

South Australia

Statutes Amendment (Surrogacy) Act 2009

An Act to amend the *Family Relationships Act 1975*, the *Births, Deaths and Marriages Registration Act 1996* and the *Assisted Reproductive Treatment Act 1988*.

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1	Existing agreements

The Parliament of South Australia enacts as follows:

Part 1—Preliminary

1—Short title

This Act may be cited as the *Statutes Amendment (Surrogacy) Act 2009*.

2—Commencement

This Act comes into operation 12 months after assent.

3—Amendment provisions

In this Act, a provision under a heading referring to the amendment of a specified Act amends the Act so specified.

Part 2—Amendment of *Family Relationships Act 1975*

4—Amendment of section 10—Saving provision

Section 10—after paragraph (c) insert:

or

- (d) the consequences at law or in equity of an order under Part 2B Division 3 of this Act.

5—Amendment of section 10B—Application of Part

Section 10B—after subsection (3) insert:

- (4) Nothing in this Part prevents a person becoming the mother or father of a child by virtue of the operation of any other law of the State (including by virtue of an order under Part 2B Division 3).

6—Insertion of heading

Before section 10F insert:

Division 1—Interpretation

7—Amendment of section 10F—Interpretation

Section 10F—after the definition of *procuration contract* insert:

recognised surrogacy agreement—see section 10HA;

8—Insertion of heading

After section 10F insert:

Division 2—Certain contracts and activities relating to surrogacy illegal

9—Amendment of section 10G—Illegality of surrogacy and procuration contracts

Section 10G—after subsection (3) insert:

- (4) This section does not apply in relation to a recognised surrogacy agreement.

10—Insertion of new Division

After section 10H insert:

Division 3—Lawful surrogacy under recognised agreements

Subdivision 1—Recognised surrogacy agreements

10HA—Recognised surrogacy agreements

- (1) In this section, unless the contrary intention appears—
- fertilisation procedure* has the same meaning as in Part 2A;
- human reproductive material* means—
- (a) human semen; or
- (b) a human ovum;
- husband* has the same meaning as under Part 2A;
- lawyer* means a person who is admitted as a barrister and solicitor of the Supreme Court and holds a current practising certificate;
- lawyer's certificate* means a certificate signed by a lawyer, and endorsed on an agreement, certifying that—
- (a) the lawyer explained the legal implications of the agreement to a party to the agreement named in the certificate; and
- (b) the party signed the agreement in the lawyer's presence;
- married woman* has the same meaning as under Part 2A;
- medical practitioner* means a legally qualified medical practitioner;
- Minister* means the Minister for Families and Communities;
- prescribed relative* means a mother, sister, step-sister or first-cousin.

- (2) A **recognised surrogacy agreement** is an agreement—
- (a) under which a woman (the **surrogate mother**) agrees—
 - (i) to become pregnant or to seek to become pregnant; and
 - (ii) to surrender custody of, and rights in relation to, a child born as a result of the pregnancy to 2 other persons (the **commissioning parents**); and
 - (b) in relation to which the following conditions are satisfied:
 - (i) the parties to the agreement are—
 - (A) the surrogate mother and, if she is a married woman, her husband; and
 - (B) the commissioning parents,and no other person;
 - (ii) all parties to the agreement are at least 18 years old;
 - (iii) the commissioning parents—
 - (A) are legally married; or
 - (B) have cohabited continuously together as *de facto* husband and wife
 - for the period of 3 years immediately preceding the date of the agreement; or
 - for periods aggregating not less than 3 years during the period of 4 years immediately preceding the date of the agreement;
 - (iv) the commissioning parents are domiciled in this State;
 - (v) either—
 - (A) the female commissioning parent is, or appears to be, infertile; or
 - (B) there appears to be a risk that a serious genetic defect, serious disease or serious illness would be transmitted to a child born to the female commissioning parent;
 - (vi) the surrogate mother has been assessed by and approved as a surrogate by a counselling service—
 - (A) that is accredited for the purposes of this subparagraph in accordance with the regulations; and

