



EXPERT: Natalie Gamble

# TOP 5 UK SURROGACY LAW MYTHS



UK surrogacy law is complicated and out of date, but also widely misunderstood. As the lawyers who have handled more surrogacy cases than any others in the UK, here are our top five most common misconceptions about UK surrogacy law.

## 1. UK surrogacy is risky – the surrogate might keep your baby

It is true that UK law treats the surrogate as the legal mother initially, and if things go wrong the intended parents cannot ‘enforce’ any surrogacy agreement in the courts as a contract. However, that does not mean that there is a high risk of things going wrong, or that the surrogate has an absolute right to keep the baby if they do.

In practice, surrogacy disputes are incredibly rare. There are only four reported UK cases where a surrogate has wanted to keep the baby, compared with well over a thousand successful UK surrogacies. And if you read those disputed cases, they are all good examples of how not to do surrogacy. Successful surrogacy is all about forming a strong foundation of trust and good communication, talking things through properly at the outset and looking after each other through the process. If things are managed well, with a good and nurtured relationship between those involved, serious problems are avoidable and incredibly rare.

It is also wrong to say that a UK surrogate has a right to keep the baby. Even if there is a dispute, the law allows the Family Court to decide who the child should live with, having decided what is best for the child. Although there are no guarantees, in practice the rare disputed cases show that the Family Court is just as likely to transfer care to the intended parents as to allow the surrogate to keep the baby.

## 2. Going overseas for surrogacy is better because you will be the legal parents from birth

Court statistics show that more UK surrogacy babies are now being born overseas than in the UK. There are many reasons why UK parents go overseas for surrogacy, including the professional services available and the shortage of UK surrogates. But it is a myth that going overseas resolves the legal issues and makes you the legal parents from birth.

In most surrogacy 'destinations' (including the US, Canada and the Ukraine) the law recognises the intended parents as the legal parents, which means a birth certificate is issued in your names immediately. However, UK law does not recognise foreign birth certificates and court orders in surrogacy cases and instead treats the surrogate and her spouse as being the child's legal parents.

Although this can be sorted out after the birth, there are UK processes you need to follow to navigate immigration rules to bring your baby home, and to get a parental order so you are the legal parents in the UK as well as in the country where your child was born.



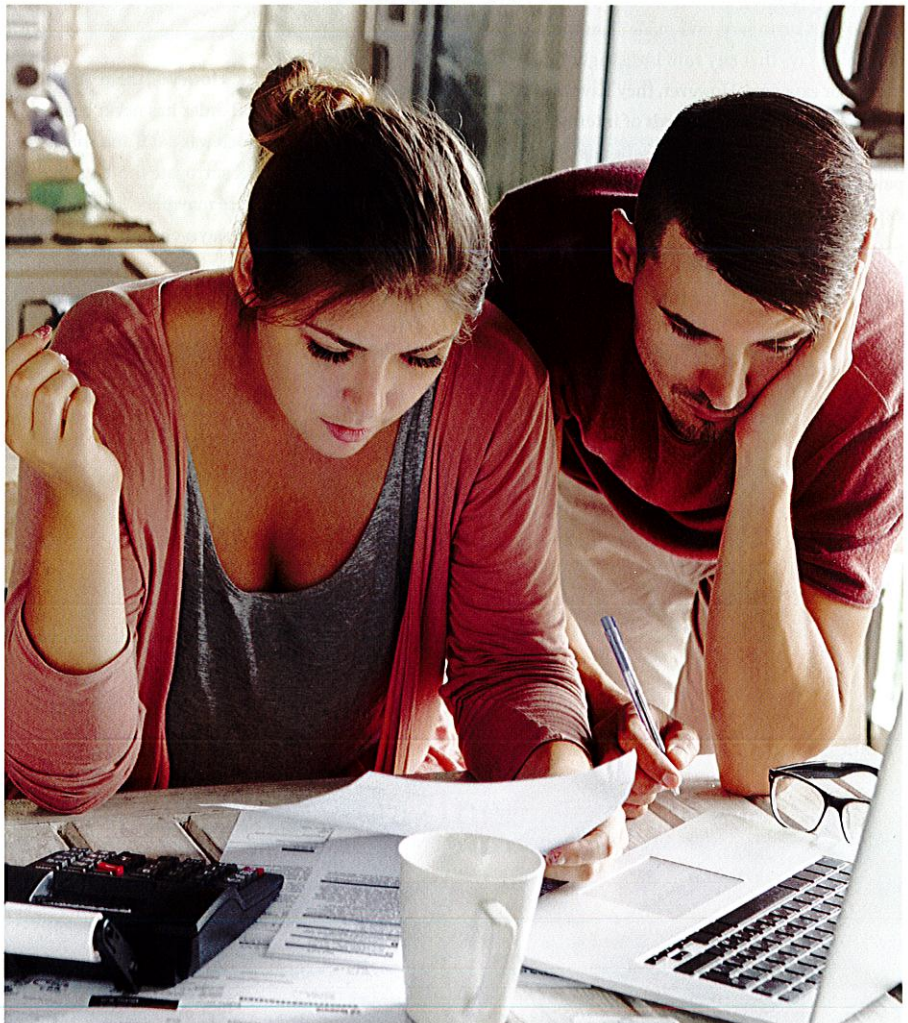
## 3. UK law makes it illegal to pay a surrogate more than reasonable expenses

