
- (3) In this section, **publish** means disseminate or provide access, by any means, to the public or a section of the public.

### Note—

See also the [Assisted Reproductive Technology Act 2007](#) which requires providers of assisted reproductive technology treatment to ensure that an assessment report is obtained and considered before a person is provided with treatment in connection with a surrogacy arrangement.

## 11 Geographical nexus for offences

- (1) This section applies for the purposes of, and without limiting, Part 1A of the [Crimes Act 1900](#).
- (2) The necessary geographical nexus exists between the State and an offence against this Division if the offence is committed by a person ordinarily resident or domiciled in

the State.

**Note—**

Section 10C of the *Crimes Act 1900* also provides that a geographical nexus exists between the State and an offence if the offence is committed wholly or partly in the State or has an effect in the State.

## **Part 3 Parentage orders**

### **Division 1 Parentage orders**

#### **12 Parentage order**

- (1) The Court may, on application under this Part, make a parentage order in relation to a child of a surrogacy arrangement.
- (2) The purpose of a parentage order is to transfer the parentage of a child of a surrogacy arrangement.

#### **13 References to “child”**

In this Part, a reference to a child is a reference to a child of a surrogacy arrangement.

### **Division 2 Application for parentage order**

#### **14 Application for parentage order**

- (1) An application for a parentage order may be made by one intended parent or by 2 intended parents jointly.
- (2) If there are 2 intended parents under the surrogacy arrangement, the application must be made jointly by the intended parents, unless the Court grants leave to an intended parent to make a sole application for a parentage order.
- (3) The Court may grant leave to an intended parent to make a sole application for a parentage order if:
  - (a) the other intended parent has died or lost capacity to make decisions, or
  - (b) the other intended parent cannot be located after reasonable endeavours have been made to locate him or her, or
  - (c) the intended parents have separated, or
  - (d) other exceptional circumstances justify that action.
- (4) The Court may, before giving leave to an intended parent to make a sole application, require the intended parent to provide evidence to the satisfaction of the Court that:
  - (a) the other intended parent has been given notice of the application, and

(b) the other intended parent does not wish to join the application for a parentage order.

(5) The fact that intended parents have separated does not prevent them from making a joint application for a parentage order.

#### **15 Date of surrogacy arrangement**

(1) An application for a parentage order may be made in relation to a surrogacy arrangement whether it was entered into before or after the commencement of this Part.

(2) A surrogacy arrangement entered into before the commencement of this Part is a ***pre-commencement surrogacy arrangement***.

(3) A parentage order may be made in respect of a pre-commencement surrogacy arrangement even if it was rendered void by a law in force before the commencement of this section (as if it had not been rendered void).

#### **16 Time within which application must be made**

(1) An application for a parentage order in relation to a child may be made not less than 30 days and not more than 6 months after the child's birth, subject to this section.

(2) For a pre-commencement surrogacy arrangement, an application for a parentage order may be made not more than 2 years after the commencement of this section.

(3) The Court may hear and determine an application for a parentage order that is made after the time limit for making an application under this section if the Court is satisfied that exceptional circumstances justify that action.

#### **17 Independent counsellor's report**

(1) An application for a parentage order must be supported by a report about the application prepared by an independent counsellor.

(2) The report must contain the independent counsellor's opinion as to whether the proposed parentage order is in the best interests of the child and the reasons for that opinion.

(3) The report is to include the counsellor's assessment of the following matters:

(a) each affected party's understanding of the social and psychological implications of the making of a parentage order (both in relation to the child and the affected parties),

(b) each affected party's understanding of the principle that openness and honesty about a child's birth parentage is in the best interests of the child,