- (B) in accordance with any relevant guidelines published by the National Health and Medical Research Council; and
 - (C) in accordance with any other requirement that may be prescribed by the regulations for the purposes of this subparagraph;
- (vii) the surrogate mother and both commissioning parents each have a certificate issued by a counselling service that complies with the requirements of subsection (3) (being, as between the surrogate mother on the one hand and the commissioning parents on the other hand, different counselling services);
- (viii) the agreement states that the parties intend—
 - (A) that the pregnancy is to be achieved by the use of a fertilisation procedure carried out in this State; and
 - (B) that at least 1 of the commissioning parents will provide human reproductive material with respect to creating an embryo for the purposes of the pregnancy, unless the commissioning parents have a certificate issued under subsection (5);
- (ix) the agreement states that no valuable consideration is payable under, or in respect of, the agreement, other than for expenses connected with—
 - (A) a pregnancy (including any attempt to become pregnant) that is the subject of the agreement; or
 - (B) the birth or care of a child born as a result of that pregnancy; or
 - (C) counselling or medical services provided in connection with the agreement (including after the birth of a child); or
 - (D) legal services provided in connection with the agreement (including after the birth of a child); or
 - (E) any other matter prescribed by the regulations for the purposes of this provision;
- (x) the agreement states that the parties intend that the commissioning parents will apply for an order under section 10HB after the child is born.

- (3) For the purposes of subsection (2)(b)(vii), a certificate complies with the requirements of this subsection if—
- (a) the certificate is issued by a counselling service that is accredited for the purposes of this subsection in accordance with the regulations; and
 - (b) the certificate states—
 - (i) that the person to whom it relates has received counselling—
 - (A) individually; and
 - (B) if the person is married, or is 1 of the commissioning parents—as a couple, about personal and psychological issues that may arise in connection with a surrogacy arrangement; and
 - (ii) that, in the opinion of the counsellor who undertook the counselling, the proposed recognised surrogacy agreement would not jeopardise the welfare of any child born as a result of the pregnancy that forms the subject of the agreement.
- (4) Without limiting any other kind of counselling that a person may seek, the counselling contemplated by subsections (2)(b)(vii) and (3)(b) must be consistent with—
- (a) any guidelines related to such counselling published by the Australian and New Zealand Infertility Counsellors Association; and
 - (b) any relevant guidelines published by the National Health and Medical Research Council.
- (5) For the purposes of subsection (2)(b)(viii)(B), a certificate issued under this subsection—
- (a) must be issued by a medical practitioner; and
 - (b) must relate to the persons who are seeking to be commissioning parents under the relevant agreement; and
 - (c) must state that, in the opinion of the medical practitioner—
 - (i) both prospective commissioning parents appear to be infertile; or
 - (ii) there is a medical reason why it would be preferable not to use human reproductive material provided by the prospective commissioning parents to create an embryo for the purposes of achieving a pregnancy.

- (6) In addition, in order for an agreement to be taken to be a recognised surrogacy agreement—
- (a) the relevant terms of the agreement (as envisaged by subsection (1)) must be set out in a written agreement; and
 - (b) the written agreement must be signed by each party to the agreement; and
 - (c) the signatures of each party must be attested by a lawyer's certificate and the certificate with respect to the surrogate mother (and, if relevant, her husband) must be given by a lawyer who is independent of a lawyer who gives a certificate with respect to either or both of the commissioning parents.
- (7) An agreement or certificate under this section must comply with any other requirement prescribed by the regulations.

Subdivision 2—Orders

10HB—Orders as to parents of child born under recognised surrogacy arrangements

- (1) In this section—

birth parent, of a child, means—

- (a) the woman who gave birth to the child; or
- (b) a man (if any) who is the father of the child under another Part of this Act (the *birth father*);

birth sibling, of a child, means a brother or sister of the child who is born as a result of the same pregnancy as the child;

commissioning parents means the commissioning parents under a recognised surrogacy agreement;

Court means the *Youth Court of South Australia* constituted of a Judge.

