



Chapter 18

Surrogacy Expenses

CONTENTS

180 CURRENT LAW

180 ALTRUISTIC SURROGACY

Surrogacy Expenses

In this chapter we discuss the payment of expenses in surrogacy arrangements. These expense could include medical costs, lost earnings and legal expenses. We also discuss and make recommendations in relation to commercial surrogacy.

CURRENT LAW

Our terms of reference ask us to consider the meaning and efficacy of section 59 of the *Infertility Treatment Act 1995* in relation to altruistic surrogacy. Section 59 states:

A person must not make, give or receive or agree to make, give or receive a payment or reward in relation to or under a surrogacy agreement or an arrangement to act as a surrogate mother.

Penalty: 240 penalty units or 2 years imprisonment or both.

Under section 59, commercial surrogacy arrangements are prohibited in Victoria. This is consistent with the guiding principle recommended by the commission in Chapter 5 that:

at no time should the use of reproductive technologies be for the purpose of exploiting (in trade or otherwise) either the reproductive capabilities of men and women or the children resulting from the use of ART.¹

The section does not clearly define the terms 'payment' or 'reward'. As a consequence, there is some uncertainty about whether the ban extends to making gifts to the surrogate or reimbursing her for expenses she incurs during the pregnancy. The Infertility Treatment Authority's publication *Conditions for Licence: Clinics, Hospitals and Day Procedure Centres*, for example, states that 'on balance, it is likely that the payment of fees for ordinary medical and related services provided as part of an altruistic surrogacy treatment is not a breach of [section 59]'.² In this chapter we discuss whether payments or rewards of this nature should be permitted.

ALTRUISTIC SURROGACY

The commission has heard contrasting opinions on whether gifts or payment in altruistic surrogacy arrangements should be permitted.

In submissions, some people expressed concern that a woman should not be disadvantaged as a result of acting as a surrogate.³

The surrogate mother should be seen as a volunteer. This means that they are volunteering their efforts for no financial advantage. However we argue that as volunteers, surrogate mothers should not be materially disadvantaged either.⁴

In these submissions there was support for payment of 'reasonable' expenses. Some people argued that prohibiting payment of reasonable expenses would prevent women from acting as surrogates.⁵

In her submission, Gina Goble reported on her research into outcomes of surrogacy arrangements in Australia.

The commissioning couple generally took the payment of medical and other reasonable expenses as their responsibility. In one case, where the gestational surrogate mother was materially advantaged, she paid for the travel, accommodation and medical expenses herself.⁶

People in favour of payment for reasonable expenses generally stated that such expenses should be limited to specified categories.⁷

Women's Health West said 'there should be provision for payment of all reasonable medical and associated expenses, as well as for income lost as a result of treatment, pregnancy and childbirth'.⁸

Interestingly, the *Adoption Act 1984* permits the adoptive parents of a child to make payment 'in respect of the hospital and medical expenses reasonably incurred in connexion with the birth of the child or the ante-natal or post-natal care and treatment of the mother of the child or of the child', as long as the payment has been approved by the Secretary to the Department of Human Services, or the court.⁹ Payment of legal expenses is permitted, and the secretary and court are empowered to authorise other payments or reward.¹⁰ However, the provision is never used in local adoptions.¹¹

The surrogate mother should be seen as a volunteer. This means that they are volunteering their efforts for no financial advantage. However we argue that as volunteers, surrogate mothers should not be materially disadvantaged either.

Some submissions argued that allowing any payment to the surrogate mother could bring Victoria into the realm of commercial surrogacy and for this reason should not be allowed.¹² An overriding concern was that sanctioning payments could lead to surrogacy arrangements being an option only for the wealthy, and that it could add to the possibility of the surrogate being exploited. Authorising payments might also introduce a notion that the foetus is 'owned' by the commissioning parents which could impact on decision making, particularly during pregnancy.

In *Position Paper Three: Surrogacy*, the commission made an interim recommendation that payment for any loss of earnings incurred by the surrogate should not be permitted. This decision was based on a concern that the possibility of deriving a financial benefit could influence a woman's decision to become a surrogate. Submissions to the commission in support of this interim recommendation said that permitting payment for loss of earnings could blur the line between commercial and altruistic surrogacy arrangements and could provide financial incentive to surrogates.¹³

However, during the course of our review, we were alerted to situations where it may be in the best interests of the child and the surrogate mother for the surrogate not to work during pregnancy. If there are medical complications during pregnancy, she may be advised to rest for health reasons and this could cause financial hardship. Allowing payment for loss of earnings could avoid a situation where a child is put at risk because of the potential for financial hardship faced by a surrogate mother.¹⁴

Irrespective of whether people approve or disapprove of payments to surrogates, participants in roundtable discussions recognised that it would be difficult to monitor payments between parties.¹⁵ In private arrangements, it would be possible to conceal payments, or to provide in-kind financial assistance.

The commission's view is that if altruistic surrogacy arrangements continue to be permitted in Victoria, the overriding principle should be that the surrogate should not obtain material advantage for her role.

