

# Maternity leave rights for parents through surrogacy

As well as the legal work we do for clients as a lawyer, my team and I also campaign to make the law better for fertility patients. It's something we do because we believe in it (just like giving our time to charities like Infertility Network UK) and more often than you might think, we get to make a difference. I am therefore thrilled to announce that, after our campaign of more than five years, the government has finally announced that it will introduce employment rights for parents through surrogacy.

Increasing numbers of parents now start a family through surrogacy, whether gay or straight, and whether in the UK or abroad. Surrogacy involves parents who have their own biological child (sometimes using donor gametes, usually on the egg side) with the help of a surrogate mother who carries the pregnancy for them. Surrogacy may be needed because of recurrent miscarriage or stillbirth, because a medical condition makes it unsafe for the mother to carry, because of prior cancer or hysterectomy, or for many other reasons. It is ultimately a human solution to a medical problem. The baby is handed over immediately at birth, and the parents take on all the normal duties and demands of looking after their newborn baby.

But at law they can have virtually no rights. The surrogate is treated as the legal mother (and if she is married, her husband is treated as the legal father) even if she is not the biological mother and has no wish to ever be treated as a parent. The parents can remedy this by applying to court for a 'parental order' which triggers the re-registration of the birth certificate in their names, but the process is lengthy and for six-nine months the parents are in limbo, caring for a child who is not legally theirs.

One of the cruelest side-effects of this ludicrously awkward and longwinded legal process has for a long time been that parents through surrogacy have no right to time off work when their new baby arrives, unlike parents who give birth or who adopt a child. Most new parents can take up to a year off work (with at least some pay) and have protected employment rights which prevent them being sacked or unfairly treated. Parents through surrogacy, however, do not. This is grossly unfair, and has resulted in parents through surrogacy having to quit their jobs or go back to work if their employer does not (or cannot) give leave on a discretionary basis.

The government has now announced that this is going to change, as part of the government's wider maternity leave and adoption leave reforms which are expected to come into force in 2015. Although the full detail has at the time of writing yet to be confirmed, we know that parents through surrogacy will be legally



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entitled to attend two antenatal appointments during the pregnancy, and to adoption leave and pay after the birth. Adoption leave is broadly equivalent to maternity leave (allowing roughly a year off work, with similar pay entitlements) with flexibility between the parents as to who takes the main leave and who takes paternity leave. When the new rules are introduced, it will become available to parents through surrogacy who are eligible to apply for a parental order, including heterosexual couples and gay dads. Surrogate mothers will also retain their right to maternity leave to recover from giving birth.

The government's response to the consultation on modern workplaces says:

*We propose that intended parents in surrogacy cases who satisfy the criteria for a Parental Order and intend to apply, or have applied, to a court for a Parental Order will be entitled to leave and pay on the same basis as adopters who are eligible for statutory adoption leave and pay, subject to the qualifying conditions and evidential requirements. In addition, both intended parents will be entitled to take unpaid time off to attend two antenatal appointments with the surrogate mother carrying their child.*

What is so exciting about the change, as well as the practical employment rights it will introduce for new parents, is that this is the very first time in UK legal history that parents through surrogacy have been recognised as having any rights in advance of the birth of their child. This is a very significant recognition that surrogacy is real and here to stay, and hopefully a first step towards wider reform of our surrogacy laws to remove the cumbersome limbo period entirely.