- (2) This section applies to a child if—
- (a) the child was born under the terms of a recognised surrogacy agreement; and
 - (b) the commissioning parents under the surrogacy agreement are domiciled in this State; and
 - (c) the child was conceived as a result of a fertilisation procedure carried out in this State.
- (3) An application may be made to the Court for an order under this section in relation to a child.
- (4) The application may be made by either or both of the commissioning parents.

- (5) The application may only be made when the child is between the ages of 4 weeks and 6 months.
- (6) In deciding an application under this section, the welfare of the child must be regarded as the paramount consideration.
- (7) In addition to being satisfied as to the matters referred to above (including as to the validity of the relevant agreement as a recognised surrogacy agreement), the Court must not make an order under this section unless it is satisfied that the surrogate mother freely, and with a full understanding of what is involved, agrees to the making of the order.
- (8) However, the Court may dispense with the requirement under subsection (7)—
 - (a) if satisfied that the surrogate mother is dead or incapacitated; or
 - (b) if satisfied that the applicants cannot contact the surrogate mother after making reasonable inquiries; or
 - (c) in any other circumstances prescribed by the regulations.
- (9) In deciding whether to make an order under this section, the Court must also take into account the following, if relevant:
 - (a) whether the child's home is, and was at the time of the application, with both commissioning parents;
 - (b) if only 1 of the commissioning parents has applied for the order, and the other commissioning parent is alive at the time of the application, whether—
 - (i) the other commissioning parent freely, and with a full understanding of what is involved, agrees to the making of an order in favour of the applicant commissioning parent; or
 - (ii) the applicant commissioning parent cannot, after making reasonable inquiries, contact the other commissioning parent to obtain his or her agreement under subparagraph (i);
 - (c) whether valuable consideration (other than for expenses of the kind allowed under section 10HA(2)(b)(ix)) has been given or received by either of the commissioning parents, or either of the child's birth parents, for or in consideration of—
 - (i) the making of the order; or
 - (ii) the handing over of the child to the commissioning parents; or
 - (iii) the making of any arrangements with a view to the making of the order;

- (d) any submission made to the Court by, or on behalf of, the birth father.
- (10) The Court must also decide whether, in the opinion of the Court, the commissioning parents are fit and proper persons to assume the role of parents of the child.
- (11) The Court may take into account anything else it considers relevant.
- (12) The Court may, before deciding whether to make an order under this section, require any party to the proceedings to provide an assessment from a counselling service (obtained at the expense of the commissioning parents) in relation to the matter.
- (13) If the Court makes an order under this section, the effect of the order for the purposes of the laws of the State will be as follows:
 - (a) the relationship between the child and the commissioning parent or each commissioning parent (as specified under the terms of the order) is to be treated as being that of child and parent;
 - (b) the relationship between the child and any birth parent is to be treated as not being that of child and parent; and
 - (c) the relationships of all other persons to the child are to be determined according to the operation and effect of paragraphs (a) and (b).
- (14) In the making of an order under this section in relation to a child, the child has as his or her name such name as the Court, on the application of either or both of the commissioning parents, approves in the order.
- (15) Subsection (14) does not prevent a name of a child being later changed in accordance with another law of the State.
- (16) If an order is made under this section, an appointment existing at the time the order is made of a person as the guardian of the child ceases to have effect.
- (17) If a child in relation to whom an application for an order has been made under this section has a living birth sibling—
 - (a) the application will be taken to relate to the child and the birth sibling; and
 - (b) the Court may only make an order about the child if it makes a comparable order (in all respects apart from any given name or names) about the birth sibling; and
 - (c) this section will apply to the birth sibling in the same way as it applies to the child.

10HC—Ability to discharge an order

- (1) Terms used in this section have meanings consistent with the meanings they have in section 10HB.

