

Modern surrogacy in the UK

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With celebrity Sarah-Jessica Parker becoming a mum of twins through surrogacy this month, surrogacy is a hot media topic. But away from the glamour and the headlines, what is the reality of surrogacy in the twenty-first century UK?

What is surrogacy?

Surrogacy involves a woman artificially conceiving a child, who she intends to hand over to someone else after the birth.

Different types of surrogacy

Surrogacy covers a range of different situations. The common elements are the birth mother's intention to hand over the child, artificial conception and a biological link between the child and one or both of the intended parents, but the other detail is open to variation.

Traditional or 'straight' surrogacy, for example, involves the artificial insemination of the surrogate mother with the intended father's sperm. The surrogate mother then carries a child which is hers and the intended father's biologically. Arrangements are often dealt with privately and informally at home, in many cases without medical supervision.

Host or 'gestational' surrogacy has been made possible by the development of in vitro fertilisation treatment (or 'IVF'), which enables human eggs to be fertilized outside the body and so transferred from one woman to another. In host

surrogacy cases, the surrogate mother carries a child she has no genetic relationship with. The child may be the biological child of both intended parents, or may be conceived with eggs or sperm from a third party donor.

In host surrogacy cases, a fertility clinic is inevitably involved. Eggs must be collected (either from a donor or from the intended mother) and fertilised. Embryos are then transferred to the surrogate mother, either fresh or having been stored and thawed at a later date. English law requires such processes to be carried out under license from the Human Fertilisation and Embryology Authority (HFEA), which means that they can only take place in a fertility clinic in the UK.

Why do people choose surrogacy?

Some women embark on surrogacy as a first option fertility treatment, including those who, as a result of surgery or an anomaly at birth, do not have a uterus which will enable them to carry a pregnancy.

But surrogacy is more typically a fertility treatment of last resort. Many surrogacy patients have behind them a long history of failed infertility treatment, some with repeated IVF cycles, others with recurrent miscarriages. For some, the long path behind them also excludes them from being able to adopt, and surrogacy represents their last chance of a having a family.

How do people find a surrogate mother in the UK?

Commercial facilitation of surrogacy is a criminal offence in the UK, which means that fertility clinics cannot offer a matching service as they do, for example, with egg or sperm donors. The onus is therefore very much on the intended parents to find a suitable surrogate mother, and this is not easy.

The ban on commercial facilitation of surrogacy means that there are no professional agencies in the UK which can find a surrogate mother for a fee (as there are in many other countries abroad). Advertising is also banned, which means that intended parents cannot advertise in newspapers, magazines or online that they are looking for a suitable surrogate mother.

Some couples are lucky enough to have a friend or relative who volunteers to help them. Failing this, there are a handful of non-profit making agencies which help match intended parents with volunteer surrogate mothers in the UK. Such organisations charge a membership fee to cover their costs, but are run on an altruistic basis by those with personal experience of surrogacy, and do not make a profit from the services they provide.

These agencies have existed on the fringes of the law for some time, tolerated but operating on a technically illegal basis. From 1 October 2009, the Human Fertilisation and Embryology Act 2008 will clarify that they can operate legally in the UK, provided that they remain non-profit making and only charge for certain of the services they provide. However, without professional regulation or a commercial foundation, these agencies are inevitably informal in approach and, as the

demand for surrogate mothers typically outstrips the numbers of volunteers, the process of finding a surrogate mother is often long and uncertain for intended parents.

How does the law apply?

Once all these practical hurdles have been overcome and a surrogate mother found, the next step is to grapple with the legal issues for those involved.

Surrogacy arrangements are, as a matter of law, unenforceable in England and Wales, which means that the intended and surrogate parents rely on each other to honour the agreement.

The rules on parenthood in the Human Fertilisation and Embryology Act 2008 provide that the surrogate mother is always the legal mother at birth. If she is married (or after 6 April 2009 in a civil partnership) her husband/civil partner is the child's second parent, unless it is shown that he/she did not consent to the arrangement. In cases involving married surrogates, this therefore excludes either intended parent from having legal status as a parent at birth, even if the intended parents are the child's biological parents.

If the surrogate mother is unmarried, the rules which determine who is the second parent are more complex. If the intended father is the biological father, he will in most cases be the legal father (with parental responsibility being dependent on him being named on the birth certificate).

The intended parents must then apply for a parental order under section 30 of the Human Fertilisation and Embryology Act 1990 (which will be replaced by the very similar section 54 of the Human Fertilisation and Embryology Act 2008 as from 6 April 2010) in order to acquire legal parenthood and extinguish the parenthood status of the surrogate mother (and her husband or civil partner).

To obtain a parental order, the intended parents must show that the criteria in section 30 have all been met. These are:

- That conception occurred artificially, rather than through sexual intercourse.
- That the intended parents are married and over 18 (as from 6 April 2010, unmarried and same sex couples will also be able to apply).
- That at least one of the intended parents is a biological parent of the child.
- That at least one of the intended parents is domiciled in a part of the United Kingdom.
- That the child is in the care of the intended parents.
- That the surrogate mother (and her husband or civil partner) consents to the order being made (the surrogate mother's consent being invalid if given less than six weeks after the birth).
- That no more than reasonable expenses has been paid (unless authorised by the court).
- That the application is made within six months of the birth.

Once a parental order is granted, the intended parents will be issued with a new birth certificate naming them as the parents, and the surrogate mother's (and her husband or civil partner's) parenthood and parental responsibility will be extinguished.

Case study: Sarah and James

Sarah and James have been married for fifteen years. Following repeated failed IVF treatment and several miscarriages, Sarah has been advised that her last hope for conceiving a child is surrogacy.

Sarah's older sister Emily, who is married to John and has three children of her own, offers to act as a host surrogate. Sarah, James, Emily and John all attend the fertility clinic where Sarah and James have until now been having treatment, and all four are given counselling.

Since Sarah and James have some embryos in storage (created with their egg and sperm) which are left over from their previous IVF treatment, Emily undergoes a treatment cycle involving a transfer of one of the stored embryos. To everyone's delight, she becomes pregnant, and nine months later gives birth at her local hospital to a healthy baby girl weighing 8lb exactly.

Sarah and James are present at the birth and James cuts his daughter's cord. Sarah and James name their daughter Harriet. After an overnight stay in hospital, Sarah, James, Emily, John and Harriet leave the hospital together. Harriet goes home with Sarah and James, while Emily goes home to recover.

A few weeks later Emily registers the birth, registering Harriet with Sarah and James' surname. Harriet's birth certificate shows Emily as her mother and John as her father.

Sarah and James then apply for a parental order. The court appoints a parental order reporter who arranges to visit Sarah and James, and Emily and John, in their respective homes. The reporter prepares a report for the court which confirms that the criteria in section 30 have been met (and in particular that no more than reasonable expenses has been paid and that Emily and John consent to the order).

Sarah and James then attend a final hearing at court with Harriet, at which the parental order is granted. A few weeks later they receive a new birth certificate naming them both as the parents.

Conclusions

Surrogacy is an increasingly accepted form of fertility treatment in the UK, albeit that the legal environment still makes it a difficult and laborious process for those involved. Far from being exclusive to glamorous celebrities, for many ordinary couples with difficult medical histories, surrogacy offers hope at the end of a very long journey.