

# Barcan+Kirby

## An Introduction to Surrogacy Law - Episode 4: The Future of Surrogacy

**Charmaine Moger (CM):** Welcome to Barcan and Kirby's podcast on all things surrogacy. My name is Charmaine Moger, and I'm a lawyer in the Family department at Barcan and Kirby.

**Charlotte Wait (CW):** And I'm Charlotte Wait, and I'm also a lawyer in the Family department at Barcan and Kirby.

**CM:** So, why is there a need for reform? Why does the law around surrogacy need to change?

**CW:** Essentially, it needs to better protect the interests of children, surrogates and also the intended parents. Currently, I think I've touched upon this already, the current laws that we're governing surrogacy with were set up years ago when traditions and values were completely different to nowadays sort of norms, so they are outdated. And the sort of criticism, I suppose, is that they currently create unnecessary delays, complexities. There's the potential to, um, exploitation for the surrogates, but also there's the position where there's the undermining of the intentions of all the parties involved with the current setup, with the parental orders.

So the intended or the talked about reform is that they're aiming to streamline this legal process to ensure that there's a greater certainty and support for everybody that's involved so that it brings the child back to the centre of their decision making as, as the family court does to ensure that their wellbeing is, is kept at the forefront of their decision making.

**CM:** And there's a real lack of clarity, isn't there, around the issue of payments, which can be made by the intended parents to the surrogate, which can make the law difficult to apply in practice as, as I've already said, the court has never refused a parental order because of payments that have been made.

**CW:** Yeah.

**CM:** But it's a real grey area, isn't it? And we know that the process can take between six to 12 months. The child could be a year before the intended parents actually have parental responsibility for that child.

**CW:** Yep.

**CM:** Having already gone through the surrogacy journey, that's, that's a huge amount of time for people to invest, isn't it?

**Charlotte Wait:** Yes, completely. And if you are in the unfortunate position that there are medical issues that require attention, that then brings further issues that need to be dealt with, with respect to who's got parental responsibility for that child.

**CM:** And who provides the consent.

**CW:** Yeah, absolutely.

**CM:** So we know that the Law Commission of England and Wales has published a joint report with the Scottish Law Commission, and they've outlined some recommendations for a robust new system to govern

surrogacy with the aim of it working better for children, surrogates and intended parents. So basically all of those involved in the journey.

So what are some of the recommendations that the Law Commission has made?

**CW:** So they've referred to it as a new pathway to legal parenthood, and this is solely surrounding surrogacy agreements and procedures that are taking place within registered clinics.

Okay? So the pathway would see that the intended parents become the legal parents for that child from birth, as opposed to waiting for months to obtain the parental order that's currently in place.

**CM:** We know that that would then give them parental responsibility from birth and be able to make all these decisions that an absolutely natural birth parent can make.

**CW:** Yes, absolutely. So the new pathway would incorporate enhanced screening and safeguards, including medical and criminal records checks, as well as, um, further sort of enhanced independent legal advice and counselling for everybody involved in the process, which does happen to a certain extent now, but. They are looking to make it clearer and easier for parents and, uh, surrogates to approach.

**CM:** We know, don't we, that in terms of the reforms, there would still be a place for parental orders?

**CW:** Absolutely, yes. So the parental orders would still be applicable for international surrogacy as well as private arrangements, so they're not obsolete by any stretch of the imagination. Those intended parents will still need to obtain a parental order through the courts, as they do now, to become the child's legal parents.

So currently there is a donor register in which it's a requirement for all donors, eggs and sperm, um, to be listed on this register and for a child to have access to that register once they turn 18. The proposal is that there is a new surrogacy register that is akin to that of the donor register, where any child that is born through surrogacy has the opportunity to trace their origins when they're older through the framework that's designed with surrogacy in mind.

**CM:** The recommendations in relation to payment mean that there will be greater clarity over which payments and tender parents are allowed to make to the surrogate, and it will include those things which are already included, such as medical wellbeing costs, um, any costs related to loss of earnings, pregnancy support and travel. It would mean that there's a prohibition on payments for carrying the child, any compensatory payments and living expenses such as rent. The payment rules are to ensure that a surrogate is not left either better off or worse off through surrogacy, which protects against the risk of exploitation.

**CW:** Yes. Protects the vulnerable, which, you know, makes sense.

Um, the suggestion is that the current law, in respect of commercial surrogacy, remains in place, so it's prohibited.

**CM:** So the surrogate couldn't be forced to give the child to intended parents because of an enforceable surrogacy contract, which can sometimes be seen in for-profit systems, for example?

**CW:** Yes, absolutely. Essentially, it continues to protect those vulnerable surrogates that are sort of. Enticed into surrogacy through the use of payments, and they're not able to be commercialised and made for a profit, essentially.

**CM:** And what we need to remember, don't we, I think, is that surrogates still have the right to withdraw their

consent with these recommendations.

**CW:** Yes.

**CM:** In relation to *international* surrogacy agreements, so many couples will opt for agreements abroad. Sometimes, in countries where there is a particular risk of exploitation of women and children, the reforms are designed to encourage intended parents. Those who want to use surrogacy to make domestic surrogacy arrangements instead, to give them that greater protection in this country. However, for those people who do opt for international surrogacy arrangements, the reforms recommend legal and practical measures to safeguard the welfare of those children, for example, by assisting them in acquiring UK nationality and recording relevant information on the surrogacy register.

**CW:** Yeah, absolutely. So, you know, international surrogacy has its place, uh, within the surrogacy process. Um, this streamlined pathway is there to try and keep it within the UK so that it can be monitored, and we've got this surrogacy register. So there is accountability to, if your surrogate, for example, is not known to the family, that the child is able to access that information when they're old enough to. It'll also ensure that the clinics are able to best support the people who are using their services.

**CM:** So it seems that these recommendations are necessary. They must come into place to protect anyone going through that surrogacy journey. But what we don't know is when those recommendations are going to be implemented.

So the final report and draft legislation were presented at the House of Commons. In March 2023, and now two years on, we are still no further forward. It's still waiting a formal response from the government, uh, with no indication as to when they will review it.

**CW:** So it's a case of watch this space, I suppose. It's exciting.

**CM:** So thank you for listening to our podcast on surrogacy. I think it's fair to say surrogacy is a complicated journey. It's important that if you are going through that process, either as a surrogate or intended parent, that you get legal advice if you've got any questions or want to discuss anything further than please make sure that you get in touch with us.

**CW:** It's the best part of my job. I love supporting intended parents and surrogates through this process, so absolutely. If you want any advice with respect to any area of this journey, please get in contact.

**CM:** Our website address is [barcankirby.co.uk](http://barcankirby.co.uk).