

YOUR ROADMAP TO MODERN FAMILY LAW

IN ENGLAND AND WALES

SURROGACY | FERTILITY | ADOPTION | GENDER



PAYNE HICKS BEACH

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A Practical Guide to Modern Family Law in England and Wales

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There are many ways in which individuals and couples are able to build and exist in a family in the modern world. The law in these fields is complex, rapidly evolving and requires highly specialised advice. Dealing with these legal arrangements to build your family with the help of advances in science, an adoption agency, or dealing with the legalities of transitioning gender, can seem impenetrable and complicated. Having the right team of lawyers will guide you through the legal process in a sympathetic and supportive manner to achieve the best possible outcome for you. We provide a bespoke service with the utmost sensitivity and discretion to all our clients.

The aim of this guide is to give you some practical advice, right at the start of your journey, so that you feel more equipped and empowered to take the next steps.

This guide provides an outline of the legal landscape and highlights areas of upcoming legal reform within the areas of fertility, surrogacy and adoption law and gender.

SURROGACY



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What is surrogacy?

Surrogacy is the process where a woman carries and delivers a baby on behalf of someone else. A ‘traditional’ or ‘straight’ surrogacy is where a surrogate is genetically related to the child she carries but gives birth to for someone else, whereas a ‘gestational’ surrogacy is where there is no genetic connection between the surrogate and the child. An embryo is implanted into the surrogate’s uterus, which has been created using the egg and sperm of other people (either from the intended parent(s) or donors). To obtain a Parental Order following a surrogacy arrangement, at least one of the intended parents must have a genetic connection to the child. ‘Double donation’ where donated gametes are used and there is no genetic affiliation to the intended parents is not seen as a surrogacy arrangement under UK law, and routes to legal parentage fall under adoption rather than surrogacy legislation.

Who is the legal parent of a child born following a surrogacy arrangement?

The legal mother of a child, as defined by section 33 of the Human Fertilisation and Embryology Act 2008 (“HFEA 2008”) is the “woman who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs, and no other woman, is to be treated as the mother of the child”. Therefore, the surrogate is the legal mother of the child born following a surrogacy arrangement, even if she has no genetic connection to the child.

If the surrogate is married or in a civil partnership, subject to conditions, her spouse or civil partner will be the child’s legal father or second parent pursuant to section 35 and 42 of HFEA 2008. If the surrogate is not married, the intended father or second parent can be named as the legal parent of the child on the child’s birth certificate.

The surrogate will remain the child’s legal mother (and her spouse the other legal parent) until the intended parent(s) obtain a Parental Order in respect of the child. This is irrespective of whether the child is born abroad and the intended mother is named on a foreign Parental Order and/or birth certificate. A surrogate cannot surrender her legal parentage of the child.

Who can be an intended parent in a surrogacy arrangement?

Heterosexual couples and same sex couples are eligible to build their family using surrogacy, as are single individuals (of any sexuality). Couples do not have to be married to be intended parents, but they must be living as partners in an enduring family relationship.

Can you pay someone to be a surrogate?

Commercial surrogacy is prohibited in England and Wales, and so you cannot pay someone to be a surrogate if there is a ‘profit element’. Only altruistic or compensatory surrogacy is allowed in England and Wales, where the surrogate can be reimbursed for her reasonable expenses. Reasonable expenses are those related to the pregnancy, such as maternity clothes, travel expenses to and from medical appointments, child care expenses and lost income.

Are surrogacy contracts enforceable in England and Wales?

No. The English Court will not recognise a surrogacy contract. Only a Parental Order can quash a surrogate’s legal parentage of the child.

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Parties will often enter into a surrogacy agreement to record their intentions and decisions on key issues and provide clarity. English lawyers cannot advise or prepare such agreements, but we can advise on the legal implications, under English law, of entering into surrogacy agreements.

Are surrogacy contracts enforceable abroad?

Surrogacy contracts are legal and well-regulated in certain jurisdictions abroad, such as certain states in the United States of America. If you enter into an international surrogacy arrangement, you should take legal advice in that jurisdiction. We will work with your foreign surrogacy specialists to protect your interests and facilitate the Parental Order process in this jurisdiction once the baby is born.

