

Surrogacy

Surrogacy is when a woman (the surrogate mother) agrees to bear a child for a couple (the intended parents) and surrender it at birth. There are two types of surrogacy:

Partial (also known as traditional or straight surrogacy) - this method uses the egg of the surrogate mother and the sperm of the intended father. This can be performed in an IVF clinic or by artificial insemination at home. In this situation the child is biologically related to the intended father and the surrogate mother.

Full (also known as gestational or host surrogacy) - this method uses the egg of the intended mother combined with the sperm of the intended father or donor sperm. In this case an IVF clinic is always required. A child conceived by this method has no biological connection to the surrogate mother.

Surrogacy and the law in England and Wales

Although surrogacy is legal in England and Wales, it is restricted by various laws. For example, the Surrogacy Arrangements Act 1985 expressly forbids advertising for a surrogate or advertising to be a surrogate. A breach of this Act is a criminal offence punishable by a fine, imprisonment or both. It is also an offence to broker a surrogacy arrangement on a commercial basis.

Surrogacy agreements are unenforceable in the courts in England and Wales, even if a contract has been signed and the expenses of the surrogate have been paid. The family courts have in practice proved sympathetic to intended parents applying to enforce a surrogacy arrangement but they have a wide discretion to act in the best interests of the child which means there are no guarantees.

Who are the legal parents of a child born through surrogacy?

Under English law, the woman who carries a child is the legal mother. Therefore the legal mother of a child born through surrogacy is always, at birth, the surrogate mother. This means that in surrogacy cases the intended mother has no recognition as a parent even if she is the child's biological mother.

If the surrogate is married, her husband will be the legal father of the child unless he did not consent to the treatment and irrespective of the biological relationships. This means that the intended father has no automatic claim to legal parenthood even if he is the biological father.

For surrogacy conceptions that took place after 6 April 2009, similar rules apply to confer parenthood on the same sex civil partner of a surrogate mother. If a surrogate mother is in a civil partnership with another woman at the time she conceives, her same sex partner will be the child's second parent, again excluding the status of the intended father.

The position is slightly different if the surrogate mother is single at the time she conceives (or if her husband or civil partner does not consent to the arrangement). The surrogate will still be the child's legal mother but if the intended father is the biological father (i.e. the surrogate is not conceiving with donor sperm) then he will also be the legal father. If the intended parents are a gay couple, fatherhood will go to the partner who is the biological father.

Who goes on the birth certificate?

Only the legal parents can be named on the birth certificate where the birth is registered in the UK. The surrogate mother will register the birth and she is recorded as the child's mother.

If the surrogate is married, her husband is recorded on the birth certificate as the father. If the surrogate mother is in a civil partnership, her same sex partner is recorded as the second 'parent' (where the conception took place after 6 April 2009).

If the surrogate mother is single, the intended father can usually be named on the birth certificate, although he must attend the birth registration in person together with the surrogate mother.

Parental orders

It is important to take steps after the birth to acquire parental rights and extinguish the legal parenthood of the surrogate and, where appropriate, her husband or civil partner.

If the intended parents are married and at least one is the child's biological parent then they can apply to the court for a parental order. Parental orders extinguish the parental status of the surrogate mother and, where appropriate, her husband or civil partner and confer full parental status and parental responsibility on both intended parents.

Intended parents should apply for a parental order regardless of whether the surrogate is married or not because the intended mother (or non-biological father) will not have full recognition as a parent unless they obtain a parental order. Once a parental order is made, a new birth certificate is issued naming the intended parents which replaces the child's original birth certificate and securing the position of both intended mother and father (or both fathers where the intended parents are a gay couple).

If the intended parents are a same sex couple in a civil partnership or are two people living together as partners in an enduring relationship, they will be able to apply for a parental order following the law change in April 2010. If a child is born before the law changes, they will have a 6 month window to apply for a parental order even if their baby is over 6 months of age.

To obtain a parental order, the intended parents must show the following:

- that they are both over the age of 18 and one or both of them is domiciled in the UK;
- that one or both of them is a biological parent of the child;
- that they are married, (or after April 2010, are civil partners of each other or are two people who are living together as partners in an enduring relationship);
- that the child's home is with them
- that the conception took place artificially (which can include home insemination)
- that the surrogate mother (and her husband or civil partner where appropriate) has fully and freely given her consent to making the order;
- that no more than reasonable expenses have been paid. What constitutes reasonable expenses depends on the facts of each particular case and legal advice should be sought for clarification.

The timetable for making the application is strict. The intended parents must apply to the court within six months of the child's birth (or for unmarried and same sex couples who cannot apply until April 2010, within six months of the change in the law) and they must allow the surrogate mother at least six weeks to reflect on her decision before she can give effective consent to their application.

What if a parental order is not available?

If any of the conditions listed above cannot be satisfied then it will not be possible to obtain a parental order. This might apply, for example, if the intended parents have no biological link with the child or if the intended parent is single. Securing the position of the intended parents may then be difficult, will involve an application to the court for adoption, special guardianship or a residence order and specialist legal advice should be sought.

Why should we apply for a parental order?

The legal implications of taking no action depend on the status of the intended parents. If the intended father is the legal father, he will be permitted to care for his child. However, the status of his partner (either the intended mother or the non-biological father) will be left unsecured. This could have many serious consequences.

The situation is even more serious if neither intended parent is a legal parent. Neither intended parent will have any legal authority to care for the child or to make decisions about the child's welfare. This can cause many difficulties (for example over consent to immunisations and medical treatment) particularly where it is not practical to secure the surrogate's involvement in day-to-day decisions. The intended parents are also likely to be committing a criminal offence in caring for the child if they do not involve social services to oversee the situation.

Although the problems associated with taking no action may not cause problems immediately, in the long term, there are many possible opportunities for the underlying legal issues to arise.

Recommended steps during the pregnancy

It is important to understand the legal position and prepare for the legal process. As well as this, it is essential for all those involved in a surrogacy to make or update their wills and take out appropriate life insurance. Taking these steps should ensure that the surrogate and her family are protected and that the intended parents achieve some recognition as parents if the surrogate dies.

International surrogacy

It is important to appreciate that international surrogacy can be immensely complex as the law on surrogacy varies between countries.

If a UK couple is considering conceiving with a foreign surrogate, they will need to take care over conflicts of law on parenthood and the rule against paying more than reasonable expenses. Some countries allow the intended parents to acquire parenthood status automatically, either through a foreign court process (such as a Californian pre-birth order) or simply by allowing them to be named on the birth certificate (as in India). However, if the intended parents are domiciled here, English law will apply to them which means that they may not be regarded as the child's legal parents (including for the purposes of entry clearance and citizenship, which can prevent them bringing their child home).

If a non-UK couple is considering conceiving with a UK surrogate, they will need to take care over the requirement that at least one of them is domiciled in the UK. If neither intended parent is domiciled in the UK, the court will not have the power to grant a parental order. This means that it will be difficult for them to secure their status as the child's parents and to take the child out of the UK.

There are many legal pitfalls with international surrogacy arrangements and so careful preparation and legal advice is essential.

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