

## International surrogacy

### FREQUENTLY ASKED QUESTIONS

- 1. Are international surrogacy arrangements enforceable?*
  - 2. Are we the legal parents?*
  - 3. Is commercial surrogacy legal in the UK?*
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  - 10. What will happen at the final hearing?*
- 1. Are international surrogacy arrangements enforceable?**
    - Although surrogacy arrangements are unenforceable in England (even where there is a genetic connection between the child and one of the intended parents) they are legal and enforceable in an increasing number of other countries, such as certain states in the USA, India and the Ukraine.
    - In countries where surrogacy arrangements are legal, a birth certificate will usually name you as the legal parents (in that country).
    - The English legal position on parentage is different (see “Are we the legal parents?” below).
  - 2. Are we the legal parents?**
    - No – not under English law. The surrogate mother is the legal mother of the child (in English law) even if she has no genetic connection to the child. She will remain the legal mother until / unless a Parental Order or an Adoption Order is made in your favour.
    - If the surrogate mother is married, her husband (or civil partner) is regarded in English law as the legal second parent of the child (unless he/she didn’t agree to the surrogacy arrangement). If the surrogate mother is unmarried, it is possible for the intended father to be treated as the legal father if he is the genetic father or if he is nominated as the other legal parent when the child is born.
    - If you have entered into a surrogacy arrangement in certain US states (often called a “gestational carrier agreement”) before the birth of the child, you can ask the US Court to make a declaration of parentage. This declaration directs the authorities to put the names of the intended parents on the child’s birth certificate as their parents.

### 3. Is commercial surrogacy legal in the UK?

- If you have entered into a surrogacy arrangement in certain US states (often called a “gestational carrier agreement”) before the birth of the child, you can ask the US Court to make a declaration of parentage. This declaration directs the authorities to put the names of the intended parents on the child’s birth certificate as their parents.
- Contrary to popular belief, commercial surrogacy in the UK is not illegal (i.e. paying a surrogate mother for her services) but the Surrogacy Arrangements Act 1985 circumscribes the availability and market for surrogacy in England and prohibits the negotiation of a surrogacy arrangement on a commercial basis.
- Section 2 of the Surrogacy Arrangements Act 1985 prohibits the negotiation of a surrogacy arrangement on a commercial basis and to do so is a criminal offence. It is not illegal for the surrogate mother or the intended parents to negotiate a surrogacy arrangement. It is illegal for a third party to negotiate the arrangement and to be paid for it.
- Section 3 of the Surrogacy Arrangements Act 1985 prohibits the advertising by a prospective surrogate mother or intended parents and makes an offence to publish such adverts.
- It is not illegal to pay a surrogate mother for her services, but a third party (for example agencies or lawyers) cannot take part in negotiations and profit from the arrangement.

### 4. What is the position in relation to expenses?

- It is not illegal to pay a surrogate mother for her services in the UK. However, if a Parental Order Application is made, the Court will need to authorise any payments made over and above the expenses she has reasonably incurred. The Judge in the Parental Order Application will consider carefully the payments made and the level of those payments and the Court will regard the child’s welfare as the paramount

consideration when deciding whether to authorise the payments made.

### 5. What other matters should we take into account?

- The children will not automatically be regarded as UK citizens (see “How can we bring our child back to the UK” above) and they will generally need visas to come to the UK.
- International surrogacy arrangements will almost always require payments to the surrogate and potentially third parties. If you apply for a Parental Order (see “Do we need to make an application for a Parental Order?”) you will need to provide full details of the payments to the English Court and you may have to ask the Court for retrospective authorisation of those payments (see (iii) under “What is involved in the application process?” below).
- Because you are not the legal parents under English law, you will not have parental responsibility for your child. Parental responsibility gives you the authority to make all the crucial decisions about a child’s upbringing.