How do intended parents become legal parents of a child born to surrogacy in England and Wales?

Intended parents will have to apply for a Parental Order, which is a Court order that grants legal parenthood to the intended parent(s) as the legal parents and extinguishes the parentage of the surrogate (and her spouse).

The criteria for a Parental Order are set out at section 54 of the Human Fertilisation and Embryology Act 2008 (for married couples, couple in a civil partnership or couples living as partners in an enduring family relationship) or section 54A (for individual applicants) and are summarised below:

1. The child has been carried by a surrogate as a result of embryo transfer or artificial insemination;
2. At least one of the applicants must have a genetic link to the child;
3. The application must be made within six months of the child's birth;
4. At the time of the application, the child must be living with the intended parent(s);
5. One or both of the applicants must be domiciled in the United Kingdom, the Channel Islands or the Isle of Man;
6. The intended parent(s) must be over 18 years of age;
7. The surrogate and any other legal parent must consent freely and with full understanding of what is involved, to the issuing of the Parental Order;
8. No money or other benefit (other than reasonably incurred expenses) has been given or received by either of the applicant(s) for or in consideration of (i) the making of the Parental Order, (ii) any agreement for the surrogate's consent (or that of any other legal parent), (iii) the handing over of the child to the applicant(s), or (iv) the making of arrangements with a view to the making of the Parental Order unless authorised by the Court; and
9. No other order relating to the child must have been previously made under section 54 or 54A 'HFEA 2008', unless the order had been quashed or an appeal has been allowed.

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Upon the grant of a Parental Order, the birth of the child will be re-registered at the Registry Office and a new birth certificate will be issued naming the intended parent(s) as the legal parent(s) of the child.

Is surrogacy law changing in England and Wales?

The Law Commission reviewed the outdated domestic surrogacy laws in their 13th Programme of Law Reform and reported its recommendations with the Scottish Law Commission in March 2023. The Law Commission set out their recommendation for a new regulatory regime for surrogacy, whereby the intended parents would become the child's legal parents from birth, amongst other recommendations.

We now wait for Parliament to engage with these recommendations and debate a draft bill to introduce any reforms. Until this time, the existing rules shall remain in effect and surrogates and intended parents should be aware of the effect of the current law.

The Law Commission has recommended that the intended parents' route to legal parentage be updated to reflect the practical reality. Under the recommendations, intended parents would be the legal parents from the birth of the child, subject to the surrogate having the right to withdraw consent. The Law Commission has suggested that there be greater clarity on permitted payments, such as medical and wellbeing costs, and lost earnings, but costs like rent would be excluded, so that the surrogate is left no better or worse financially as a result of the arrangement. Commercial arrangements, where there is a profit element, will remain unenforceable save in the case of international surrogacy arrangements where the retrospective authorisation of expenses still needs to be obtained from the Courts.

The Law Commission has also suggested some other reforms, including a new regulatory route and a Surrogate Register to allow the children born as a result of surrogacy to trace their background.

Please see the Law Commission's Report and recommendations [here](#).



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FERTILITY



What is a declaration of parentage?

A declaration of parentage can be made in respect of whether a named person is or was the parent of another named person. This can be relevant following, for example, errors at UK fertility clinics, following disputes about an individual's parentage, including conception arrangements, and by adopted individuals in respect of their birth parents.

What is the Human Fertilisation and Embryology Authority (the "Authority")?

The Authority is an independent 'arm's length body' of the Department of Health, working on behalf of the Government. The Authority licenses, monitors and inspects fertility clinics, as well as provides information about fertility treatment, clinics and donation.

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Can donors be identified?

Upon turning 16, donor-conceived people conceived at a UK licensed clinic can apply for non-identifying information about their donor as to:

1. A description of the donor, including physical appearance, including height, weight, skin, hair and eye colour, and the ethnic group(s) of the donor's parents, their religion, occupation, interests and skills;
2. The donor's year and country of birth;
3. The donor's marital status;
4. The donor's reasons for donating;
5. The donor's personal and family medical history, including the screening tests carried out on the donor; and
6. Other information as listed at Regulation 2 (2) of the Human Fertilisation and Embryology Authority (Disclosure of Donor Information) Regulations 2004.

