

As social funding cuts hit across Europe, access to infertility services decreases (and prices greatly increase). As a result, increasingly more foreign couples are visiting Ukraine to arrange for gestational surrogacy.

While Ukrainian legislation is quite liberal, returning home with their child may present new problems because each country has different laws regarding what is allowed or forbidden in regards to surrogacy. Some countries ban surrogacy outright, including Germany, Sweden and France. Authorities in the U.K. have also been known to present legal roadblocks.

Despite the growth in international surrogacy, there is no international regulation of surrogacy or minimum standards to which nations must adhere. Moreover, there are no international conventions, or reciprocal arrangements for the recognition of the legal parentage of a child. Thus, a parental order obtained, for instance, in California will not be recognized in England.

Some countries demand evidence that at least one parent of the child has a genetic relationship with the child, usually by DNA testing, while other countries insist on seeing the legal release of the child by the husband of any married surrogate (which makes the use of a single surrogate mother more attractive). Where surrogacy follows a gifted embryo and neither new parents are genetically linked obtaining citizenship and travel document becomes far more difficult and protracted, even into U.S. In any event, compliance with numerous regulations and formalities takes months and greatly adds to the stress of the intended parents.

The legal complexities of surrogacy make it essential that potential parents seek legal advice both in their home countries and in Ukraine. For your convenience, below we provide a brief overview of applicable international surrogacy laws:

### **Belgium**

Altruistic surrogacy is legal in Belgium, but commercial surrogacy is illegal. And although altruistic surrogacy is technically legal, there is only one hospital taking in couples and there are extremely strict rules to get in. This makes a lot of couples seek treatment outside Belgium.

### France

In France, Article 17/6 of the Civil Code makes void any agreement with a third party relating to procreation or gestation. In the *Mennesson* case, the highest court in France, the *Cour de Cassation*, ruled that it was contrary to public policy to give effect to foreign surrogacy agreements. An appeal is currently being prepared by the intending parents to the European Court of Human Rights. Likewise, the French embassy's website in Kyiv strongly warns its citizens against the practice, saying those who fail to comply with the ban may encounter "serious judicial and administrative problems" including possible criminal sanction.

On the other hand, the *Conseil d'Etat*, the highest administrative court, provided an administrative means of recognizing foreign surrogacy agreements by overturning a decision of the French Consulate in India not to issue travel documents. The *Conseil d'Etat* has no jurisdiction over matters of parentage but nevertheless made an order which effectively made lawful a surrogacy agreement entered into overseas.

### Germany

The German courts have held that surrogacy is a breach of Article 1 of the Constitution, which states that human dignity is inviolable. To make a human being the subject of a contract is impermissible under German law, including the use of a third party's body for the purposes of reproduction. The strict definition of motherhood under the German Civil Code also makes surrogacy arrangements impermissible.

### Netherlands

The popular image of the Netherlands as a liberal bastion does not as yet extend to its approach to surrogacy. Altruistic surrogacy is legal in the Netherlands, but commercial surrogacy is illegal. Entering or attempting to enter a surrogacy arrangement can be punished with imprisonment. Moreover, although altruistic surrogacy is technically legal, there are very few hospitals taking in couples and there are extremely strict rules to get in. This makes a lot of couples seek their treatment outside the Netherlands.

### Sweden

Surrogacy is banned in Sweden, but Sweden recently took a step toward a possible lifting of its ban on surrogate motherhood, when the Riksdag's Committee on Social Affairs recently voted by a wide majority on to authorize the government to carry out an inquiry into surrogate motherhood. Surrogacy in Sweden is on the right track, but still a very long way from liberalization.

### United Kingdom

Commercial surrogacy arrangements are not legal in the United Kingdom. Such arrangements were prohibited by the Surrogacy Arrangements Act 1985, making it illegal to pay more than expenses for a surrogacy. Regardless of contractual or financial consideration for expenses, surrogacy arrangements are not legally enforceable within the United Kingdom. A surrogate mother still maintains the legal right of determination for the child, even if they are genetically unrelated. Unless a parental order or adoption order is made the surrogate mother remains the legal mother of the child.

The UK's approach makes it very difficult for the intending parents to enter into commercial surrogacy arrangements. For example, it is unlawful for intending parents to advertise for a surrogate, or for a woman to advertise a willingness to become a surrogate. The Surrogacy Arrangements Act 1985 s.2(1) prevents a third party (though not a surrogate or intending parents) from initiating or taking part in negotiations, offering or agreeing to negotiate, or compiling any information with a view to its use in making, or negotiating the making of, surrogacy arrangements.

Since the Human Fertilisation and Embryology Act 1990 came into force, intending parents have been able to acquire legal parenthood of their child to the exclusion of the surrogate (and, if applicable, her husband) by a parental order. The criteria for a parental order are now contained in section 54 of the Human Fertilisation and Embryology Act 2008. A parental order will usually be granted by the English courts, provided that the criteria set out in section 54 are met and it is in the child's best interests to make the order. Although the Act provides that no more than 'reasonable expenses' should be paid to the surrogate, the English courts have retrospectively approved surrogacy payments made overseas which go beyond reasonable expenses. In any case, the couple must provide the English court with detailed documentation of all payments made to the surrogate mother.

### United States

Issuance of a U.S. citizenship at birth to a child born abroad is governed by Immigration and Nationality Act (INA) Sections 301 and/or 309. The determination of citizenship to children born overseas to a U.S. parent falls within jurisdiction of the U.S. Department of State, which requires a U.S. citizen to have a biological connection to a child in order to transmit U.S. citizenship to such child. Simply being named as a parent on a Ukrainian birth certificate for a child born as a result of surrogacy arrangement in Ukraine does not mean that the birth certificate will meet the U.S. immigration and citizenship requirements.

The State Department determines the citizenship of each child born as a result of surrogacy program individually, on a case by case basis, after carefully considering the specific facts surrounding the child's birth and his or her parents' situation. The best evidence available to parents to show their blood relationship to a child born to a surrogate mother in Ukraine is DNA testing, which obviously cannot be performed until after the child is born.

A U.S. citizen parent who has a child using a surrogate mother in Ukraine may apply for a Consular Report of Birth Abroad of an American Citizen (CRBA) and a U.S. passport for the child at the U.S. Embassy in Kyiv (Consular Section). A CRBA certifies that a child born abroad is a U.S. citizen and lists only the name(s) of the U.S. citizen parent(s) with a biological connection to the child. If the spouse of the U.S. citizen parent does not have a biological connection to the child or is not a U.S. citizen, the spouse will not be recorded on the CRBA even if he or she is listed on the local Ukrainian birth certificate.

If the U.S. Embassy determines that the child is a U.S. citizen, he or she will need a U.S. passport to enter the United States. As part of the application process, the intended parents should provide to the U.S. Embassy evidence of the child's conception and birth, as well as evidence of the parents' identity, citizenship, and requisite physical presence in the United States. They also will need to arrange for the child's DNA tests.

In summary, if the child is not biologically related to a U.S. citizen parent, the child will not acquire U.S. citizenship automatically at birth. Furthermore, should the child have blood relationship only to the U.S. citizen father, but not the father's wife, the case would be treated as a birth out of wedlock to a U.S. citizen father, pursuant to Immigration and Nationality Act, Section 309(a), and the father would have to meet the additional requirements of that section otherwise, INA 301 requirements would apply, including certain residence requirements.

