

# Barcan+Kirby

## An Introduction to Surrogacy Law - Episode 3: The Legal Requirements for the Surrogate

**Charmaine Moger (CM):** Welcome to Barcan and Kirby's podcast on all things surrogacy. Today, we're going to talk to you about the legal requirements for the surrogate.

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 what we know is, they really, a surrogate should be over the age of 21 years old.

Some clinics may require further screening for those over 35, and surrogates must be healthy enough to carry a pregnancy with a history of at least one successful pregnancy to term without complications.

Surrogate should have a healthy BMI, ideally, not higher than 35 and be eligible for treatment at a fertility clinic.

And, of course, what we know is that the clinics themselves will cover it down half assessments, and they may have slightly different requirements.

Surrogates must be resident in the UK, and it is recommended that surrogates seek counselling to understand the impact of surrogacy and to ensure it won't negatively affect them.

So the surrogate can be someone who is known to the intended parents. Sometimes it could be a family member or friends, or it can be a third party through a clinic.

As we've said, if the surrogate is married or in a civil partnership, then their spouse or civil partner will be the child's second parent at birth, unless they did not give permission.

It's often the case that the intended parents will pay for the surrogate's legal fees throughout the process because they need to get legal advice.

This is a huge decision for them, and they need to think about also whether a Will is required, for example, in the unfortunate event that something happens to the surrogate during birth.

**CW:** I think it's also a requirement of the clinics that all parties are to take their own independent legal advice, receive a letter of advice from that, so that they can evidence that they have gone off and taken their advice and are still making that informed decision to commit to the surrogacy journey.

**CM:** So what we know is that clinics tell surrogates and intended parents that they need to get legal advice. We know that as lawyers, we cannot be involved in drafting or reviewing a surrogacy agreement.

So I guess the big question is, what role is there for lawyers with these agreements?

**CW:** Yes, absolutely. So it's it is very within legislation that we're not allowed anywhere near these surrogacy agreements, but we can meet with the intended parents or the surrogates prior to them entering

into that agreement to sort of guide as to what they might want that agreement to include.

There are many, many, many aspects that this agreement should detail. And my advice always is that it should be detailed to try and nail down as many issues as they possibly could foresee ahead of time to ensure that everybody is able to make that informed decision without the emotions or the hormones that are kind of raging through everybody's body at that point in time.

It's dealt with in a calm manner where they've got the time and the space to give consideration to huge things.

**CM:** The agreement is a detailed document, isn't it? It's meant to cover and foresee every eventuality. It's not going to cover absolutely everything. But the whole point is that before that journey, the surrogacy journey has started, and the surrogate and intended parents are having these conversations.

**CW:** Yes.

**CM:** They're thinking about issues that might affect them throughout the journey, throughout the pregnancy.

The surrogacy agreement, for example, it has to include key things such as whose egg is being used, whether the surrogate is married, and details of the clinic.

It will confirm that the child is going to be raised by the intended parents.

It will often include clauses such as, for example, for the surrogate not to have sex seven days before the first embryo is implanted or until pregnancy is confirmed or the attempt at conception is failed.

It will also deal with issues such as consent and cooperation of testing, whether that's medical, genetic, and who's going to pay for that?

**CW:** Yeah, absolutely. It can also go to the really, really tricky subjects, such as the intended parents, with the use of their embryos. How many times do they attempt IVF? Or for the surrogate, how long in between cycles does that surrogate want to wait?

These are all really personal questions that they are going to have to deal with ahead of time so that everybody's expectations are understood and managed.

**CM:** And one of the key elements of the agreement, which is quite commonly discussed, is in relation to fees, because I think part of the myth is that surrogacy is really expensive because people can claim all these expenses. But actually, the reality is that expenses have to be approved by the court when the parental order is made.

**CW:** Yes.

**CM:** And we know that it's reasonable for travel and accommodation costs for the surrogate to be paid by the intended parents.

**CW:** Maternity wear for time off for appointments, if they are having their wages reduced because they are having to attend these appointments, for example, or travel associated with that, then they can be compensated for that.

But the key is it has to be reasonable. Unfortunately, there is no legal definition of what is reasonable.

**CM:** I think a general range at the moment that's cited is between £12,000 and £18,000, but the amount will obviously vary based on the circumstances. And I'm aware no parental order has ever been refused because too much was paid.

**CW:** No.

**CM:** It's important that the agreement, it does cover issues such as whether there's going to be a private room at the hospital, who's going to be paying that, the name the child will be registered with, and also practical issues such as who's going to have skin to skin contact with the baby when they're born, who's going to be there at the birth.

**CW:** Yeah. All really personal important questions that need to be asked ahead of time. But I think the one thing we need to make really clear is that none of this is enforceable.

**CM:** And I think some of these issues are also a little bit more tricky if the surrogate is known to the intended parents. For example, if it is a friend or a family member, that family member or friend may feel that they've got a bit more right to be there, for example, than the surrogate would like.

**CW:** Absolutely, yeah.

**CM:** Because if the surrogate is using a donor via a clinic that's unnamed to them, perhaps it's maybe easier for them to feel a bit more in control of the guidelines that they would like in place.

**CW:** But you could also switch that up and, you know, the person that you have chosen as your surrogate, if they are friends and family, they know you, they know what you have gone through as intended parents to have got to that point. And therefore, you've got that connection with them, which is invaluable.

And that is why there, you know, there are so many options available to people as to what route they choose with surrogacy and who they choose as their surrogate.