Upon turning 18, people who were donor-conceived at a UK licensed clinic from donations made by donors registered after 31 March 2005 can request identifying information. This includes information such as the full name of their donor, the donor's date of birth and town of birth, the appearance of the donor and the last known postal address of the donor.

Can donors identify children conceived with their gametes?

For donations made after 1 August 1991, donors can be informed of the number of children conceived from their donation, the sex of those children and the year(s) those children were born.

Can donors be paid for their sperm or eggs?

In England and Wales, it is unlawful to pay donors for their donations, although they can be reimbursed for their reasonable expenses.

Will a donor have rights and obligations to the donor-conceived child?

If a sperm donor donates through an Authority licensed clinic, the donor will not be the legal parent of any child conceived as a result of this donation, nor will that donor have any legal obligations towards or rights in respect of that child. The donor will not be named on the birth certificate. If a donation is not made through the Authority, there is a risk that the donor could be considered the legal parent.

The child's legal mother will be the woman who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs. Therefore, if the egg donor does not carry the child, she will not be the child's legal mother.

Will fertility law change?

The Authority is seeking a review of the law of Human Fertilisation and Embryology Act 1990 ("HFEA 1990"), which is the primary legislation in respect of fertility law. The Authority held a public consultation that closed in 2023, which it will review before making recommendations.

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ADOPTION



What is adoption?

Adoption is the process where a child becomes the legal child of the adoptive parents and those adoptive parents are granted parental responsibility for the child. The parental responsibility of the birth parents is extinguished. An adopted person is treated in law as if they were legitimately born to the adopter(s).

Who can adopt a child?

A prospective adopter must be over the age of 21 years, but they do not have to be married or in a civil partnership. A person can adopt as an individual or within a couple, and both same sex and opposite sex couples can adopt.

The partner of a child's parent can also make an application to adopt a child. A birth mother or father may make an application for adoption as a couple with their partner.

A single applicant may make an application provided they are not married or in a civil partnership, unless their spouse/civil partner cannot be found, they have permanently separated or the spouse's/civil partner's ill-health render them incapable of making an adoption order.

The applicant(s) must be domiciled in the British Isles. An individual applicant, or one of the applicant couple, must have been habitually resident in the UK for at least a year before commencing the application process.

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What are the conditions for making an adoption order in England and Wales?

The Court may not make an adoption order if the child has a parent or guardian unless one of the conditions below are met (subject to rules on parental consent):

1. The Court is satisfied that either (i) each parent or guardian of the child consents to the making of the adoption order or (ii) that the parent's or guardian's consent should be dispensed with.
2. The child has been placed for adoption by an adoption agency with the prospective adopters in whose favour the order is proposed to be made, and either (i) the child was placed for adoption with the consent of each parent or guardian and the birth mother's consent was given when the child was at least six weeks old, or (ii) the child was placed for adoption under a placement order, and no parent or guardian opposes the making of the adoption order. A parent or guardian may not oppose the making of an adoption order under this condition without the court's leave.

Applications for adoption can only be made in respect of children under the age of 18 at the time of the application.

What are the Court's considerations when deciding to make an adoption order?

The Court's paramount consideration is the child's welfare, throughout his or her life. The Court must at all times be aware, in general, that any delay in coming to a decision relating to adoption is likely to prejudice the child's welfare.

The Court must consider the following factors:

1. The child's ascertainable wishes and feelings, in light of the child's age and understanding;
2. The child's particular needs;
3. The likely effect on the child throughout his or her life or having ceased to be a member of the birth family and becoming an adopted person;
4. The child's age, sex, background, and any of the child's characteristics which the court or agency considers relevant;
5. Any harm which the child has suffered or is at risk of suffering;
6. The relationship the child has with his or her relatives, with any person who is a prospective adopter with whom the child is placed, and with any other person in relation to whom the Court considers the relationship to be relevant, including:
 - a. The likelihood of any such relationship continuing and the value to the child of its doing so;
 - b. The ability and willingness of any of the child's relatives, or of any such person, to provide the child with a secure environment in which the child can develop, and otherwise to meet the child's needs, and
 - c. The wishes and feelings of any of the child's relatives, or of any such person, regarding the child.

