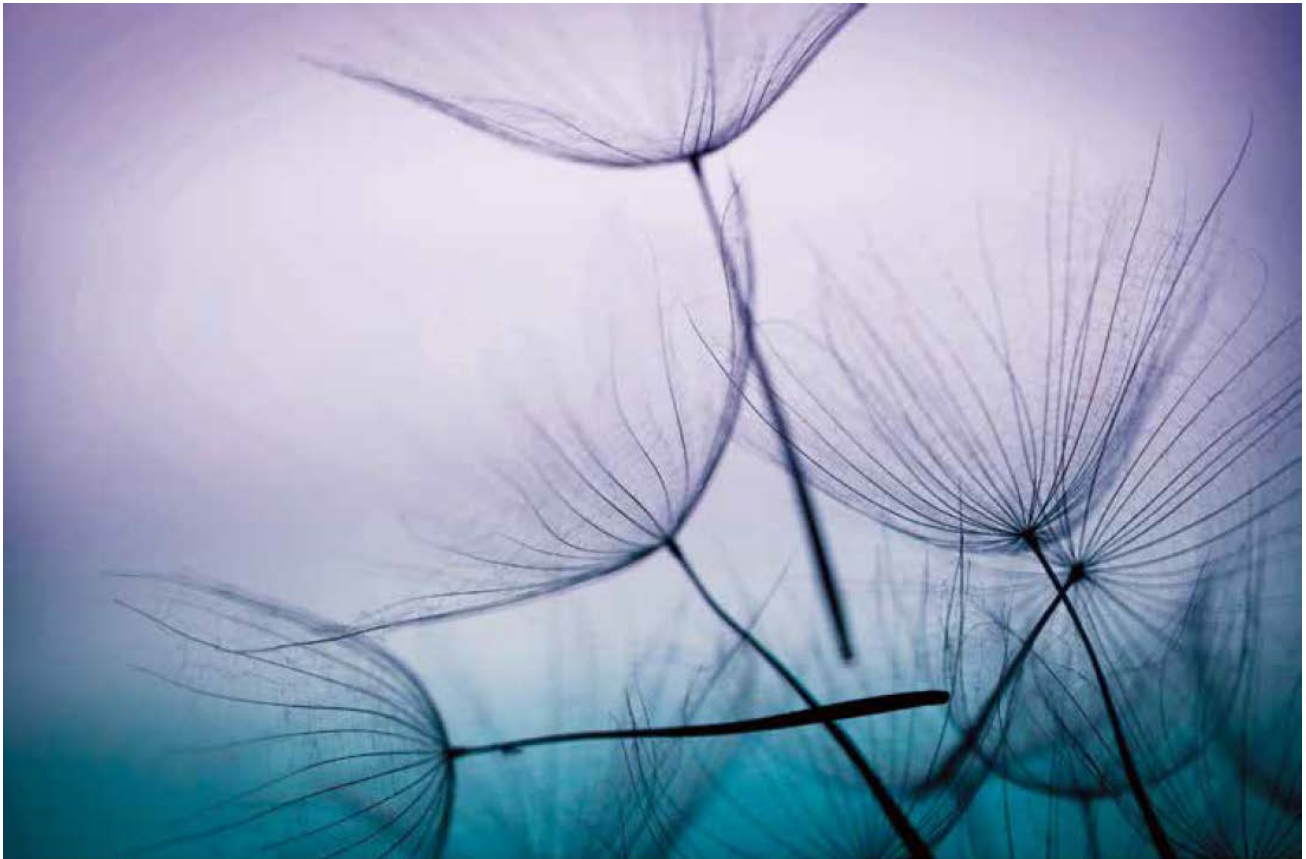


International surrogacy arrangement legal checklist



For people considering a surrogacy arrangement, it can be difficult to know where to begin and what to anticipate. Before entering into any surrogacy arrangement, there are key questions that each person should ask themselves to avoid legal uncertainty and possible missteps.

This checklist is a useful tool to help you navigate this process.