### 6. How can we bring our child back to the UK?

- Depending on the circumstances of the surrogacy arrangements, the child will not necessarily be British at birth, even if one or both intended parent is British.
- Where the child is born British, an application will need to be made to the nearest British diplomatic post for a British passport. These applications will then be sent back to the UK for consideration. These applications can be complex and require extensive documentation and careful explanation of the particular surrogacy arrangement which has led to the child being born British. These applications will usually attract close scrutiny and this can result in lengthy processing times of several months. The child can then travel to the UK on a British passport.

- Where the child is not British at birth, an application to register the child as British may need to be made. This can be made from abroad or from within the UK and can be a lengthy process. Again, detail and evidence of the surrogacy arrangement and any family legal proceedings in the UK and abroad will need to be provided.
  - If the application is to be made from within the UK, careful consideration of how to bring the child to the UK in the interim will need to be undertaken. This will vary depending on the child's nationality at birth. We can advise on the best options and assist in both bringing the child to the UK and to register the child as a British Citizen.
  - Once the child has been successfully registered, they will be issued with a Certificate of Registration, which can be used to apply for a British passport for the child.
  - The position is more complex where the commissioning parents are not British but resident in the UK with limited or indefinite leave to remain and prospective intended parents in this position are advised to seek advice at the earliest opportunity.
- In order to obtain a Parental Order, you will need to meet a number of conditions including the following:
    - The application must be made within 6 months of the child's birth;
    - The surrogate mother must fully consent to the Parental Order, understanding that she will be giving up all parental rights;
    - No payments should be made / have been made to the surrogate mother, save for those necessary to cover reasonable expenses (although the Court can give retrospective approval to payments over and above reasonable expenses);
    - There must be a genetic connection between the child and at least one of you; and
    - At the time both of the application and the making of the Order, the child's home must be with you and either or both of you must be domiciled in the United Kingdom.
  - Your application must be served on the surrogate mother (and her husband). The surrogate mother must return the acknowledgement of service to the Court office.

## **7. Do we need to make an application for a Parental Order?**

- Yes – we would generally advise you to make an application. A Parental Order will recognise you as the legal parents and will extinguish the legal parentage of the surrogate mother (and her husband). Without a Parental Order, you will not be the legal parents under English law and you will not have parental responsibility.

## **8. What is involved in the application process?**

- A Parental Order application can be made by two applicants who are (a) married (b) civil partners or (c) living as partners in an enduring family relationship.

## **9. What will happen at the Directions Appointment?**

- Following the application form being issued, the Court will list a directions appointment. At that hearing, the Court will appoint a Parental Order Reporter – their role is to meet you and the child and to prepare a report for the Court.
- The Court will give directions for the filing of evidence (statements from you and any other relevant witnesses). Your statement will need to include details of all expenses and payments to the surrogate mother and any third parties relating to the surrogacy arrangement.
- The Court is likely to set a date for a final hearing.

## 10. What will happen at the final hearing?

- You will be asking the Court to make a Parental Order in your favour. The Judge will consider your evidence and the Parental Order Report and will make a Parental Order if satisfied that all of the conditions have been satisfied.
- If the Judge isn't satisfied that all of the relevant conditions have been complied with, you can ask the Court to make a Residence Order in your favour which would give you parental responsibility for the child.
- If you are granted a Parental Order, the parental responsibility of the surrogate mother is automatically extinguished and you will have full legal responsibility for your child under English law.

## OUR SERVICES

Making a decision to have a child is momentous and for some the complexity and emotion of that decision is amplified, particularly for those entering into a surrogacy arrangement.

Our clients' surrogacy arrangements all have an international dimension where the child is born abroad (surrogacy arrangements are unenforceable in this country but are enforceable in a number of other countries). To support this, we have built one of the strongest immigration teams in the country. We will help you to obtain a Parental Order for your child and / or to explore any other options available.

Our clients come from diverse backgrounds and cultures. We have represented same sex and heterosexual couples, both married and unmarried. We are committed to achieving the best possible results for all our clients, whilst maintaining absolute discretion.

We look forward to helping you through this very special time in your life.

## For further information, please contact



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