- (c) the care arrangements proposed by the applicant or applicants in relation to the child,
  - (d) any contact arrangements proposed in relation to the child and his or her birth parent or parents or biological parent or parents,
  - (e) the parenting capacity of the applicant or applicants,
  - (f) whether any consent given by the birth parent or parents to the parentage order is informed consent, freely and voluntarily given,
  - (g) the wishes of the child, if the counsellor is of the opinion that the child is of sufficient maturity to express his or her wishes.
- (4) The report may address any other relevant matters.
- (5) The report must:
- (a) indicate the persons who were interviewed for the purposes of the report, and the date or dates on which the interviews were conducted, and
  - (b) set out the basis on which the person making the report claims to be an independent counsellor.
- (6) The provisions of any law or rules of court relating to the adducing of opinion evidence apply in relation to the independent counsellor's report, unless inconsistent with this section.
- (7) For the purposes of this section, an ***independent counsellor*** is a qualified counsellor who:
- (a) is not the counsellor who counselled the birth mother, the birth mother's partner (if any) or an intended parent about the surrogacy arrangement, to meet a precondition to the making of a parentage order, and
  - (b) is not, and is not connected with, a medical practitioner who carried out a procedure that resulted in the conception or birth of the child.

## **Division 3 Making of parentage order**

### **18 Making of parentage order by Court**

- (1) The Court may make a parentage order only if satisfied that the preconditions to the making of a parentage order have been met.
- (2) However, the Court may make a parentage order, despite not being satisfied that a precondition to the making of the order has been met, if:
  - (a) the precondition is not a mandatory precondition to the making of a parentage

order, and

(b) the Court is satisfied that exceptional circumstances justify the making of the parentage order, despite the precondition not having been met.

(3) In deciding whether to make the parentage order, the Court may also have regard to any other matter it considers relevant.

### **19 Ancillary orders**

On making a parentage order, the Court may make such other orders in relation to the child as it considers appropriate.

### **20 Birth siblings must be kept together**

(1) If a child has any living birth siblings, the Court is to make a parentage order in relation to the child only if the Court also makes or proposes to make a parentage order in relation to each birth sibling, so that the child and all his or her living birth siblings become children of the same applicant or applicants.

(2) A **birth sibling** of a child is any brother or sister of the child who is born as a result of the same pregnancy as the child.

(3) However, the Court may make a parentage order, despite non-compliance with subsection (1), if the Court considers it in the best interests of the child to make an order even if the parentage of his or her birth sibling is not transferred to the same applicant or applicants.

## **Division 4 Preconditions to making of parentage order**

### **21 Preconditions to making of parentage order**

This Division sets out the preconditions to the making of a parentage order.

#### **Note—**

Mandatory preconditions to the making of a parentage order cannot be waived by the Court. Other preconditions can only be waived in exceptional circumstances. See section 18.

### **22 Best interests of child are paramount**

(1) The Court must be satisfied that the making of the parentage order is in the best interests of the child.

(2) This precondition is a mandatory precondition to the making of a parentage order.

### **23 Surrogacy arrangement must be altruistic**

(1) The surrogacy arrangement must not be a commercial surrogacy arrangement.

(2) This precondition is a mandatory precondition to the making of a parentage order.

**24 Surrogacy arrangement must be a pre-conception surrogacy arrangement**

- (1) The surrogacy arrangement must be a pre-conception surrogacy arrangement.
- (2) This precondition is a mandatory precondition to the making of a parentage order.

**25 Intended parent must be single person or member of a couple**

- (1) The surrogacy arrangement must be an arrangement under which:
  - (a) there are 2 intended parents who, at the time of entering into the arrangement, are a couple, or
  - (b) there is only one intended parent.
- (2) A **couple** consists of a person and the person's spouse or de facto partner.
- (3) This precondition is a mandatory precondition to the making of a parentage order.

**26 Age and wishes of child must be considered**

- (1) The child must be under 18 years of age at the time the application is made.
- (2) The Court must have regard to the wishes of the child, if the child is of sufficient maturity to express his or her wishes and the Court considers it appropriate to take those wishes into account.
- (3) These preconditions are mandatory preconditions to the making of a parentage order.

**Note—**

The above preconditions will generally be of relevance only to pre-commencement surrogacy arrangements, which may have been entered into some years before the commencement of this Act.