Accordingly, the commission recommends the Infertility Treatment Act be amended to provide that a woman must not receive any material benefit or advantage as the result of an arrangement to act as a surrogate mother. Consistent with this principle, reimbursement of prescribed payments actually incurred should be permitted.

Prescribed payments should be limited to:

- any reasonable medical expenses associated with the pregnancy which are not otherwise provided for through Medicare, private health insurance or any other benefit
- in the absence of any entitlement to paid maternity or other leave, lost earnings up to a maximum period of two months
- additional lost earnings or medical expenses incurred as a result of special circumstances arising during pregnancy or immediately after birth, for example, where the surrogate has been advised by her doctor that she should stop working earlier than anticipated
- any reasonable legal expenses associated with the surrogacy arrangement.

The commission suggests that the principle that a surrogate must not receive material advantage should be expressed in legislation, and the detail of permitted payments should be specified in regulations.

In determining the scope of the prescribed payments, the commission has been guided by the principle that a woman should not receive any material benefit or advantage for her role in a surrogacy arrangement. As such, any reimbursement of expenses should only apply to an actual loss incurred.

A surrogate's lost earnings may only be reimbursed in the absence of leave entitlements that would otherwise be provided. A two-month time limit is set for the value of lost earnings to cover the likelihood that she may not be able to work or wish to work immediately before and after the birth of the child.

The commission's recommendation that additional lost earnings or medical expenses be available as a prescribed payment is only to apply in special circumstances. This would include the

- 1 Recommendation 1.
- 2 Infertility Treatment Authority, *Conditions for Licence: Clinics, Hospitals and Day Procedure Centres* (7th ed, August 2006) 17.
- 3 Submissions PP3 2 (Anonymous), PP3 18 (Fertility Society of Australia), PP3 48 (Women's Health West).
- 4 Submission PP3 48 (Women's Health West).
- 5 Submissions PP3 42 (Anonymous), PP3 45 (Anonymous).
- 6 Submission PP3 15 (Gina Goble).
- 7 Eg, submissions CP 19 (Anita Stuhmcke), CP 71 (Simon and Adam), CP 132 (Australian Infertility Support Group), CP 156 (Law Institute of Victoria), PP3 18 (Fertility Society of Australia) PP3 28 (Dr Ruth McNair), PP3 56 (Melbourne IVF Counselling Service).
- 8 Submission PP3 48 (Women's Health West).
- 9 *Adoption Act 1984* s 119(2).
- 10 *Adoption Act 1984* s 119(2).
- 11 Information supplied by Catherine Burnett, Department of Human Services (8 February 2007). The *Adoption and Permanent Care Manual* does not refer to the provision: Department of Human Services, *Adoption and Permanent Care Manual* (2004).
- 12 Eg, submissions CP 81 (Suryan Chandrasegaran), CP 89 (Ministerial Advisory Committee on Gay and Lesbian Health), CP 159 (Association of Relinquishing Mothers (Vic)), CP 169 (Social Questions Committee—CWL Victoria and Wagga Wagga), PP3 39 (Rhonda Brown).
- 13 Submissions PP3 39 (Rhonda Brown), PP3 56 (Melbourne IVF Counselling Service).
- 14 Surrogacy roundtable, 21 February 2006.
- 15 Surrogacy roundtable, 21 February 2006.

18

Chapter 18

Surrogacy Expenses

RECOMMENDATIONS

119. A woman must not receive any material benefit or advantage as the result of an arrangement to act as a surrogate mother.
120. Consistent with the principle that a woman should not receive any material benefit or advantage for acting as a surrogate mother, reimbursement of prescribed payments actually incurred should be permitted.
121. Prescribed payments should be limited to:
 - any reasonable medical expenses associated with the pregnancy which are not otherwise provided for through Medicare, private health insurance or any other benefit
 - in the absence of any entitlement to paid maternity or other leave, lost earnings up to a maximum period of two months
 - any additional lost earnings or medical expenses incurred as a result of special circumstances arising during pregnancy or immediately after birth, for example, where the surrogate has been advised by her doctor that she should stop working earlier than anticipated
 - any reasonable legal expenses associated with the surrogacy arrangement.
122. Surrogacy agreements should continue to be void. However, where parties to a surrogacy arrangement have agreed to the reimbursement of prescribed payments, that part of the agreement should be enforceable.

situation in which a woman acting as a surrogate is advised by her doctor to stop working earlier than anticipated. Additional medical expenses could arise from complications or unforeseen events during pregnancy or after birth. Because additional payments are only to be available in special circumstances, the potential for financial benefits to influence a woman's decision to become a surrogate is reduced.

In the next chapter we propose a mechanism for scrutinising whether the parties to a surrogacy arrangement have complied with these restrictions. We recommend a process for enabling the transfer of legal parentage from the surrogate mother and any partner to the commissioning parent(s). This process would require a court to be satisfied that the surrogate has not received any material advantage as a result of her role in the surrogacy arrangement.

Section 61 of the Infertility Treatment Act provides that surrogacy contracts are void. The commission believes that section 61 should remain in place, subject to one exception. If parties to a surrogacy arrangement have agreed to the reimbursement of expenses in accordance with the legislation, that aspect of the agreement should be enforceable.