

Legislative Council—No 31

As introduced and read a first time, 21 June 2006

South Australia

Statutes Amendment (Surrogacy) Bill 2006

A BILL FOR

An Act to amend the *Family Relationships Act 1975* and the *Reproductive Technology (Clinical Practices) Act 1988*.

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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 2006*.

2—Commencement

- 5 This Act comes into operation 3 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*

5 4—Amendment of section 5—Interpretation

Section 5, after the definition of *father* insert:

fertilisation procedure means—

- (a) artificial insemination; or
- 10 (b) the procedure of fertilising a human ovum outside the body and transferring the fertilised ovum into the body; or
- (c) the procedure of transferring an unfertilised human ovum into the body for the purposes of fertilisation within the body;

5—Amendment of section 10—Saving provision

Section 10—after paragraph (c) insert:

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

6—Amendment of section 10A—Interpretation

Section 10A(1), definition of *fertilization procedure*—delete the definition

20 7—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 section 10HB).

25 8—Insertion of heading

Before section 10F insert:

Division 1—Interpretation

9—Amendment of section 10F—Interpretation

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

30 *recognised surrogacy agreement*—see section 10HA;

10—Insertion of heading

After section 10F insert:

Division 2—Certain contracts and activities relating to surrogacy illegal

11—Amendment of section 10G—Illegality of surrogacy and procurement contracts

Section 10G—after subsection (3) insert:

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

12—Insertion of new Division

After section 10H insert:

Division 3—Lawful surrogacy under recognised agreements

10HA—Recognised surrogacy agreements

- 10 (1) In this section, unless the contrary intention appears—

human reproductive material means—

- (a) human semen; or
- (b) a human ovum;

husband has the same meaning as under Part 2A;

15 *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—

- 20 (a) the lawyer explained the legal implications of the agreement to a party to the agreement named in the certificate; and
- (b) the party gave the lawyer apparently credible assurances that the party was not acting under coercion or undue influence; and
- (c) the party signed the agreement in the lawyer's presence;

25 *marriage relationship* means the relationship between 2 persons cohabitating as husband and wife or *de facto* husband and wife;

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;

30 *prescribed relative* means a mother, sister, step-sister or first-cousin.

- (2) A *recognised surrogacy agreement* is an agreement—

- 35 (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, or 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 surrogate mother has already given birth to a child (being a child who was alive at birth);
 - (iv) the commissioning parents have cohabited continuously together in a marriage relationship for the period of 5 years immediately preceding the date of the agreement;
 - (v) the commissioning parents are domiciled in this State;
 - (vi) the surrogate mother is a prescribed relative of at least 1 of the commissioning parents, or has a certificate issued under subsection (3) in relation to the proposal that she act as a surrogate mother for the commissioning parents;
 - (vii) the surrogate mother and both commissioning parents each have a certificate issued by a counselling service that complies with the requirements of subsection (4) (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)(vi), the Minister may, on application by a person who is contemplating entering into an agreement that is intended to be a recognised surrogacy agreement under this section, issue a certificate under this subsection that will enable the person to act as a surrogate mother under such an agreement even though she is not a prescribed relative of the persons who would be the commissioning parents under that agreement if the Minister is satisfied—

- (a) that the person applying for the certificate has a relationship with the prospective commissioning parents that appears to indicate that the surrogacy arrangements under such an agreement have a reasonable prospect of success; and
- (b) that, in the circumstances as the Minister knows them, there is no reason that should prevent the Minister from issuing the certificate.

(4) 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—
 - (i) that is independent of a person who holds a licence under Part 3 of the *Reproductive Technology (Clinical Practices) Act 1988*; and
 - (ii) that satisfies any requirements prescribed by the regulations for the purposes of this provision; and
- (b) the certificate states that the person to whom it relates has received counselling about personal and psychological issues that may arise in connection with a surrogacy arrangement.

(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 under this section must comply with any other requirement prescribed by the regulations.

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;

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.

5 (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 6 weeks and 6 months.

10 (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 both birth parents freely, and with a full understanding of what is involved, agree to the making of the order.

15 (8) However, the Court may dispense with the requirement under subsection (7) in relation to a birth parent if satisfied—

(a) that the birth parent is dead or incapacitated; or

20 (b) that the applicants cannot contact the birth parent after making reasonable inquiries.