**27 Age of birth mother**

- (1) The birth mother must have been at least 25 years old when she entered into the surrogacy arrangement.
- (2) For a pre-commencement surrogacy arrangement, it is sufficient that the birth mother was at least 18 years old when she entered into the surrogacy arrangement.
- (3) In all cases, it is a mandatory precondition to the making of a parentage order that the birth mother was at least 18 years old when she entered into the surrogacy arrangement.

**28 Age of intended parents**

- (1) Each intended parent must have been at least 18 years old when he or she entered into the surrogacy arrangement.

(2) This precondition is a mandatory precondition to the making of a parentage order.

### **29 Maturity of younger intended parent must be demonstrated**

- (1) If an intended parent was under 25 years of age when the surrogacy arrangement was entered into, the Court must be satisfied that the intended parent is of sufficient maturity to understand the social and psychological implications of the making of a parentage order.
- (2) An intended parent who was under 25 years of age when the surrogacy arrangement was entered into must provide evidence to the satisfaction of the Court:
  - (a) that he or she received counselling from a qualified counsellor about the surrogacy arrangement and its social and psychological implications before entering into the surrogacy arrangement, and
  - (b) that the counsellor was satisfied that he or she was of sufficient maturity to understand the surrogacy arrangement and its social and psychological implications.
- (3) This precondition is a mandatory precondition to the making of a parentage order.
- (4) This precondition does not apply to a pre-commencement surrogacy arrangement.
- (5) If the Court grants leave to an intended parent to make a sole application in respect of a surrogacy arrangement that involves 2 intended parents, it is not necessary to establish that the intended parent who is not a party to the application meets this precondition.

### **30 Medical or social need for surrogacy arrangement must be demonstrated**

- (1) The Court must be satisfied that there is a medical or social need for the surrogacy arrangement.
- (2) There is a medical or social need for a surrogacy arrangement if:
  - (a) there is only one intended parent under the surrogacy arrangement and the intended parent is a man or an eligible woman, or
  - (b) there are 2 intended parents under the surrogacy arrangement and the intended parents are:
    - (i) a man and an eligible woman, or
    - (ii) 2 men, or
    - (iii) 2 eligible women.
- (3) An **eligible woman** is a woman who:



- (a) is unable to conceive a child on medical grounds, or
  - (b) is likely to be unable, on medical grounds, to carry a pregnancy or to give birth, or
  - (c) is unlikely to survive a pregnancy or birth, or is likely to have her health significantly affected by a pregnancy or birth, or
  - (d) if she were to conceive a child:
    - (i) is likely to conceive a child affected by a genetic condition or disorder, the cause of which is attributable to the woman, or
    - (ii) is likely to conceive a child who is unlikely to survive the pregnancy or birth, or whose health would be significantly affected by the pregnancy or birth.
- (4) This precondition does not apply to a pre-commencement surrogacy arrangement.

### **31 Affected parties must consent to order**

- (1) Each of the affected parties must consent to the making of the parentage order.

**Note—**

**Consent** is defined to mean informed consent freely and voluntarily given by a person with capacity to give the consent.

- (2) The consent of a birth parent to the making of the parentage order is a mandatory precondition to the making of a parentage order unless the Court is satisfied that:
- (a) the birth parent has died or lost capacity to give consent, or
  - (b) the birth parent cannot be located after reasonable endeavours have been made to locate him or her.
- (3) If the Court grants leave to an intended parent to make a sole application in respect of a surrogacy arrangement that involves 2 intended parents, it is not necessary to establish that the intended parent who is not a party to the application consents to the making of the parentage order.

### **32 Applicant or applicants must be resident in NSW**

The applicant or applicants must be resident in New South Wales at the time of the hearing of the application.

### **33 Child must be living with applicant or applicants**

The child must be living with the applicant or applicants at the time of the hearing of the application.

### **34 Surrogacy arrangement must be in writing**

- (1) The surrogacy arrangement must be in the form of an agreement in writing, signed by

the birth mother, the birth mother's partner (if any) and the applicant or applicants.

(2) This precondition does not apply to a pre-commencement surrogacy arrangement.

### **35 Counselling must have been obtained**

(1) Each of the affected parties must have received counselling from a qualified counsellor about the surrogacy arrangement and its social and psychological implications before entering into the surrogacy arrangement.