This is perhaps the most common misconception of all!

There are criminal offences in the UK around advertising and profit-making agencies, but parents and surrogates do not commit any offence no matter what the surrogate is paid. Yes you read that right.

How UK law deals with the issue of payments is much more subtle. After a child is born through surrogacy the intended parents must apply for a parental order to become legal parents. That is a private application made to the Family Court, and as part of that process the court has to decide either that only 'reasonable expenses' has been paid or, if not, that it should 'authorise' the excess payments retrospectively.

While the intention when the law was written in 1990 was clearly to discourage payments to surrogates, in practice there are no criminal sanctions and the only power the Family Court has is to deny a parental order - which it never does and never would because the child's welfare is paramount. On the ground, the world has moved on and the Family Court now routinely authorises compensation payments, so much so that in a recent case a High Court judge described the authorisation of around £30,000 plus expenses as a 'non-controversial issue'.





#### 4. The amount allowed for reasonable expenses in the UK is £15,000

UK law does not define 'reasonable expenses' and there is no fixed amount which is allowed. It is up to the Family Court to decide, in each case, what is reasonable. If more than expenses has been paid, the court also has a power to authorise payments retrospectively.

The custom in UK surrogacy is to agree a lump sum in advance for 'expenses', with fixed sums of between £12,000 and £18,000 typical in practice. When intended parents apply for their parental order, most provide the Family Court with a list of what the agreed sum was for (including things like loss of earnings, maternity clothes, travel costs, extra support at home and a recuperation holiday). However, in most cases, the lump sum covers expenses in a generalised way, rather than with a costed breakdown. Most UK surrogacy cases are heard by lay magistrates, who rarely question this approach even if the sum agreed seems to be more than the actual expenses.

High Court judges have commented on this 'going rate' for UK surrogacy, and made clear there is no law which says that any sum is the right figure to pay for expenses. However, they have also made clear (based on hundreds of international surrogacy cases where compensation is openly paid to surrogates) that payments of more than expenses can and will be authorised if necessary.

What is allowed and what is not is confusing and causes a lot of anxiety for intended parents who



want to follow the rules. However, the practical reality is that a parental order has never been refused because too much was paid, and the only real risk of paying a UK surrogate more than expenses is that your case may have to go to a more senior judge if the payments are questioned. In practice that is unlikely if you stick within the normal bracket for UK surrogacy expenses.

#### 5. Surrogacy for single people is illegal in the UK

Surrogacy may be difficult for single people in the UK, but it is not illegal. The issue is that (currently) single parents are not eligible to apply for a parental order, which extinguishes a surrogate's legal responsibilities and makes the intended parents the legal parents. Although there can be ways around this, the lack of a clear legal solution is understandably off-putting for UK surrogates, and that makes it hard for single parents to find a surrogate in the UK.

The good news is that the law is changing. After a human rights ruling last year that the current law discriminates unfairly against single parents, the government has told Parliament that it will be changing the law to allow single parents to apply for parental orders. We don't yet know exactly when the law will be changed, but the government is using a special fast-track process to do it, and it looks like the new rules will be in force before the end of 2017. Single parents will then be in the same boat as everyone else when it comes to UK surrogacy.

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