

**PUBLIC CONSULTATION PAPER ON
THE STATUS OF CHILDREN (ASSISTED REPRODUCTION TECHNOLOGY) BILL**

A. Introduction

1. The Ministry of Law (“MinLaw”) proposes to introduce a Status of Children (Assisted Reproduction Technology) Bill (“Bill”), which deals with the issues of legal parentage and status of children conceived through assisted reproduction technology (“ART”). In particular, the Bill will:

- (a) clarify the legal parentage and status of children conceived through ART (also termed as “fertilisation procedure” in the proposed Bill);
- (b) clarify the legal parentage and status of children conceived through ART where the wrong egg, sperm or embryo was used in the fertilisation procedure as a result of a mistake or negligence, for example, in cases involving such a mix-up during an in-vitro fertilisation (“IVF”) procedure (“ART mix-up”);
- (c) make a related amendment to section 114 of the Evidence Act to allow relevant evidence (e.g. reliable scientific evidence) to be adduced to displace the presumption of paternity created under that section; and
- (d) make a related amendment to section 3(1) of the Legitimacy Act to enable persons whose mothers are domiciled in Singapore to be legitimised under the Act.

2. The Bill does not seek to regulate ART services and treatment in Singapore, which are presently regulated by MOH under the Private Hospitals and Medical Clinics Act (“PHMCA”). Licensed healthcare institutions must be approved under the PHMCA and the regulations thereunder to provide ART services. Approved health care institutions are allowed to make ART services available only to legally married couples.

3. The introduction of the Bill is timely given the increasing number of babies conceived through ART in Singapore. Medical advances which have given rise to more effective techniques to treat infertility, for example, Intracytoplasmic Sperm Injection (“ICSI”) together with a more affluent and aging population, have resulted in a rise in the popularity of ART. The Bill will provide much needed clarity for the legal parentage and status of children born through ART.

4. MinLaw seeks your views and feedback on the Bill.

B. Legal Parentage and Status of Children Conceived Through ART

5. The Bill is drafted on the premise that a child conceived through ART should have a single set of legal parents, that is, a legal mother and a legal father.

6. Part II of the Bill (that is, clauses 3 to 9) deals with parenthood and the legal status of children in ART cases.

7. Clause 3 of the Bill deals with legal motherhood. Under Clause 3, a woman who carries or has carried a child as a result of a fertilisation procedure (that is, the gestational or “birth” mother) will be treated in law as the mother of the child. In other words, no one else (including a third party egg/embryo donor) can claim to be the child’s mother. This is no different from the existing position where the “birth” mother is generally treated as the child’s mother.

8. Clauses 4(1) - (6) of the Bill deal with legal fatherhood in cases where the mother was *married* at the time she underwent the fertilisation procedure. Where the child was conceived with the sperm of the mother’s husband, her husband is to be treated in law as the father. Where the child was *not* conceived with the husband’s sperm, her husband is also to be treated in law as the father of the child unless he can show that he did not consent to his wife undergoing the fertilisation procedure at the time it was carried out. If the husband did not consent to the fertilisation procedure but has accepted the child as a child of the marriage knowing that the child was not conceived with his sperm, he too will be treated in law as the father of the child. In these circumstances, the child will be treated as legitimate and a child of the marriage.

9. Clause 4(7) deals with legal fatherhood in cases where the mother was not married but has a *de facto* partner¹ at the time she underwent the fertilisation procedure. If the *de facto* partner consents to the child being regarded as a child of the relationship, the High Court may, on application, declare the *de facto* partner to be treated in law as the father of the child. However, such a declaration does not have the effect of conferring on the child legitimacy status in law².

10. Clause 5 deals with the parental rights and obligations of a man whose sperm was used in a fertilisation procedure in three other situations:

- (a) where the gestational mother is married but did not obtain her husband’s consent to the fertilisation procedure and her husband does not accept the child born as a child of the marriage;
- (b) where the gestational mother is unmarried and does not have a *de facto* partner; and

¹ Defined in clause 2 of the Bill to mean a man with whom the mother was living in a relationship as if he was her spouse.

² The child will still be considered as illegitimate and consequently, will not be entitled to share in the estate of the *de facto* partner in the event that the *de facto* partner dies intestate. In this regard, under the Intestate Succession Act, only legitimate children are entitled to a share in the estate of a deceased person who died intestate.

- (c) where the gestational mother has a *de facto* partner who either did not consent to the fertilisation procedure or has not been declared as the father of the child.