- (2) The Court may, if satisfied as described in subsection (3), make an order discharging an order under section 10HB on receiving an application to do so from—
 - (a) the Attorney-General; or
 - (b) the chief executive of the administrative unit principally assisting in the administration of the *Adoption Act 1988*.
- (3) On an application under subsection (2), the Court may make an order discharging an order under section 10HB if it is satisfied that—
 - (a) the original order was obtained by fraud, duress or other improper means; or
 - (b) a consent relied on for the making of the original order was not an effective consent because it was obtained by fraud, duress or material inducement; or
 - (c) there is an exceptional reason why the original order should be discharged.
- (4) In the making of an order under this section in relation to a child, the Court is to declare the name by which the child is to be known, having regard to the principle that the child's first name should not be changed by the order except in exceptional circumstances.
- (5) Subsection (4) does not prevent a name of a child being later changed in accordance with another law of the State.
- (6) The Court is not to make an order under this section unless—
 - (a) to do so would be for the welfare and best interests of the child who would be affected by the order; and
 - (b) the Court is satisfied that reasonable efforts have been made to give notice of the application to—
 - (i) each of the birth parents of the child; and
 - (ii) each of the commissioning parents; and
 - (iii) if the Court considers it appropriate having regard to the child's age, the child.
- (7) Any person may apply for leave to intervene in an application under this section and the Court may make an order entitling the person to intervene in the application.
- (8) A person who is permitted under subsection (7) to intervene in an application under this section is to be treated as a party to the application with all the rights, duties and liabilities of a party, unless the Court orders otherwise.
- (9) If an order is made under this section, the Court may make any consequential or ancillary order it thinks fit in the interests of justice or for the welfare and in the best interests of the child to whom the order relates, including any order relating to—
 - (a) the ownership or possession of property; or

- (b) any matter affecting the child in relation to the duties, powers, responsibilities and authority which, by law, parents have in relation to children; or
 - (c) the domicile of the child.
- (10) If an order is made under this section, the rights, duties and relationships under the law of the State are to be as if the original order had not been made.
- (11) Subsection (10)—
- (a) does not apply to the extent that its application would be inconsistent with any order made under subsection (9); and
 - (b) does not affect—
 - (i) anything lawfully done; or
 - (ii) the consequences of anything lawfully done; or
 - (iii) any proprietary right or interest that became vested in any person,while the original order was in force.

10HD—Court to notify Registrar of Births, Deaths and Marriages

- (1) The Registrar of the Youth Court of South Australia is to give to the Registrar of Births, Deaths and Marriages written notice of the particulars described in subsection (2) if the Court makes an order under section 10HB or 10HC.
- (2) The particulars of which notice has to be given are—
- (a) the date of the order; and
 - (b) the full name, address and occupation of each of the birth parents; and
 - (c) the full name, address and occupation of each of the commissioning parents; and
 - (d) the name by which the child to whom the order relates is known before, and is to be known after, the order becomes effective; and
 - (e) details of the date and place of birth of the child; and
 - (f) if relevant, the terms of any consequential or ancillary order made under section 10HC(9); and
 - (g) any particulars prescribed by the regulations; and
 - (h) if available, any other information required by the Registrar of Births, Deaths and Marriages in relation to registration under the *Births, Deaths and Marriages Registration Act 1996* of the birth of the child to whom the order relates.

10HE—Access to Court records

Except as authorised by the Youth Court of South Australia, the records of proceedings for an order under section 10HB or 10HC will not be open to inspection.

10HF—Finality of orders

An order under section 10HB cannot be appealed against, reviewed, called into question, or affected by any court, on any account, except under section 10HC.

Subdivision 3—Related matters

10HG—Power of court to cure irregularities

- (1) In this section—

Court means the *Youth Court of South Australia* constituted of a Judge.

- (2) If the Court, on application under this section, is satisfied—

- (a) that—

- (i) there has been a failure to comply with a requirement under this Division with respect to any matter associated with an agreement intended to be a recognised surrogacy agreement; or
- (ii) there is a matter arising under this Division that a person cannot reasonably satisfy or achieve; and

- (b) that in the circumstances of the particular case it would be a just and appropriate course of action for the Court to exercise the powers conferred by this section,

the Court may excuse the failure or excuse compliance with the matter by ordering that, subject to such conditions as may be stipulated by the Court, the requirement or the matter (as the case requires) be dispensed with (to the necessary extent).

