

Your guide to surrogacy

Surrogacy is where a woman carries and gives birth to a baby for another person or couple. In the UK the government supports surrogacy as part of the range of assisted conception options. “Our view is that surrogacy is a pathway, starting with deciding which surrogacy organisation to work with, deciding which surrogate or intended parent(s) (IP(s)) to work with, reaching an agreement about how things will work, trying to get pregnant, supporting each other through pregnancy and then birth, applying for a parental order to transfer legal parenthood and then helping your child understand the circumstances of their birth.” For further information see: **Gov.Uk - Guide to having a child through surrogacy**

Types of surrogacy

There are two types of surrogacy. These are known by a number of different expressions which are explained below:

- Straight surrogacy

Straight (also known as full, traditional or partial) surrogacy is when the surrogate provides her own eggs to achieve the pregnancy. The intended father, in either a heterosexual or male same-sex relationship, or an individual, provides a sperm sample for conception through either self-insemination at home or artificial insemination with the help of a fertility clinic. If either the surrogate or intended father has fertility issues, then embryos may also be created in vitro and transferred into the uterus of the surrogate.

- Host surrogacy

Host (also known as gestational) surrogacy is when the surrogate doesn't provide her own egg to achieve the pregnancy. The surrogate is genetically unrelated to the child. She is a gestational parent. In such pregnancies, embryos are created in vitro and transferred into the uterus of the surrogate using either

- Intended mother's egg and intended father's sperm.
- Intended mother's egg and a donor's sperm.
- A donor egg and intended father's sperm.
- A donor egg and donor sperm (although the intended parent(s) would not be able to apply for a parental order in this instance as one of them has to be biologically linked to the child).

Who are the legal parents at birth?

In the UK, the surrogate is the legal mother of the child unless you get a parental order from the court; even if the eggs and sperm used are yours or donated (ie, the surrogate is not genetically related to the child). Once you have a parental order for the child, the surrogate will have no further rights or obligations to the child.

Who the second legal parent is at birth will depend on your circumstances. If the surrogate is married or in a civil partnership, her partner will automatically be the second legal parent (until a parental order is granted), unless it can be shown that her partner did not consent to her treatment. If the surrogate is single, then the man providing the sperm (if he wants to be the father) will automatically be the second legal parent at birth. However, it is possible for the surrogate to nominate a second legal parent such as the intended mother or non-biological father if you'd all prefer. To do this, both the intended second parent and the surrogate will need to give their consent before the sperm, egg or embryo are transferred.

The non-genetic intended parent does not acquire legal parenthood or parental responsibility until the relevant order is made. The permanent transfer of legal parenthood and parental responsibility to the intended parent(s) can only be brought about by the making of a parental order under section 54 of the HFEA 2008 or adoption order.

The law previously only allowed two people to apply for a parental order, however, it has recently been changed and it is now possible for one person to apply for a parental order if you are a biological parent of the child (i.e. your eggs or sperm were used to create the baby).

This is a complicated area so you should talk to your clinic early on about nominating a second legal parent so they can support you through the process and take legal advice.

Surrogacy contracts

Surrogacy agreements are not enforceable by UK law, even if you have a signed document with your surrogate and have paid their expenses. The intended parents and surrogate can still record how they want the arrangement to work in a surrogacy agreement. You cannot pay a surrogate in the UK, except for their reasonable expenses.

Section 2(1) of the SAA 1985 prohibits commercial arrangements for surrogacy in the UK. Section 3 and Section 4 of the SAA 1985 deal with the rules on advertisement and the nature of punishment for offences, both of which are criminal offences.

This means that a solicitor cannot draft a surrogacy contract/agreement or advise on one. Parties to a surrogacy arrangement sometimes want an agreement though, which sets out expectations throughout the surrogacy and following the birth of a child, including the making of the parental order. It can be useful to include practical arrangements and to consider intentions, in the event of disagreement later. It is important to emphasise that any agreement is not legally binding and consent to a surrogacy arrangement can be withdrawn at any time.

Parental orders

A parental order confers legal parenthood and parental responsibility on the intended parent(s). The effect of the order is that, in law, the child is for all purposes treated as their child and not the child of any other person. Parental orders are made under section 54 of the HFEA 2008.

A parental order, like an adoption order, is transformative, so as to transform the identity of that child, so that they become the child of the intended parent(s) and any legal links to any other parents (whether genetically related or unrelated) are brought to an end. Importantly, where regulatory orders fall away as the child reaches adulthood, the transformative nature of adoption and parental orders is lifelong. The bar to set aside a parental order (like an adoption order) is set very high.

Who can apply for a parental order?

The application can be made by one or two people (the intended parent(s)) who must be aged at least 18 years.

The intended parent or one of the intended parents where there are two people applying, must have provided the genetic material (gametes) used to create the embryo. An arrangement involving both donor sperm and eggs would not be permitted within the scope of the legislation. Adoption would be the only transformative order available in this scenario.