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This information is for people considering an international surrogacy arrangement, including potential parents, surrogates, donors, interested family members or friends, medical practitioners or IVF clinicians. The checklist provides a summary and general overview of potential legal issues which may impact upon Australian citizens or residents who are considering entering into an international surrogacy arrangement. **It does not constitute legal advice.**

Surrogacy is poorly regulated in many countries. There may be concerns about the potential exploitation of surrogates and egg donors, the legal rights of children who are born as a result, immigration requirements, as well as the regulations and practices that govern the safety and control of medical treatment.

Australian and other countries' laws concerning overseas surrogacy may vary so people should check the current legal situation in both countries before undertaking an international surrogacy arrangement.

The best way to avoid legal uncertainty and possible missteps is for all parties to seek early, independent and specialised legal advice which takes account of personal circumstances. It is also recommended that commissioning parents and surrogates seek specialist medical advice and counselling prior to any surrogacy arrangement.

Any arrangement should consider all checklist items.

For more advice on surrogacy, visit www.varta.org.au/surrogacy

VARTA wishes to thank Kellehers Australia for collaborating on the modification of the checklist devised and created by Kellehers Australia, following consultation with consumers and health professionals.

KELLEHERS AUSTRALIA

BARRISTERS & SOLICITORS

*Town Planning, Environmental Law,
Local Government, Government Relations,
Property Law*

ABN 47 350 401 635

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For more information visit the
Victorian Assisted Reproductive Treatment Authority
at www.varta.org.au or phone 03 8601 5250

Before commencing an arrangement

The questions below relate to variations between countries in terms of eligibility, local laws and practices and other key considerations regarding treatment and individual responsibilities.

-
- ☐ Is the commissioning parent/s eligible for surrogacy treatment according to the laws of the destination country?
-
- ☐ Is the surrogate eligible?
-
- ☐ What are the relevant laws in the destination country in which the arrangement is taking place? What are the laws in Australia? What are the state laws?
-
- ☐ Is there any risk that the commissioning parent/s or the surrogate is committing a criminal offence in either country?
-
- ☐ What if the commissioning parent/s has plans to relocate later to a country where surrogacy is forbidden? What if the commissioning parent/s moves states?
-
- ☐ What if the child is born in a different country or state from which the embryo was formed? How will this affect the arrangement and/or parentage order? Can the birth certificate be changed?
-
- ☐ Is medical, legal or psychological advice required before commencing the arrangement? Have all parties received it? If not, what are the consequences of proceeding without this advice?
-
- ☐ Have all financial implications (including travel costs, travel and medical insurance, clinic costs etc.) been considered, including in the eventuality of delays and/or complications?
-
- ☐ Is the commissioning parent/s commencing multiple surrogacy arrangements at the same time? Are the surrogates aware? What if multiple surrogates conceive simultaneously? What if each surrogate has a multiple pregnancy?
-
- ☐ Are donor sperm or eggs being used? What laws apply in respect to access to identifying information about the donor/s and the rights and responsibilities of the donor/s in the destination country? Will all parties know the origins of the donor gametes (sperm or eggs) to be used in the procedure?
-
- ☐ Is the import or export of sperm, eggs and/or embryos required? What are the import/export regulations in the country of origin and destination country? Will there be any difficulty satisfying these regulations?
-
- ☐ Has a foreign legal professional been engaged in preparation for visa or court procedures?
-
- ☐ Has a local lawyer been engaged in Australia to monitor the procedures abroad, including to ensure they comply with Australian law on the recognition of foreign court judgments?
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- ☐ Is it clear to all parties what assistance Australian consulates, embassies or high commissions can and cannot provide? What local embassy and departmental guidelines apply?
-
- ☐ Is any government permission required to commence a surrogacy arrangement? When is permission sought? What are the procedures? What evidence is needed for the application?
-
- ☐ What visa and/or travel arrangements apply for parents entering or leaving a foreign country for surrogacy? Has this been organised ahead of time and are all consular officials satisfied?
-
- ☐ Is a written surrogacy agreement required? Between which parties (commissioning parent/s, surrogate, donor/s, treating doctor or clinic)? Who should prepare this?
-
- ☐ Is a written agreement legally binding overseas? Is the agreement binding in Australia?
-
- ☐ If the surrogate is unable to speak the language in which the documents relating to the surrogacy arrangement are written, has she been given access to a trained interpreter? Did she have an independent lawyer or advisor present? If she is unable to read, has she been read the entire document?
-
- ☐ Have all parties (including the surrogate) received a copy of all the documents?
-
- ☐ What terms apply to the arrangement? For example:
- The number of embryos to be transferred?
 - What happens in the instance of a multiple birth?
 - Who will attend appointments?
 - What tests will be conducted?
 - What occurs if prenatal tests show the baby has a serious abnormality?
 - Who makes decisions about the birth? Who will attend?
 - Who is responsible for discharge arrangements from the maternity hospital?
- Who will advise on these issues?
-
- ☐ Who pays for what? What compensation is to be paid to the surrogate? How much is the commissioning parent/s prepared to pay?
-
- ☐ What steps can be taken to ensure the competence of the clinic and treating physician?
-
- ☐ What are the clinic's practices and regulations around storage, genetic testing, transport, and patient identification procedures?
-
- ☐ What if a surrogate, her partner, or the commissioning parent/s change their mind and do not want to proceed with the surrogacy?
-
- ☐ What happens if the relationship between the commissioning parents breaks down? Are their rights the same? Will the commissioning parents need to seek special legal assistance?
-
- ☐ What happens if a biological commissioning parent dies? Where does that leave a non-biological commissioning parent?
-