(9) In deciding whether to make an order under this section, the Court must also take into account the following, if relevant:

25 (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—

30 (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

35 (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—

40 (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.
- 5 (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.
- 10 (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.
- 15 (13) If the Court makes an order under this section, the order will have the effect of an adoption order made by the Court under the *Adoption Act 1988*—
 - (a) so that, for the purposes of any other Act or law, the child has been adopted by a commissioning parent or commissioning parents (according to the terms of the order); and
 - 20 (b) so that the child becomes, in contemplation of law, the child of a commissioning parent or commissioning parents (according to the terms of the order) and ceases to be the child of any birth parents; and
 - 25 (c) so that the rights of the child with respect to a commissioning parent or commissioning parents (according to the terms of the order) will be the same as an adopted child.
- 30 (14) Without limiting the operation of subsection (13) but subject to a succeeding subsection, any provision of the *Adoption Act 1988* prescribed by the regulations will apply in relation to the child, the commissioning parents or the order, with such modifications or exclusions as the regulations may provide.
- 35 (15) In the making of an order under this section in relation to a child—
 - (a) the child has as his or her surname—
 - 35 (i) if the order is made in favour of both commissioning parents and they are both known by the same surname—that surname; or
 - (ii) in any other case—a name the Court, on the application of either or both of the commissioning parents, approves in the order; and
 - 40 (b) the child has as his or her given name or names a name or names the Court, on the application of either or both of the commissioning parents, approves in the order.

- 5
- (16) Subsection (15) does not prevent a name of a child being later changed in accordance with another law of the State.
- (17) Subject to subsection (18), the Registrar of Births, Deaths and Marriages must, on receipt of notice of the making an order under this section in relation to a child—
- 10
- (a) endorse any entry made in the register of births relating to the child with a note recording the fact of the order; and
- (b) add a fresh entry of the name or names of the commissioning parent or parents who are in contemplation of law the parents of the child under the terms of the order.
- (18) If a birth parent applies to the Court to be removed from the register of births as the parent of a child who is within the terms of an order under this section—
- 15
- (a) the Court must make an order to give effect to the application; and
- (b) the Registrar of Births, Deaths and Marriages must, on receipt of the relevant order, alter the register of births to give effect to the order.
- (19) Subject to the operation of subsections (17) and (18), access to any information contained in the register of births in relation to a child who is within the terms of an order under this section will be restricted or regulated in the same way as information relating to a child who has been adopted under the *Adoption Act 1988*.
- 20
- (20) Except as authorised by the Court, the records of proceedings for an order under this section will not be open to inspection.
- 25
- (21) 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
- 30
- (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.

35

10HC—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—
- 40
- (a) that—

- 5
- (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,
- 10 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).
- 15 (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.

10HD—Ministerial power of delegation

- 20 (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.
- 25

13—Insertion of heading

Before section 10I insert:

Division 4—Interaction with other laws

14—Amendment of section 13—Confidentiality of proceedings

- 30 (1) Section 13(1)—delete "the Court" and substitute:
a court
- (2) Section 13(2)—delete "the Court" and substitute:
a court

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

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

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

Part 3—Amendment of *Reproductive Technology (Clinical Practices) Act 1988*

5 16—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*;

17—Amendment of section 10—Functions of Council

10 Section 10—after subsection (5) insert:

- (6) The code of ethical practice should (insofar as may be relevant) deal with the issue of the use of artificial fertilisation procedures to give effect to recognised surrogacy agreements on its merits and without drawing unnecessary or unreasonable distinctions between
15 circumstances that arise under such agreements and circumstances that arise in other cases that are within the ambit of the operation of this Act.

18—Section 13—Licence required for artificial fertilisation procedures

Section 13(3)(b)—after subparagraph (ii) insert:

20 , or except for the purposes of a recognised surrogacy agreement

Schedule 1—Transitional provision

1—Transitional provision

25 Section 20(4) of the *Reproductive Technology (Clinical Practices) Act 1988* does not apply with respect to a regulation made under that Act on or before the commencement of this Act that is expressed to come into operation on the day on which this Act comes into operation.