

## **Surrogacy law reform: Parliamentary briefing paper, November 2023**

**NGA Law (specialist surrogacy law firm)**

**Brilliant Beginnings (leading non-profit UK surrogacy agency)**

### **What is surrogacy?**

Surrogacy is where a woman carries and giving birth to a child for someone else. The intended parents may be a different-sex couple who cannot carry a pregnancy (perhaps following cancer, repeated miscarriages, unexplained infertility or the mother having been born without a womb), a same-sex couple or a single parent. Historically surrogacy has involved the artificial insemination of a woman with the intended father's sperm (called traditional surrogacy). Modern surrogacy typically involves embryos created in a fertility clinic with the intended parents' eggs and sperm (or with donated eggs) which are transferred to a surrogate who carries a child not biologically hers (called gestational or host surrogacy).

### **How many UK children are conceived through surrogacy?**

Around 400 children per year are born through surrogacy to UK parents (according to family court statistics), up from around 50 per year before 2008. More than half are now born through international surrogacy, largely due to difficulties created by the current UK legal framework. The most popular international surrogacy destination is the USA, where surrogacy is safe and ethical but very expensive. Other surrogacy destinations include Ukraine, Canada, Cyprus, Mexico and Nigeria.

### **Do surrogates often change their minds?**

This is a common misconception. Surrogates are typically mothers who have enjoyed pregnancy and want to help someone else to have a family. They commit to carrying a baby for the intended parents which they do not see as their own. Over the past 30 years, there have been only a tiny handful of UK cases involving surrogates seeking to keep the baby, compared with several thousand successful UK arrangements. Surrogates are very clear they are not the child's mother, and prefer the term 'surrogates' to 'surrogate mothers'.

### **Is surrogacy exploitative, or a risk to women or children's rights?**

Informed consent is core to any ethical surrogacy arrangement, but all credible research evidence shows that UK surrogates overwhelmingly report positive long term outcomes, and that children born through surrogacy do as well or better in terms of psychological adjustment than any other children.

### **Is it illegal to pay a surrogate in the UK?**

UK law does not make it illegal to pay a surrogate more than her expenses, although the Family Court must retrospectively authorise any payments of more than 'reasonable expenses' after the birth. UK surrogates are typically paid £12,000 to £25,000, with expenses interpreted loosely. Parents going overseas pay compensation to surrogates more openly, with US surrogates typically compensated \$30,000 to \$80,000 plus expenses. There have now been hundreds of cases in which compensation has been authorised by the family court, and none where authorisation has been refused.

## **Current law and practice**

**The Surrogacy Arrangements Act 1985** – makes UK surrogacy agreements unenforceable, prohibits third parties arranging surrogacy for profit in the UK, prevents lawyers from drafting surrogacy agreements, and prohibits advertising. The Act was a reaction to media coverage of the 'baby Cotton' case in 1985 and its intent was to discourage surrogacy. In fact UK surrogacy has grown informally, with UK surrogacy

arrangements frequently made via Facebook groups or non-profit surrogacy organisations in the UK (including Brilliant Beginnings). There is, however, a shortage of UK surrogates.

**The Human Fertilisation and Embryology Act 1990 (updated in 2008)** – makes the surrogate and her spouse the legal parents, regardless of biology. The intended parents can apply for a parental order after their child is born to become the legal parents instead (see Annex) after which they receive a UK birth certificate in their names. The court process takes 6-12 months.

## The Law Commissions' Review

The Law Commissions of England and Wales and Scotland have completed an in-depth review UK surrogacy law. Their final recommendations (March 2023) include:

- The creation of a new 'pathway to parenthood' to enable intended parents to be recorded on their child's initial birth certificate (provided the surrogate does not change her mind).
- Regulation of non-profit UK surrogacy organisations to oversee the new pathway, including requirements for a written surrogacy agreement, screening, legal advice and counselling.
- Tighter categorisation of permitted payments to UK surrogates with a new requirement to account for costs along the way, and possible sanctions for intended parents who breach the rules.
- No significant changes to the law for parents conceiving through international surrogacy.

The recommendations include many positives, but need to go further to create meaningful change.

## Current issues and problems

**Difficulties finding a UK surrogate** – There is a chronic shortage of UK surrogates, combined with restrictions on advertising and professional matching services. That means not just long waiting lists, but no clear process or certainty of intended parents ever finding a UK surrogate.