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GENDER



How do we assist transgender and non-binary individuals and their families?

We can advise clients on the process of obtaining a Gender Recognition Certificate (GRC), under the Gender Recognition Act 2004, to recognise their acquired gender.

We acted successfully in a case where a transgender adolescent sought gender affirming treatment abroad. Please see the full judgment [here](#).

How can a young person consent to gender-affirming treatment?

A minor under the age of 16 may be ‘Gillick’ competent (“if and when the child achieves a sufficient understanding and intelligence to enable him or her to understand fully what is proposed”: *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112) and so able to consent to medical treatment themselves. The Court have determined that physicians should determine whether a child under 16 is ‘Gillick’ competent and therefore has capacity to consent to medical treatment.

It remains possible for parents of minors to consent to medical treatment on behalf of their children. The parents’ right to consent to medical treatment on behalf of their children continues even in respect of ‘Gillick’ competent children, except where they are seeking to override the ‘Gillick’ competent’s child’s decision. However, if the child is not ‘Gillick’ competent or cannot reach a decision, the parents continue to have a right to give valid consent to their child’s treatment by virtue of their parental responsibility.

Parents do not have to apply to the Court to determine whether their child can receive puberty blocking treatment, but in certain circumstances, such as if the parents feel pressured by the child to consent or if the child’s doctors disagree on the treatment, then parents should apply to Court for judicial determination.

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What is a Gender Recognition Certificate?

A Gender Recognition Certificate (“GRC”) is legal recognition of an individual’s acquired gender and permits that individual to record their acquired gender on official documents.

What are the requirements for obtaining a Gender Recognition Certificate?

Individuals over the age of 18 are able to apply to the Gender Recognition Panel for a Gender Recognition Certificate if they have either (i) lived in the other gender, or (ii) changed gender under the law of a country or territory outside the United Kingdom.

The Gender Recognition Panel must be satisfied that this individual (i) has or has had gender dysphoria, (ii) has lived in the acquired gender throughout the period of two years ending on the date on which the application is made, and (iii) intends to live in the acquired gender until death.

The individual must provide two medical reports which set out the details of the gender incongruity or gender dysphoria.

HOW WE CAN HELP

Payne Hicks Beach’s Modern Family Team acts for a wide variety of individuals building their families. Our Modern Family lawyers are well known for their discretion, empathy and trust. We are experts in fertility, surrogacy (both domestic and international) and adoption law, in addition to having extensive experience in complex children law matters, often with an international and public law dimension. Our expert lawyers are key commentators on modern family law.

Named Winners of the Family Team of the Year at the Chambers HNW Awards, we are widely recognised as one of the best firms in the country by the legal directories, including [Chambers and Partners](#) and [The Legal 500 UK](#). Our team is described as having “*an unparalleled reputation in the field of family law and a modern families practice which is excellent*”, as being “*a quality outfit with a reputation that speaks for itself*” and noted for bringing “*dedication to cases and an understanding that each one is foremost a client’s story, not just another case.*”

We are sensitive to the highly personal issues involved and are able to recommend suitably qualified professionals, where appropriate. We have strong connections with lawyers and other professionals in other jurisdictions, most particularly relevant when dealing with international surrogacy issues. We also work closely with our highly regarded in-house specialists in the areas of immigration, tax and succession planning, employment and privacy and reputation departments to complement your family building arrangements.

Seeking our advice promptly is often the best way to have one of the best solicitors in England and Wales looking after your interests.

DISCLAIMER: This publication is not intended to provide a comprehensive statement of the law and does not constitute legal advice and should not be considered as such. It is intended to highlight some issues current at the date of its preparation. Specific advice should always be taken in order to take account of individual circumstances and no person reading this article is regarded as a client of this firm in respect of any of its contents.



PAYNE HICKS BEACH

CONTACT US

10 New Square, Lincoln's Inn, London, WC2A 3QG

DX 40 London/Chancery Lane

T: +44 (0)20 7465 4300

General enquiries contact: enquiries@phb.co.uk
phb.co.uk/service/family-law-solicitors/