- (3) An order under subsection (2) may have effect for the purposes of any Act or law that may be connected to the status or operation of recognised surrogacy agreements or to the operation of this Division.

10HH—Ministerial power of delegation

- (1) The Minister may delegate to a person (including a person for the time being holding or acting in a specified office or position) a function or power of the Minister under this Division.
- (2) A delegation under this section—
- (a) must be by instrument in writing; and
- (b) may be absolute or conditional; and
- (c) does not derogate from the ability of the Minister to act in any matter; and

- (d) is revocable at will.

11—Insertion of heading

Before section 10I insert:

Division 4—Interaction with other laws

12—Amendment of section 13—Confidentiality of proceedings

- (1) Section 13(4)(a)(i)—delete "by the Court" and substitute:
by a court
- (2) Section 13(4)(a)(i)—delete "of the Court" and substitute:
of the court
- (3) Section 13(4)(b)(i)—delete "the Court" and substitute:
a court

13—Amendment of section 14—Claim under this Act may be brought in the course of other proceedings

- (1) Section 14(1)(a)—delete "the Court" and substitute:
a court
- (2) Section 14(2)—delete "the Court" and substitute:
a court

14—Insertion of section 15

After section 14 insert:

15—Regulations

- (1) The Governor may make such regulations as are contemplated by, or necessary or expedient for the purposes of, this Act.
- (2) Without limiting the generality of subsection (1), the regulations may—
 - (a) make provisions of a savings or transitional nature consequent on the amendment of this Act by another Act or the commencement of specified regulations under this Act;
 - (b) incorporate or operate by reference to a specified code or standard as in force at a specified time or as in force from time to time;
 - (c) fix fees to be paid in respect of any matter under this Act and regulate the recovery, refund, waiver or reduction of such fees;
 - (d) impose a penalty, not exceeding a fine of \$10 000, for contravention of, or non-compliance with, a regulation;
 - (e) fix expiation fees, not exceeding \$315, for alleged offences against the regulations.

- (3) The regulations may—
 - (a) be of general application or limited application;
 - (b) make different provision according to the matters or circumstances to which they are expressed to apply;
 - (c) provide that a matter or thing in respect of which regulations may be made is to be determined according to the discretion of the Minister.
- (4) If a code or standard is referred to or incorporated in the regulations—
 - (a) a copy of the code or standard must be kept available for inspection by members of the public, without charge and during normal office hours, at an office determined by the Minister; and
 - (b) evidence of the contents of the code or standard may be given in any legal proceedings by production of a document apparently certified by the Minister to be a true copy of the code or standard.

Part 3—Amendment of *Births, Deaths and Marriages Registration Act 1996*

15—Amendment of section 4—Definitions

- (1) Section 4, definition of *registrable event*—after "marriage" insert:

and includes the making or discharge of a surrogacy order
- (2) Section 4—after the definition of *still-born child* insert:

surrogacy order means an order under section 10HB of the *Family Relationships Act 1975*.

16—Insertion of Part 3 Division 6

After section 22 insert:

Division 6—Surrogacy orders

22A—Surrogacy orders

- (1) On receipt of a notice under section 10HD of the *Family Relationships Act 1975* in relation to the making or discharge of a surrogacy order about a child whose birth is registered in this State, the particulars provided in the notice must be registered by the Registrar in relation to the registration of the child's birth and the child's name.
- (2) Without limiting subsection (1), the Registrar must, in relation to the Register, make such entries and alterations as are necessary to give effect to the operation of section 10HB(13) or 10HC(10) (as the case requires) of the *Family Relationships Act 1975*.

