

SURROGACY

1. Definitions

- 1.1 Surrogacy is the practice whereby a woman (the surrogate mother) carries a child for another person and (usually) that person's partner (the commissioning couple) as the result of an agreement prior to conception that the child should be handed over to them after the birth.
- 1.2 The surrogate mother may be the genetic mother - i.e. her own egg was used to create the embryo - or she may have had a fertilised embryo implanted in her, in which case she will not be genetically related to the child. These situations are sometimes referred to as, respectively, "partial" surrogacy and "host" or "full" surrogacy.
- 1.3 The commissioning couple may both be the genetic parents, or just one or neither of them may be genetically related to the child. This will depend on the sources of the egg and sperm used to create the embryo. In some instances it may be that both the sperm and the egg were provided by donors, so that the resulting child is not related genetically to either the surrogate mother or the commissioning couple. (In such cases the commissioning couple cannot apply for a parental order – see section 3 below.)

2. Legal parentage of children resulting from surrogacy arrangements

- 2.1 Provision as to the legal parentage of children resulting from certain fertility treatments is made by the Human Fertilisation and Embryology Act 1990 and the Human Fertilisation and Embryology Act 2008. The 1990 Act and 2008 Act set out specific conditions that must be fulfilled for the commissioning couple to apply for a parental order. If they do not fulfil these conditions, they cannot apply for a parental order (see section 3 below).

The provisions apply regardless of whether the surrogate mother was in the United Kingdom or elsewhere when the embryo was placed in her or when, as the case may be, she was artificially inseminated but must be considered together with the definitions of "parent" etc in the British Nationality Act 1981.

2.2 The legal mother

- 2.2.1 For the purposes of both the Human Fertilisation and Embryology Acts and the nationality legislation, the surrogate mother is to be treated as the mother of the child.

2.3 The legal father

Child born before 1 July 2006

2.3.1 For the purposes of both the Human Fertilisation and Embryology Act 1990 and the nationality legislation, the legal father of the child is the husband of the surrogate mother provided he consented to her treatment.

2.3.2 If the surrogate mother was not married when the child was born, or if her husband did not consent to her treatment, the child has no father for the purposes of the nationality legislation.

Child born on or after 1 July 2006

2.3.3 The child's father is either

- a) the man (if any) to whom the surrogate mother was married at the time of the birth, or
- b) the man (if any) together with whom the surrogate mother received treatment services from a person licensed under the Human Fertilisation and Embryology Act 1990 to provide such services (but not if the creation of the embryo was brought about with the sperm of that man), or
- c) (if neither a) nor b) applies) a person who is proven to be the father by the production of either:
 - i. a birth certificate issued by the competent authority within 12 months of the birth which names him as the father, or
 - ii. such other evidence (e.g. a DNA test report or court order) as may satisfy the Secretary of State on this point (see, further, paragraph 22.3 of Annex F to Chapter 6).

Child conceived on or after 6 April 2009

2.3.4 The child's father is either

- a. the man (if any) to whom the surrogate mother was married at the time of the birth, or
- b. the man (if any) together with whom the surrogate mother received treatment services from a person licensed under the Human Fertilisation and Embryology Act to provide such services (but not if the creation of the embryo was brought about with the sperm of that man), or
 - ba. a person who is treated as a parent of the child under s.42 or 43 of the Human Fertilisation and Embryology Act 2008 (second female parent), or

- c. (if neither of the above applies), a person who is proven to be the father by the production of either:
- i. a birth certificate identifying him as such, and issued by the competent registration authority within 12 months of the birth of the child to which it relates or
 - ii. such other evidence (e.g. a DNA test report or court order) as may satisfy the Secretary of State in this point.

3. Parental Orders

- 3.1 A couple (married couple, civil partners or a couple in an enduring family relationship) may additionally be treated as the legal parents of the child if a parental order has been made in their favour under s.54 of the Human Fertilisation and Embryology Act 2008. Such an order made before 6 April 2010 will not have any automatic nationality consequences for the child, but may justify registration under s.3(1) of the BNA 1981 (see Chapter 9).

A child who is the subject of a parental order made in a UK court **after 6 April 2010** will become a British citizen from the date of the order if either of the persons who obtained the order is a British citizen.

- 3.2 On an application made by two people, the court may make an order providing for a child to be treated in law as the child of the applicants if –
- the child has been carried by a woman who is not one of the applicants, as a result of the placing in her of an embryo or sperm and eggs or her artificial insemination, and
 - the gametes of at least one of the applicants were used to bring about the creation of the embryo,

In addition, the following conditions must be fulfilled:

- the couple must be husband and wife, civil partners or two persons living as partners in an enduring family relationship, and are not in prohibited degrees of relationship with each other;
- the commissioning couple must apply for the parental order within 6 months of the child being born,
- the child must be living with the commissioning couple at the time they apply for the parental order,
- the husband, wife or both must be domiciled in the UK, Channel Islands or Isle of Man,
- the couple must both be over 18 at the time the order is made,

- the surrogate and her husband (if she has one) must agree freely and unconditionally to the making of the order,
- no money, other than reasonable expenses, has been paid to the surrogate.

4. **Some practical considerations**

- 4.1 In some countries it is possible to obtain a court order before the child's birth which allows the commissioning couple, rather than the surrogate mother and her partner, to be named as the parents on the child's birth certificate.
- 4.2 Where the child is born on or after 1 July 2006, the birth certificate (if issued within 12 months of the birth) will constitute conclusive evidence of paternity for nationality purposes irrespective of whether the named father is treated as such by the Human Fertilisation and Embryology Act (unless the surrogate mother is married at the time of the birth).
- 4.3 Where the child was born before 1 July 2006, neither the foreign court order nor the resulting birth certificate affects the legal position in the United Kingdom, as described in paragraphs 2.3.1 or 2.3.2 above. These documents may, however, support a case for registration under s.3(1) of the BNA 1981 where either or both named parents are British citizens and it is clear that the child is to be brought up as part of their family.