(2) The birth mother and the birth mother's partner (if any) must have received further counselling from a qualified counsellor about the surrogacy arrangement and its social and psychological implications after the birth of the child and before consenting to the parentage order.

(3) This precondition does not apply to a pre-commencement surrogacy arrangement.

(4) If the Court grants leave to an intended parent to make a sole application in respect of a surrogacy arrangement that involves 2 intended parents, it is not necessary to establish that the intended parent who is not a party to the application received counselling about the surrogacy arrangement.

### **36 Legal advice must have been obtained**

(1) Each of the affected parties must have received legal advice from an Australian legal practitioner about the surrogacy arrangement and its implications before entering into the surrogacy arrangement.

(2) The legal advice obtained by the birth mother and the birth mother's partner (if any) must have been obtained from an Australian legal practitioner who is independent of the Australian legal practitioner who provided legal advice about the surrogacy arrangement to the applicant or applicants.

(3) This precondition does not apply to a pre-commencement surrogacy arrangement.

(4) If the Court grants leave to an intended parent to make a sole application in respect of a surrogacy arrangement that involves 2 intended parents, it is not necessary to establish that the intended parent who is not a party to the application received legal advice about the surrogacy arrangement.

### **37 Information must be provided for inclusion in central register**

(1) All information about the surrogacy arrangement that is registrable information under Division 3 of Part 3 of the *Assisted Reproductive Technology Act 2007* must have been provided to the Director-General of the Department of Health, for entry in the central register kept under that Act.

(2) The Court may waive compliance with this precondition in relation to any information

that is not known to an affected party and cannot reasonably be ascertained by the affected party.

### **38 Birth of child must be registered**

- (1) The birth of the child must have been registered in accordance with the requirements of the *Births, Deaths and Marriages Registration Act 1995* or a corresponding interstate law.
- (2) If the child was born outside the Commonwealth and registration of the birth is not permitted under the *Births, Deaths and Marriages Registration Act 1995* or a corresponding interstate law, the birth of the child must have been registered in accordance with the requirements (if any) of the law of the jurisdiction in which the child was born.
- (3) In this section, a **corresponding interstate law** means a law of another State, or of a Territory, that provides for the registration of births, deaths and marriages.

## **Division 5 Effect of parentage order**

### **39 General effect of order**

- (1) On the making of the parentage order in relation to a child:
  - (a) the child becomes a child of the intended parent or parents named in the order and they become the parents of the child, and
  - (b) the child stops being a child of a birth parent and a birth parent stops being a parent of the child.
- (2) Accordingly:
  - (a) the child of the surrogacy arrangement has the same rights in relation to the intended parent or parents named in the order as a child born to the parent or parents, and
  - (b) the intended parent or parents named in the order have the same parental responsibility as the birth parent had before the making of the order.

#### **Note—**

For example, for the purposes of a distribution on intestacy, a child of a surrogacy arrangement is regarded as a child of the intended parent or parents named in the order and the child's family relationships are determined accordingly. See section 109A of the *Succession Act 2006*.

- (3) Other relationships are determined in accordance with subsection (1).
- (4) However, for the purposes of any law of New South Wales relating to a sexual offence (being a law for which the relationship between persons is relevant), any relationship that would have existed if a parentage order had not been made continues to exist for

the purposes of that law in addition to any relationship that exists under this section by virtue of the order.

#### **40 Effect on property**

- (1) A parentage order does not have effect so as to deprive a child of a surrogacy arrangement of any vested or contingent property right acquired by the child before the making of the parentage order.
- (2) Subject to subsection (1), a parentage order has effect in relation to a disposition of property, whether by will or otherwise, and whether made before or after the commencement of this section, and to a devolution of property in relation to which a person dies intestate.

#### **41 Liability of trustees and legal personal representatives in relation to children**

- (1) If, before conveying, transferring or distributing any property among the persons appearing to be entitled to the property, a trustee or legal personal representative gives a claims notice and the time fixed by the notice has expired, the trustee or legal personal representative is not liable to any person:
  - (a) who claims directly or indirectly an interest in the property by virtue of a parentage order, and
  - (b) of whose claim the trustee or legal personal representative does not have notice at the time of the conveyance, transfer or distribution.
- (2) Nothing in this section prejudices the right of a person to follow property into the hands of a person, other than a bona fide purchaser for value, who has received it.