11. In the circumstances referred to in paragraph 10 above, the man whose sperm was used in the fertilisation procedure will *not* be treated as the child's father *unless*:

- (a) he marries the gestational mother; or
- (b) he is her *de facto* partner at the time the fertilisation procedure was carried out or becomes her *de facto* partner at any time thereafter and a court declaration is obtained declaring him as the child's father.

In the case of (b) above, the declaration does not have the effect of conferring on the child legitimacy status in law. In both situations spelt out in (a) and (b) above, the man's rights and liabilities as the child's father will be restricted to rights and liabilities that arise *after* he becomes the husband of the child's mother (in the case of (a)) or *after* he is declared as the child's father (in the case of (b)).

C. Legal Parentage and Status of Children Conceived and Born As a Result of ART Mix-ups

12. ART mix-ups may arise because of errors in the carrying out of the fertilisation procedure. For instance, sperm, eggs or embryos belonging to third parties may inadvertently be used in the fertilisation procedure without the knowledge or consent of the woman and her husband by reason of a mistake or negligence. In a situation involving an ART mix-up, there can be two sets of couples who may lay claim to be the legal parents of the child, that is, the couple who underwent the ART treatment and another couple, whose sperm or egg or embryo was inadvertently used in the fertilisation process. It is also possible that both couples may disclaim that they are the child's parents as they do not want the child who was conceived through a mistake, and the child becomes effectively parentless.

13. There are a number of possible options to deal with the legal parentage and status of children conceived as a result of such ART mix-ups. MinLaw seeks to adopt an approach which addresses the interests of all affected parties (with the child's interests being the paramount consideration) to deal with the legal status of children conceived as a result of ART mix-ups in clause 6 of the Bill.

14. The approach under clause 6 provides a *default* position that the gestational mother and her husband who consented to the ART treatment will be the legal parents of the child. However, any interested party may make an application to the court within two years from the date of *discovery* of the mistake for a declaration that he or she be declared as the father or mother of the child, as the case may be. The court may, in the best interests of the child, make such a declaration. However, in determining whether such a declaration should be made, the court would have to consider the following factors:

- (a) The wishes and opinions of the child, if he is able to express himself or herself;
- (b) the child's biological relationship with the parties to the proceedings;
- (c) the age of the child and any bond that has developed between the child and any person claiming that the person be treated as the child's parent;
- (d) the intention of the parties with regard to the parentage of the child;
- (e) the conduct and behaviour of the parties;
- (f) the relationship between the child and any siblings he may have;
- (g) the ability of the parties to provide for the child's physical, emotional and developmental needs;
- (h) the extent to which each of the parties in the proceedings can facilitate the child's relationship with the other party or parties to the proceedings; and
- (i) whether the issues of care, custody and control over the child may be resolved by means other than a declaration.

15. This approach will ensure that the child will not be left effectively parentless if no one wants the child after the mistake is discovered. In recognising that there may not be a one-size-fits-all solution, this approach also gives the court the flexibility to take into account circumstances on a case-by-case basis bearing in mind what would be in the best interests of the child.

16. The alternative options to deal with ART mix-ups which MinLaw considered but do not recommend can be summarised as follows:

- (a) **Alternative Option 1: To provide that the court determines legal parenthood on a case-by-case basis, taking into account the best interests of the child.**

This option *does not* provide for a default position whereby the gestational mother and her husband would be the parents of the child. While this option will give the court the flexibility to take into account varying circumstances, it has several disadvantages. First, it may result in the child having any combination of legal parents and guardians. It is also possible that nobody wants the child and the child can end up effectively parentless.

- (b) **Alternative Option 2: To provide that the court determines that *either* the gestational mother *or* the genetic mother will be the legal mother; and the person who will be the legal father will be**

the man to whom the legal mother is married. Those not granted legal parenthood can apply to be made guardians and can be granted contact with the child.

This option *does not* provide for a default position whereby the gestational mother and her husband would be the parents of the child. As the court may grant access rights to parties in appropriate situations, this option has the benefit of preserving the child-parent biological link. However, couples who conceive a child through ART with donated gametes from third parties may prefer to delink this child-parent biological bond. It is also possible that nobody wants the child and the child can end up effectively parentless.