- (3) Subject to subsection (4), a certificate issued by the Registrar after the registration of the particulars provided in a notice under section 10HD of the *Family Relationships Act 1975*—
 - (a) must only disclose and certify up-to-date particulars contained in an entry; and
 - (b) must not provide any information disclosing a change in a parent or parents of the relevant child, or a change in the name of the child (including by disclosing the name of, or information about, any birth parent who is no longer considered as a parent of the child).
- (4) A person—
 - (a) who is the subject of a surrogacy order and who has attained the age of 18 years; or
 - (b) who is a party to the surrogacy agreement that gave rise to a surrogacy order,is entitled to a certificate certifying all relevant entries in the Register.
- (5) On the receipt of a notice under section 10HD of the *Family Relationships Act 1975* in relation to the making or discharge of a surrogacy order about a child whose birth is registered in another State, the Registrar must send a copy of the notice to the relevant registering authority.

17—Insertion of section 29A

After section 29 insert:

29A—Saving provision—surrogacy arrangements

This Part does not limit the operation of Division 6 of Part 3.

18—Insertion of section 49A

After section 49 insert:

49A—Saving provision—surrogacy arrangements

- (1) Despite a preceding section of this Part, but subject to subsection (2), the Registrar must restrict access to the Register so as to keep confidential any information that would disclose the making or discharge of a surrogacy order.
- (2) Subsection (1) does not apply if the person seeking access to a relevant part of the Register is—
 - (a) a party to the surrogacy agreement that gave rise to the surrogacy order; or
 - (b) the person who is the subject of the surrogacy order if he or she has attained the age of 18 years.

Part 4—Amendment of *Assisted Reproductive Treatment Act 1988*

19—Amendment of section 3—Interpretation

Section 3—after the definition of *in vitro fertilisation procedure* insert:

recognised surrogacy agreement means a recognised surrogacy agreement under section 10HA of the *Family Relationships Act 1975*;

20—Amendment of section 9—Conditions of registration

Section 9(1)(c)—after subparagraph (iv) insert:

(iva) for the purposes of a recognised surrogacy agreement;

Schedule 1—Transitional provisions

1—Existing agreements

(1) In this clause—

Court means the *Youth Court of South Australia* constituted of a Judge;

surrogacy contract means a surrogacy contract as defined by section 10F of the *Family Relationships Act 1975*.

- (2) Subject to this clause, if the Court, on application under this clause, is satisfied that in the circumstances of the particular case it would be an appropriate course of action for the Court to exercise the powers conferred by this clause, the Court may determine that a surrogacy contract entered into before the commencement of this clause should have effect as a recognised surrogacy agreement under section 10HA of the *Family Relationships Act 1975* (as enacted by this Act), despite the operation of Part 2B of that Act.
- (3) An application under this clause—
- (a) must be made by all parties to the surrogacy contract; and
 - (b) must be made within 15 months after the commencement of this clause.
- (4) An application cannot be made under this clause if a child has been born as a result of the relevant pregnancy and the child is more than 5 years old on the day on which this clause comes into operation.
- (5) An application may be made under this clause, and the Court may make an order under this clause, despite the operation of sections 10G and 10H of the *Family Relationships Act 1975*.
- (6) The Attorney-General may intervene in any proceedings under this clause to make representations or tender evidence (or both).
- (7) If the Court makes an order under this clause—
- (a) the surrogacy contract will be taken to be a recognised surrogacy agreement validly entered into under section 10HA of the *Family Relationships Act 1975*; and

- (b) a child within the contemplation or operation of the agreement will be taken to be a child born under the terms of a recognised surrogacy agreement; and
- (c) the person or persons to whom custody or rights were to be surrendered under the surrogacy contract will be taken to be a commissioning parent or commissioning parents under a recognised surrogacy agreement; and
- (d) the Court may consider and deal with an application under section 10HB of the *Family Relationships Act 1975* (as enacted by this Act) as if it applied to the surrogacy contract (and to the parties to the surrogacy contract) and, if relevant, as if subsections (2)(c) and (5) of that section did not apply; and
- (e) the Court may make any other related order as it thinks fit.