- (3) In this section:

**claims notice** means notice referred to in section 60 of the [Trustee Act 1925](#), section 92 of the [Probate and Administration Act 1898](#) or section 93 of the [Succession Act 2006](#).

#### **42 Name of child**

- (1) On the making of a parentage order in relation to a child, the child is to have as his or her surname and given name or names such name or names as the Court, in the parentage order, approves on the application of the intended parent or parents.
- (2) Before changing the surname or given name or names of a child, the Court must have regard to the wishes of the child, if the child is of sufficient maturity to express his or her wishes and the Court considers it appropriate to take those wishes into account.
- (3) The Court must not approve a name that would be a prohibited name under the [Births, Deaths and Marriages Registration Act 1995](#).

- (4) Nothing in this section prevents the changing of any name of a child, after the making of a parentage order, under the law of New South Wales.

**Note—**

Part 4A of the *Births, Deaths and Marriages Registration Act 1995* provides for the registration of a parentage order. After a parentage order is registered, a birth certificate issued in respect of the child must show the new name and parentage details of the child.

## **Division 6 Discharge of parentage order**

### **43 Application for discharge of parentage order**

- (1) An interested person may apply to the Court for the discharge of a parentage order in relation to a child whose parentage was transferred by the order.
- (2) An **interested person** means:
- (a) a child whose parentage was transferred by the order, if 18 years of age or older, or
  - (b) each of the child's birth parents and intended parents, or
  - (c) the Attorney General.

### **44 Power of Court to discharge parentage order**

- (1) On an application under this Part, the Court may make an order discharging a parentage order in relation to a child.
- (2) However, the Court may make the order only if it is satisfied of one of the following:
- (a) the parentage order was obtained by fraud, duress or other improper means,
  - (b) a consent the Court making the parentage order considered had been given to the making of the parentage order was, in fact, not given or was given for payment, reward or other material benefit or advantage (other than the birth mother's surrogacy costs),
  - (c) there is an exceptional reason why the parentage order should be discharged.

### **45 Effect of discharge of parentage order**

- (1) On the discharge of a parentage order, the rights, privileges, duties, liabilities and relationships of the child and all other persons are the same as if the parentage order had not been made.
- (2) However, the discharge of a parentage order does not affect:
- (a) anything lawfully done, or the consequences of anything lawfully done, while the parentage order was in force, or

(b) a right, privilege or liability acquired, accrued or incurred while the parentage order was in force.

(3) For the purposes of any law of New South Wales relating to a sexual offence (being a law for which the relationship between persons is relevant), any relationship that would have existed if a discharge order had not been made continues to exist for the purposes of that law in addition to any relationship that exists under this section by virtue of the order.

(4) This section applies except to the extent the Court otherwise orders.

#### **46 Ancillary orders**

On the discharge of a parentage order, the Court may make such other orders in relation to the child as it considers appropriate.

### **Division 7 Other provisions relating to parentage order**

#### **47 Proceedings to be heard in closed court**

Proceedings in respect of a parentage order are to be heard in closed court, unless the Court otherwise directs.

#### **48 Right of appeal**

(1) Any of the birth parents or intended parents may appeal to the Court of Appeal against a decision refusing an application for a parentage order.

(2) Any of the following persons may appeal to the Court of Appeal against a decision granting or refusing an application for discharge of a parentage order:

(a) the child of a surrogacy arrangement, if 18 years of age or older,

(b) the birth parents,

(c) the intended parents,

(d) if the Attorney General made the application—the Attorney General,

(e) another person who was served with the application.

(3) An appeal lies as of right.

(4) Fresh evidence or evidence in addition to, or in substitution for, the evidence given in the proceedings in relation to which the appeal is made may be given on the appeal.