**No legal structure or security** – UK law makes surrogacy arrangements feel risky and uncertain, based on trust and with the surrogate given an absolute right to change her mind. The intended parents are not recognised as legal parents, even if they are their child's biological parents, and surrogates and their spouses are given legal responsibility for children they do not consider theirs.

**Intended parents being driven overseas** – A majority of parents now choose to go abroad to conceive their children through surrogacy. However, children born overseas are often born stateless and parentless and face long delays securing travel documents to come home. While most international commercial surrogacy is safe, legal and ethical, some risks exploitation of women, particularly in less economically developed countries.

**Parental orders** – The court process to resolve parenthood is outdated, occurs too late and takes too long. The criteria have been criticised by High Court judges, including:

In *Re Z (No. 2) (2016)* the President of the High Court Family Division made a formal declaration of incompatibility under the Human Rights Act that the law discriminated against children born to single parents.

The President of the Family Division in Re X (2014): *“Can Parliament really have intended an application made just one day late to be barred forever?... It is the very antithesis of sensible; it is almost nonsensical.”*

Ms Justice Russell in Re Z (2016): *“There is no screening of either surrogate or commissioning parents and no support available other than support from others involved with the [Facebook] forum... This unregulated form of surrogacy means that there are on the one side vulnerable surrogates, and on the other commissioning parents who are legally unprotected from unpredictable outcomes.”*

## Is there a better way?

We need workable law which accepts that surrogacy is a positive and established form of family building, and which manages its realities sensitively and pragmatically. 7,800 people have signed our petition for surrogacy law reform which calls for:

- **Parentage from birth** – Children should have secure status with their parents immediately from birth. The Law Commissions have recommended a ‘pathway’ for parenthood which enables a minority of intended parents to be recorded on the birth certificate without a court process. This needs to be extended to include a mechanism for recognising the parentage of all children born through surrogacy, including those born overseas to UK parents.
- **A regulated framework for UK surrogacy** – As the Law Commissions have recommended, there should be a more formal process for those entering into surrogacy arrangements (including screening, written agreements, counselling and legal advice) to ensure all parties are giving free informed consent, to safeguard the adults and the child and to set clear and strong foundations.
- **Honesty about surrogate compensation** – Surrogacy compensation is already a reality that the court routinely authorises, and in the context of a carefully regulated framework, it can be managed safely and ethically. Imposing more restrictions on payments to surrogates is impractical, unnecessary and will actively disincentivise UK surrogates.
- **Children’s long term welfare interests** – Surrogates and parents should be encouraged to promote openness with the child and to maintain an ongoing connection. Public records should be expanded to keep better information for children born through surrogacy, including in international surrogacy cases. This will bring the law on surrogacy into line with the law on gamete donation.



NGA Law is a specialist fertility law firm, which has represented parents in nearly 2,000 surrogacy cases, including 19 landmark reported cases (including the very first international surrogacy, and the case in which the President of the Family Division made a declaration of incompatibility under the Human Rights Act). The firm has also been involved in policymaking on surrogacy for many years, working with the Department of Health, Human Fertilisation and Embryology Authority and various charities, and being instrumental in winning previous legal changes.

Brilliant Beginnings is a leading non-profit UK surrogacy agency (one of only four surrogacy organisations in the UK) which works with UK parents and surrogates, supporting ethical UK and international surrogacy arrangements, and campaigns to raise awareness and encourage positive change.

## **Annex – Criteria for a parental order**

The court may make a parental order providing for a child to be treated in law as the child of a couple or single person over 18 if:

- The child is carried by someone else following artificial insemination or embryo transfer and at least one of the applicants is the biological parent.
- If the applicants are a couple, they are married, civil partners or living as partners in an enduring family relationship (although case law has modified this).
- The application is made within six months of the birth (although case law has modified this).
- The child's home is with the applicant/s and one or both of the applicants is domiciled in a part of the UK, Channel Islands or Isle of Man (although case law has modified this).
- The surrogate (and her spouse) unconditionally consent to the order freely and with full understanding, not before the child is six weeks old (unless the surrogate cannot be found or is incapable of giving agreement).
- The court is either satisfied that no more than reasonable expenses has been paid, or agrees to authorise the payments retrospectively (although case law has established that payments will always be authorised if the order is in the child's best interests).
- The order is appropriate to safeguard the child's lifelong welfare.

Further reading:

[Surrogacy law reform - Brilliant Beginnings](#)

[Making a difference - NGA Law](#)

<https://www.change.org/p/uk-government-it-s-time-to-review-uk-surrogacy-law>