

Surrogacy

Overview

This factsheet explains concepts and legal principles relevant to surrogacy arrangements.

What is Surrogacy?

Surrogacy is an arrangement in which a woman carries and delivers a child for another person or couple.

The woman who has the child is called the “surrogate”. The parent or parents for whom the child is intended are called the “commissioning”, “intended” or “social” parents.

There are two general models of surrogacy arrangement:

- Using the egg of the surrogate mother and the sperm of the commissioning father (sometimes called “traditional”, “partial” or “straight” surrogacy), and
- Using the egg of the commissioning mother (or else of a donor) combined with the sperm of the commissioning father (or donor sperm)(sometimes called “gestational”, “full” or “host” surrogacy).

Traditional surrogacy may be performed at an IVF clinic, or by artificial insemination at home. A child born through traditional surrogacy will be biologically related to the commissioning father.

An IVF clinic is always required for host surrogacy. A child born through host surrogacy will not be biologically related to the surrogate mother.

Is Surrogacy Legal?

Commercial surrogacy is illegal in this country, under the Surrogacy Arrangements Act 1985.

The Act makes it a criminal offence, on a commercial basis, to:

- Initiate a surrogacy arrangement;
- Offer or agree to negotiate a surrogacy arrangement, or
- Compile information to use in making or negotiating surrogacy arrangements.

Certain advertisements about surrogacy are also illegal, namely those indicating:

- A person is willing to enter into a surrogacy arrangement, and
- A person is looking for a woman willing to become a surrogate mother.

Surrogacy other than on a commercial basis is legal in the UK.

Are all Payments Connected with Surrogacy Illegal?

The fact that commercial surrogacy is illegal might suggest all payments connected with a surrogacy arrangement are against the law. This is not the case.

Payments made to, or for the benefit of, the surrogate mother are not illegal under the Surrogacy Arrangements Act 1985.

However, at a later stage in a surrogacy arrangement (see below under *How do commissioning parents get a Parental Order?*), any payments made to a surrogate will be looked at carefully.



Continue overleaf >

Is it necessary to have a Formal Surrogacy Agreement?

A written document is not necessary. However, many involved in a surrogacy arrangement will find it comforting to have recorded in writing their respective expectations.

A surrogacy agreement, if prepared, can be as general or as detailed as the commissioning parents and the surrogate wish. It should record the amount and purpose of any payment made to the surrogate.

Many surrogacy arrangements proceed on the basis that the surrogate will have no involvement in the child's life once he or she is born. If that is agreed, it should be recorded in writing. If it is intended the surrogate will have some relationship (which might range from being sent pictures and updates once a year to regular time together) with the child, that should be spelled out.

Are Surrogacy Agreements enforceable?

In the UK, a surrogacy agreement is **not** enforceable. A surrogate may decide to keep the child she is carrying. She has the right to do so, even if the child is not genetically related to her (as in host surrogacy). Any agreement with commissioning parents cannot be enforced as if it were a contract. There is no right to reclaim any money paid by the commissioning parents to the surrogate for expenses.

If a surrogate does change her mind, a Family Court Judge can be asked to resolve the dispute. He or she will do so by deciding the outcome that is in the best interests of the child.

The reverse is also true: commissioning parents may change their mind in which case the child would remain with the surrogate.

Statistically, changes of heart by the surrogate or commissioning parents are rare. Surrogacy UK (see below under *Resources*) estimates that only about 2% of surrogacy arrangements break down.

Who are the Legal Parents of a child born through Surrogacy?

At birth, the woman who carried the child is always the legal mother, even if there is no genetic relationship (as in host surrogacy).

The child's legal father, or second parent, will usually be the surrogate's husband, civil partner or cohabitant.

If treatment was performed in a licensed clinic, and the surrogate has no partner, the child will have no legal father or second parent.

The commissioning parents may become the child's legal parents by applying for a Parental Order. Unless they do, they will not be the child's legal parents even if either or both of them are genetically related to the child.

How do commissioning parents get a Parental Order?