#### **49 Registrar of Births, Deaths and Marriages to be notified of order**

(1) The registrar of the Court is to give notice of a parentage order, or a discharge of a parentage order, made by the Court to the Registrar of Births, Deaths and Marriages.

- (2) The regulations may make provision for the form in which the notice is to be given and the information required to be included in the notice.

#### **50 Notice to be given to other States**

- (1) The registrar of the Court is to give notice of a parentage order, or a discharge of a parentage order, made by the Court in relation to a child whose birth the registrar has reason to believe is registered in another State or a Territory to the registering authority of the State or Territory.
- (2) The regulations may make provision for the form in which the notice is to be given and the information required to be included in the notice.
- (3) In this section:

**registering authority** has the same meaning as it has in the *Births, Deaths and Marriages Registration Act 1995*.

#### **51 Director-General of Department of Health to be notified of order**

- (1) The registrar of the Court is to give the Director-General of the Department of Health notice of the making of a parentage order or the discharge of a parentage order by the Court.
- (2) The regulations may make provision for the form in which the notice is to be given and the information required to be included in the notice.

**Note—**

The Director-General of the Department of Health keeps a central register of surrogacy information under Part 3 of the *Assisted Reproductive Technology Act 2007*.

### **Part 4 Protection of privacy of surrogacy arrangements**

#### **52 Prohibition on disclosure of information relating to surrogacy arrangements**

- (1) A person must not publish any material that identifies, or is reasonably likely to identify, a person as a person affected by a surrogacy arrangement.

Maximum penalty: 25 penalty units or imprisonment for 12 months, or both.

- (2) For the purposes of this section, each of the following persons is a person affected by a surrogacy arrangement:
  - (a) a child of a surrogacy arrangement,
  - (b) an affected party in relation to a surrogacy arrangement,
  - (c) a party to any proceedings under this Act (other than the Attorney General),
  - (d) a person whose consent to a surrogacy arrangement, or the making of a

parentage order, is required under this Act.

- (3) This section does not prohibit the publication of any material if:
  - (a) the person identified (or reasonably likely to be identified) as a person affected by a surrogacy arrangement consents to being identified, and
  - (b) the material does not identify (and is not reasonably likely to identify) any person affected by the surrogacy arrangement who does not consent to being identified.
- (4) In this section, a reference to the consent of a person affected by a surrogacy arrangement is, if that person is a child of a surrogacy arrangement who is under 18 years of age, a reference to the consent of the person who has parental responsibility for the child.
- (5) In this section:

***publish*** means disseminate or provide access, by any means, to the public or a section of the public.

### **53 Restricted access to court records**

- (1) A person (including a party to any proceedings before the Court and any news media organisation) is not entitled to access court records that relate to proceedings in respect of a parentage order, except with leave of the Court.
- (2) An application for leave by a child of a surrogacy arrangement who is under 18 years of age can be made only with the consent of the person or persons who have parental responsibility for the child.
- (3) The Court can impose conditions on access granted by leave of the Court.
- (4) Section 21 of the *Court Information Act 2010* applies in relation to a condition of access imposed under this section in the same way as it applies to a condition of access imposed under that Act.

**Note—**

Section 21 of the *Court Information Act 2010* makes it an offence to disclose or use information for a purpose or in a manner that the person knows is contrary to a condition of access imposed by the Court.

- (5) The restriction on access imposed by this section has effect despite anything to the contrary in the *Court Information Act 2010*.
- (6) Rules of court may be made for or with respect to the grant of leave under this section.
- (7) In this section:

***court record*** has the same meaning as it has in the *Court Information Act 2010*.



**news media organisation** has the same meaning as it has in section 10 of the [Court Information Act 2010](#).

## Part 5 Access to birth information

### Note—

See also Part 3 of the [Assisted Reproductive Technology Act 2007](#) which gives the affected parties in relation to a surrogacy arrangement, and a person born as a result of a surrogacy arrangement, access to information about the surrogacy arrangement.

### 54 Definitions

In this Part:

**full birth record** means a record certifying both particulars relating to the birth of a person registered under section 17 of the [Births, Deaths and Marriages Registration Act 1995](#) and particulars relating to a parentage order or discharge of a parentage order relating to the person registered under Part 4A of that Act.

