

Barcan+Kirby

An Introduction to Surrogacy Law - Episode 1: What is 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. I suppose the first question is, what is surrogacy?

Um, society has changed, and surrogacy has become more common. It's increased fourfold over the last decade. Celebrities have brought this to the forefront of discussion with the likes of Kim and Kloe Kardashian, as well as Ada Williams, for example.

In the UK, surrogacy is governed by the Surrogacy Arrangements Act 1985 and certain provisions of the Human Fertilisation and Embryology Act 2008.

So essentially, surrogacy is more common nowadays than it has ever been before. So, the legal definition of what surrogacy is... Charmaine is going to talk to us a little bit about.

CM: Surrogacy is where a woman, the surrogate, bears a child on behalf of another couple or individual who intended to become the child's legal parents, whom we will refer to as the intended parents throughout this discussion.

There are two types of surrogacies. Firstly, there's traditional surrogacy, and that takes place using the surrogate's egg. Then there's gestational surrogacy, which takes place using a donor egg. For some people, surrogacy can be the only way to have children who have a genetic link to them. But in the UK, there must be a medical reason for surrogacy.

So while surrogacy is a lot more popular across the world, and we hear about lots of famous people going through surrogacy in the UK, you can only use the surrogacy route if there's a medical reason to do so. So, one parent must have a genetic link to the child; otherwise, the child would be required to be adopted by the intended parents, which is a discussion for another day, isn't it?

CW: Yeah.

CM: Um, if you give birth to the child, you're always considered the legal mother. In UK law, even when using a donated egg, the surrogate is the legal parent until the time a parental order is made. So we'll go on to talk about parental orders in due course. The intended parents must be domiciled in the UK, and the surrogate must be over the age of 21, and the donor must be over the age of 18.

So, is surrogacy legal in this country?

CW: Yes, absolutely. Anyone in the UK can enter into a surrogacy agreement, but it cannot be enforced by the law. It means that ultimately, a surrogate has that decision right up until after the birth as to whether or not they wish to keep that child. There are many other ways that we can deal with it after the fact. But ultimately, yes, if the surrogate changes their mind at any point during that process, then that will mean that they are able to keep that child, as they have given birth to it.

CM: So we know that there are lots of myths around surrogacy. It might be helpful if we go through some of them to dispel those myths before we carry on.

CW: So the first sort of myth that we came across was the fact that it's deemed that surrogacy is only available to the wealthy or celebrities.

CM: We know that's not true because, whilst the costs of surrogacy can vary significantly, it's not exclusively available for the rich. Intended parents can find ways to manage costs through loan savings or payment plans, and some regions and other organisations offer more affordable programmes.

Surrogacy is available for everyone, and it will depend on many factors such as, for example, whether you're using a fertility clinic, whether you have treatment in the UK or abroad, or whether you're using a family member or friend as a surrogate or a third party. And whilst compensation for surrogacy expenses can form part of the surrogacy agreement, surrogates often have personal motives for going through the surrogacy process; for example, the desire to help others or a passion for childbirth.

CW: The second myth, I suppose, is will the surrogate try to keep the child?

CM: Well, they might try to, but most fertility clinics require a psychological evaluation of both the intended parents and the surrogate before they enter into an agreement.

This helps ensure a healthy relationship and prevents any issues with parental custody. It's very rare for a surrogacy arrangement to break down, and most surrogates do not view the child as their own in any way. If an arrangement does break down, it's often due to there being a misunderstanding about everyone's expectations, or this is disagreement over something which has happened during the pregnancy, which hasn't previously been discussed.

It's why it's really important for anyone considering entering into a surrogacy arrangement to obtain legal advice so that they understand their responsibilities and legal rights.

CW: Yeah, absolutely. Things like the surrogacy agreement that they've reached between them; that should be as detailed as possible, really, I suppose, so that it breaks down all of those issues ahead of time before all the emotions and the hormones are raging. It enables everybody to give their say on what their expectations are from the surrogacy agreement.

CM: See, some people think, or one of the other myths, is that a surrogate is genetically related to the baby. Is that true?

CW: No, not always. So, for example, in gestational surrogacy, the surrogate does not share any genetics with the child. The surrogate will carry that or be implanted with an embryo that's created from either the intended parents or a donor's egg and/or sperm. So no, absolutely not.

CM: People often think that surrogacy is only for couples facing infertility issues.

CW: Yes, whilst infertility is probably the most common reason for surrogacy, it's not the only one. Some individuals or couples may choose surrogacy for other reasons, such as health concerns or medical reasons.

CM: So you don't just have to experience infertility to go through this surrogacy process?

CW: No, not at all.

CM: If, for example, you go through the surrogacy journey and the child is born in a different country and they're given a foreign birth certificate or a foreign court order naming the intended parents, is the parental order still needed?

CW: Yes. In terms of surrogacy and making sure that the intended parents become the legal parents within the UK sort of jurisdiction without a parental order, the surrogate will still be the legal mother of that child, whether or not there is a foreign birth certificate.