The Human Fertilisation and Embryology Act 2008 allows the court to make a Parental Order in relation to a child born through surrogacy.

The following conditions must be met:

- The child must be genetically related to one of the commissioning parents;
- The commissioning parents must be married, civil partners or in a committed relationship;
- The application must be made within six months of the child's birth (note that this is an absolute requirement and the time period of making the application **cannot** be extended);
- The child's home must be with the commissioning parents;
- At least one of the commissioning parents must have a legal connection (called domicile) to the UK (including the Channel Islands or the Isle of Man),
- The commissioning parents must both be over eighteen;
- The surrogate (and any other legal parent) must agree to the Parental Order, and
- No money or benefit (other than for expenses) may have been paid in relation to the surrogacy.

The court can still make a Parental Order even if payments have been made beyond those described in the last condition. Whether it will do so depends on (amongst other considerations) the sums involved and the surrogate's financial circumstances. The court will look very carefully indeed at an arrangement that amounts to the "purchase" of a child via surrogacy.

If a Parental Order is made, the commissioning parents will become the child's legal parents. The surrogate (and any legal father or second parent), will cease being the child's legal parents. A new birth certificate will be issued for the child naming the commissioning parents.

Continue overleaf >

The law presently **does not** allow a single commissioning parent to apply for a Parental Order.

If commissioning parents cannot apply for a Parental Order (for example, if neither is related to the child genetically, if the child is more than six months old, if the surrogate has withdrawn her consent, or if there is only one commissioning parent), an application for an adoption order is an alternative.

International Issues

Increasingly, commissioning parents are entering into arrangements with surrogates outside of the UK. The issues identified above apply to international surrogacy arrangements as well. In addition, the international dimension raises its own complications, which include:

- The child's nationality, if born abroad to a non-British / EU citizen;
- The child's entry clearance – if not an EU national, he or she will need a visa to enter the UK;
- Different approaches overseas to the commercialisation of surrogacy – in some countries, payments in addition to expenses are legal and required;
- The fact that a surrogacy arrangement might be enforceable abroad but not in the UK, and
- Differences between countries about who is treated as a surrogate child's legal parents (in the Ukraine and some US States, for example, the commissioning parents are automatically the child's legal parents).

In Conclusion

Surrogacy involves complicated legal issues. The legal framework continues to evolve. Those considering surrogacy – whether as commissioning parents or surrogates – should seek specialist advice as early in the process as possible (ideally before making any decisions). If there are potential problems with a surrogacy arrangement, early identification and management helps ensure a positive outcome.

Resources

Human Fertilisation and Embryology Authority (HFEA)

Finsbury Tower
103-105 Bunhill Row
London
EC1Y 8HF
Tel: 020 7291 8200
Fax: 020 7291 8201
Email enquiries@hfea.gov.uk
<http://www.hfea.gov.uk/>

The HFEA is the UK's independent regulator overseeing the use of gametes and embryos in fertility treatment and research. It licenses fertility clinics and centres carrying out IVF, other assisted conception procedures and human embryo research.

Surrogacy UK

PO Box 323
Hitchin
Hertfordshire
SG5 9AX
<http://www.surrogacyuk.org/>

One of the UK's leading not-for-profit surrogacy organisations, run by surrogates and commissioning parents.

COTS

Moss Bank
Manse Road
Lairg
IV27 4EL
Tel: 0844 414 0181 (local rate call)
Fax: 01549 402777
Email: info@surrogacy.org.uk
<http://www.surrogacy.org.uk/>

Another voluntary surrogacy organisation working in the UK with those on both sides of surrogacy arrangements.

Please feel free to discuss your own position and concerns.
Contact your nearest office on:

T: 0800 916 9015
E: enquiries@slatergordon.co.uk
W: www.slatergordon.co.uk

Slater & Gordon Lawyers (UK) LLP is one the UK's leading and largest legal practices with offices throughout England, Wales and Scotland.

Slater & Gordon (UK) LLP is authorised and regulated by the Solicitors Regulation Authority and the Financial Conduct Authority for insurance mediation activity. The information in this factsheet was correct at the time of going to press.