- (c) **Alternative Option 3: To provide that the gestational mother and her husband who consented to ART treatment will be the parents of the child. The third parties whose eggs, sperm or embryos were inadvertently used in the ART treatment of the gestational mother will not have any legal status vis-à-vis the child.**

This option is similar to the proposed clause 6 of the Bill whereby the gestational mother and her husband are deemed to be the parents of the child. The difference is that this is a conclusive position, which cannot be altered or varied by the Courts. The key advantage of this option is that it provides the most certainty for the child, but the disadvantage is that the outcome may not be in the best interests of the child (for instance, if the child is not welcome by the gestational mother and her husband, he may face potential neglect or ill-treatment). The biological egg and sperm donors are effectively cut off and have no rights to the child. Further, if the gestational parents do not want the child, they will have to give the child up for adoption.

- (d) **Alternative Option 4: To provide that both the gestational and the genetic mother are legal mothers, and the husbands of the legal mothers will be the legal fathers.**

This option, though unconventional, has the benefit of maintaining the child's links with all interested parties. The disadvantage is that it could result in the child having four legal parents. Couples who conceive a baby through ART with donated gametes from third parties may prefer to delink the child-parent biological bond but this option preserves the bond, whether desired by the respective couples or otherwise.

17. MinLaw welcomes views on whether the adopted approach in clause 6 of the Bill is the most appropriate option to deal with ART mix-up cases.

D. Application of Part II of the Bill

18. Part II of the Bill will apply to children born on or after the date of commencement of the Bill (Clause 7(3)).

19. However, Clause 12 provides, as a transitional measure, that for children born through ART before the commencement date of the Bill, the child or any person claiming to be his father or mother may apply to the court for a declaration of parentage within two years from the commencement date of the Bill or, in ART mix-up cases, two years from the date of the discovery of the mistake, whichever is the later.

20. In deciding whether to grant a declaration, the court will have to take into account the factors set out in clause 6 (see paragraph 14 above).

21. Clause 12 will thus allow an affected child or person to seek relief from the court through the Bill in *past* ART cases (especially ART mix-up cases), where the status of the child and/or his parentage could be uncertain or contested.

E. Amendment to Section 114 of the Evidence Act

22. Section 114 of the Evidence Act provides as follows:

Birth during marriage conclusive proof of legitimacy

114. The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within 280 days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.

23. Section 114 of the Evidence Act presently provides a conclusive evidential rule for paternity which can only be rebutted by showing that the husband had “no access” to the woman when the child was conceived. This does not take into account the fact of advancements in science through which reliable scientific evidence (for e.g. DNA tests) can now be produced to prove the paternity of the child.

24. Two fairly recent High Court cases involving proceedings under the Women’s Charter, namely *AD v AE (minors: custody, care, control and access)* [2005] 2 SLR(R) 180³ and *WX v WY* [2009] 3 SLR(R) 573⁴ have highlighted how the operation of the presumption can pose practical difficulties where there is scientific evidence to show that a person other than the man presumed to be the father of a child under section 114 is the biological father.

³ In *AD v AE (minors: custody, care, control and access)* [2005] 2 SLR(R) 180, a conflict arose between a DNA report and the presumption of paternity under section 114 of the Evidence Act. While the court did not have to rule on this particular issue, it observed that section 114 of the Evidence Act was promulgated at a time when it was not contemplated that the paternity of a child could be proved scientifically at a level of confidence beyond 99.9%. The court added that although some changes to section 114 of the Evidence Act might be necessary, it was still useful to have a provision that presumes paternity, provided that it was not an irrebuttable or conclusive presumption.

⁴ In *WX v WY* [2009] 3 SLR(R) 573, the court commented that the presumption of section 114 of the Evidence Act had its origins in the common law presumption of legitimacy, which was introduced to avoid the grave stigma and penalties associated with illegitimacy at a time when conclusive proof of paternity was not available, and avoided using the presumption.

25. Clause 10 of the Bill therefore makes a related amendment to section 114 of the Evidence Act to enable any relevant evidence, including reliable scientific tests, to be adduced to displace the presumption of paternity and that the offspring is not the person's biological child on a balance of probabilities.

F. Amendment of Section 3 of the Legitimacy Act

26. Clause 11 makes a related amendment to section 3(1) of the Legitimacy Act to enable persons whose mothers are domiciled in Singapore to be legitimised under the Act as well. Presently, only persons whose fathers are domiciled in Singapore can be legitimised under the Act.

G. Conclusion

27. MinLaw would like to seek your views and feedback on this proposed Bill. You may convey your views and feedback in electronic or hard copy form, by 20 December 2012, to:

Legal Policy Division
Ministry of Law
100 High Street
#08-02, The Treasury
Singapore 179434

Fax: 6332 8842
E-mail: MLAW_Consultation@mlaw.gov.sg