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During the pregnancy: what happens if...?

- ☐ Extra medical care is required or requested?
- ☐ Medical complications occur for the surrogate or the baby? Who is responsible to ensure the surrogate fully understands what is happening?
- ☐ The pregnancy fails or is terminated?
- ☐ There is a dispute with the treating clinic or surrogate regarding expenses or medical treatment?
- ☐ The performance of the treating doctor or clinic is unsatisfactory?
- ☐ The surrogate does not keep to the terms of the arrangement? For instance, if she does not attend medical appointments, or makes lifestyle choices which are of concern?

After the child is born

These questions relate to the legal obligations once the child is born.

- ☐ What are the commissioning parent/s immediate legal obligations? Can the baby come back to Australia with the commissioning parent/s and legalities wait? Until when?
- ☐ How is the birth to be registered? What is required? Whose name/s will be on the baby's birth certificate under mother, father, or parent? Will it make a difference later?
- ☐ Who is legally responsible for the child? Is this the same as who is considered the child's legal parent/s?
- ☐ What nationality will the child have? Is the child a citizen of Australia? Will the child have dual citizenship?
- ☐ Other than birth registration, are there official steps that might be required by government, clinics etc?
- ☐ What are optional court procedures? What are compulsory court procedures? Do these make a difference?
- ☐ Is a parentage order application required? Why is it needed/ recommended? What is the application process? What options are available for the commissioning parent/s if a court refuses to grant a parenting order? Is an appeal possible?
- ☐ What if an application to take the child back to Australia is refused? Is an appeal possible?
- ☐ Has adequate, detailed documentary evidence been collected about the arrangement throughout the pregnancy? (About payment, consent, motivations, factual background etc.)

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- ☐ What if the surrogate is unable to be located for any evidence requested by consular officials or a court?
-
- ☐ What if foreign laws change suddenly? What would happen if the surrogate is already pregnant? What if there are embryos in storage?
-
- ☐ What if the surrogate changes her mind? Is there any time limit?
-
- ☐ What if the commissioning parent/s changes their mind?
-
- ☐ Have the commissioning parent/s decided whether to disclose to their child the origins of their conception? What is the significance of open disclosure versus non-disclosure?
-
- ☐ Are there any embryos in storage? What is to be done with unused embryos? What is the legislation and clinic policy surrounding storage, disposal, or donation of embryos? Does the commissioning parent/s need to make arrangements to transport these back to Australia? What is the legislation in the destination state about importation and storage of embryos?
-

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