**original birth certificate** means a certificate certifying the particulars relating to the birth of the person registered under section 17 of the [Births, Deaths and Marriages Registration Act 1995](#).

### 55 Child's right to registered birth information

- (1) A person who is the child of a surrogacy arrangement and in respect of whom a parentage order is made is entitled to receive, if the person is 18 years of age or older:
  - (a) the person's original birth certificate, and
  - (b) the person's full birth record.
- (2) If the person is less than 18 years of age, the person is not entitled to receive his or her original birth certificate or full birth record except with the consent of the person or persons who have parental responsibility for the person.
- (3) This section does not affect the discretion conferred on the Registrar of Births, Deaths and Marriages by section 46 of the [Births, Deaths and Marriages Registration Act 1995](#).

### Note—

Section 46 of the [Births, Deaths and Marriages Registration Act 1995](#) gives the Registrar discretion to provide a person with information extracted from the Register of Births, Deaths and Marriages if satisfied the person has adequate reason for wanting information from the Register.

- (4) In this section, a reference to a parentage order includes a reference to an Interstate parentage order.

## **56 Rights of other parties to registered birth information**

- (1) A person who is an affected party in relation to a surrogacy arrangement in respect of which a parentage order is made is entitled to receive:
  - (a) the original birth certificate of the child of the surrogacy arrangement, and
  - (b) the full birth record of the child of the surrogacy arrangement.
- (2) In this section, a reference to a parentage order includes a reference to an Interstate parentage order.

## **57 Application for supply of birth information**

- (1) An application for the supply of an original birth certificate or full birth record under this Part is to be made in writing to the Registrar of Births, Deaths and Marriages in accordance with any requirements made by or under the *Births, Deaths and Marriages Registration Act 1995*.
- (2) An entitlement under this Part is subject to compliance with any such requirements.

## **Part 6 Miscellaneous**

### **58 Proceedings for offences**

Proceedings for an offence under this Act may be dealt with summarily before the Local Court.

### **59 Regulations**

- (1) The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.
- (2) In particular, the regulations may make provision for any fees to be paid in connection with this Act.
- (3) A regulation may create an offence punishable by a penalty not exceeding 10 penalty units.

### **60 Review of Act**

- (1) The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.
- (2) The review is to be undertaken as soon as possible after the period of 3 years from the date of assent to this Act.
- (3) A report on the outcome of the review is to be tabled in each House of Parliament

within 12 months after the end of the period of 3 years.

## **Schedule 1 Savings, transitional and other provisions**

### **Part 1 General**

#### **1 Regulations**

- (1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of the following Acts:

    this Act

- (2) Any such provision may, if the regulations so provide, take effect from the date of assent to the Act concerned or a later date.
- (3) To the extent to which any such provision takes effect from a date that is earlier than the date of its publication on the NSW legislation website, the provision does not operate so as:
- (a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication, or
  - (b) to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the date of its publication.

### **Part 2 Provisions consequent on enactment of this Act**

#### **2 Pre-commencement surrogacy arrangements—enforcement of birth mother's costs**

- (1) Section 6 (1) extends to a surrogacy arrangement entered into before the commencement of that subsection.
- (2) Section 6 (2) applies only in relation to a surrogacy arrangement entered into on or after the commencement of that subsection.

#### **3 Access to court records**

- (1) A person cannot be found guilty of an offence against section 21 of the *Court Information Act 2010*, as applied by section 53 of this Act, in respect of any contravention of any conditions imposed by the Court on the grant of access to court records under section 53 of this Act that occurs before the commencement of section 21 of the *Court Information Act 2010*.
- (2) This clause does not affect any liability for contempt of the Court.

### **Part 3 Provision consequent on enactment of **Courts and Other****

## Legislation Amendment Act 2011

### 4 Application of amendments

The amendments made to section 38 by the *Courts and Other Legislation Amendment Act 2011* apply in relation to the making of parentage orders on or after the day on which the amendments commence.

### Schedule 2 (Repealed)