Section 54(1) HFEA 2008 provides that where two people apply for a parental order, the order provides for a child to be treated in law as the child of the intended parents if:

- The child has been carried by a woman who is not one of the intended parents, as the result of the placing in her of an embryo or sperm and eggs or her artificial insemination.
- The gametes of at least one of the intended parents were used to bring about the creation of the embryo.

- The conditions set out in HFEA 2008, sections 54(2) to 54(8A) are satisfied.

Section 54(2) HFEA 2008 provides that where two people apply for a parental order, the applicants must be:

- Husband and wife;
- Civil partners of each other; or
- Two persons who are living as partners in an enduring family relationship and are not within prohibited degrees of relationship in relation to each other.

Section 54A HFEA 2008 provides that where one person applies for a parental order, the order provides for a child to be treated in law as the child of the intended parent if:

- The child has been carried by a woman who is not the intended parent, as the result of the placing in her of an embryo or sperm and eggs or her artificial insemination.
- The gametes of the intended parent were used to bring about the creation of the embryo.
- The conditions set out in HFEA 2008, sections 54(2) to 54(8) are satisfied.

The conditions to be satisfied include that:

- The child must be living with the intended parent or parents.
- At least one of the intended parents must be domiciled in the UK, in the Channel Islands or the Isle of Man.
- No money or other benefit must have been given or received, other than for reasonable expenses, unless the court authorises such payment (retrospectively, if appropriate). The question of what falls within or beyond the definition of expenses reasonably incurred is a case-by-case question dependant on the facts.

What information must the intended parent or parents provide to the court?

The following information must be provided to the court:

- The child's birth certificate.
- Proof of the genetic link between at least one of the intended parents and the child (usually in the form of DNA test results).

When should the application be made?

The application must be made within six months of the date of birth of the child (section 54 (3) and section 54A (11)). The court has on occasions extended this time limit if deemed in the best interests of the child.

Surrogacy arrangements entered into outside the UK

Watson Morris cannot give you advice regarding non-UK surrogacy arrangements however we can give you information which may assist anyone making their own enquiries. It is clear that given the prohibition on commercial surrogacy within the UK, there are increasing numbers of couples taking advantage of countries with less restrictive regulatory regimes in place, for example India, the Ukraine and some US states, such as California and Connecticut.

There are no international conventions, treaties or reciprocal arrangements currently in force that govern surrogacy, so any orders made abroad are not recognised (or enforceable) in the UK. Commissioning parents

must still apply for parental orders in the UK court despite any orders or arrangements made overseas.

There are a number of countries where surrogacy is not legal, for example, France and China, and others where surrogacy is completely unregulated (although lack of any regulation may not denote an acceptance of surrogacy, merely that the issue has not yet been made the subject of legislation).

Further information

The following organisations may be able to provide further information regarding UK surrogacy arrangements:

- **Childlessness Overcome Through Surrogacy (COTS) website**
- **COTS Facebook group**
- **Surrogacy UK (SUK) website**
- **SUK Facebook group**
- **Brilliant Beginnings (BB) website**
- **BB Facebook group**
- **My Surrogacy Journey website**
- **My Surrogacy Journey Facebook group**

What consent needs to be obtained from the surrogate and when?

The surrogate (and her husband, if applicable) must give free and unconditional agreement, with full understanding, to the order being made. The court may dispense with such agreement in circumstances where the surrogate (and husband, if applicable) cannot be found or are incapable of giving agreement.

The agreement must be obtained no earlier than six weeks after the birth of the child (section 54(96), HFEA 2008).

Birth certificate

As the making of a parental order gives the intended parent(s) legal parenthood, it provides authority for the details of both parents, if two have applied, (whether a heterosexual or same sex couple) to be entered on the birth certificate. In practice, this entails the child being issued with either a reissued British birth certificate naming the intended parents in place of the surrogate and her husband, if applicable, or where the child has been born abroad, the issue of a first British birth certificate showing the applicants as parents.

Practical tips

The key to prospective intended parents avoiding problems is that they should seek as much information before any irreversible steps are taken. It is also advisable for them to keep an accurate documentary account of all steps taken.

As the interests of the child are paramount, this greatly assists the court in remedying what might otherwise be insurmountable problems arising from procedural flaws or unauthorised actions. However, prospective parents and those advising them should in no way take for granted the indulgence of the court and should take all possible steps to ensure strict compliance with the letter as well as the spirit of the legislation.

There are non-profit surrogacy agencies in the UK (**Surrogacy UK or COTS Surrogacy UK | Home**, to name but two). They can provide a wealth of information, resources and a community of other intended parents and surrogates to support any surrogacy journey. It is therefore highly recommended that intended parents contact one.

This guide is for general guidance only and should not be treated as a definitive guide or be regarded as legal advice. If you need more information about the issues referred to in this guide, please seek formal advice.