Worcestershire Acute Hospitals NHS Trust

Guidance for the Care of the Woman Involved in Surrogacy

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Key Amendments

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Introduction

A surrogacy arrangement is one in which one woman ("the Surrogate Mother") agrees to bear a child for another woman or a couple ("the Intended Parent(s)") and surrender the child at birth.
There are two types of surrogacy: Partial surrogacy and Full surrogacy.

Full surrogacy
The Surrogate Mother provides the egg. The egg is then fertilised (either naturally or through artificial insemination) by either the intended father or a sperm donor.

Partial surrogacy
The Surrogate Mother has no genetic link with the child but gestates embryos usually created from the eggs and sperm of the Intended Parents (or where applicable, donor eggs and/or sperm).

See appendix 1 for guidance on documentation.

1. What is the legal position?

Surrogacy is not prohibited by law. However, surrogacy through commercial arrangement is illegal (in accordance with section 2 Surrogacy Arrangements Act 1985) and therefore it is an offence for an individual or agency to act on a profit - making basis to organise or facilitate a surrogacy arrangement for another person. Any persons or organisations who organise or facilitate a surrogacy arrangement must do so on a non-commercial basis.

Surrogate Mothers can however receive reasonable expenses from the Intended Parents, such as for maternity clothing, insemination and IVF costs and costs of travelling to and from hospital. More examples can be found in 'Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation 1998' available on the Department of Health website.

Staff should be alert to any third parties (i.e. parties outside of the Surrogate Mother and Intended Parents) who may be acting illegally on a profit - making basis. Should staff become suspicious that the parties are involved in a commercial arrangement, they should contact the Lead for Safeguarding Children for further advice and guidance.

Are surrogacy arrangements legally enforceable?
The Courts have held that a surrogacy arrangement is not a legally binding contract and therefore, an arrangement between the Surrogate Mother and the Intended Parents is not enforceable. Either party are therefore free to change their mind at any time.

2. Pre-birth

2.1 Ante-natal care

It is important to recognise that the Trust's duty of care is to the Surrogate Mother. The Trust owes no duty to the Intended Parents. All applicable ante-natal care should be provided to the Surrogate Mother in the usual way. The Intended Parents can be involved in this process

provided that the Surrogate Mother consents to this. The Trust should facilitate this so far as is practical.

The Surrogate Mother has the right to make all decisions relating to her ante-natal care. It is important to remember that the child is not recognised as a "person" until birth and therefore, the rights of the mother should take precedence over the interests of the unborn child. No one else can make decisions on her behalf.

Due to the legal complexities, health professionals should advise women involved in surrogacy arrangements that they may wish to seek the expert advice of a lawyer (DOH, 2008).

2.2 Antenatal Screening Infectious diseases

The British Medical Association in their paper "Considering Surrogacy? Your questions answered" (2007) highlight that parties should consider screening for HIV or hepatitis (or other applicable transmittable disease) prior to conception.

Where treatment has been provided in a licensed clinic, the eggs and the sperm to be used will be tested for HIV, hepatitis and other transmittable diseases. However, with self insemination, there will be a risk of transmission of infection to the Surrogate Mother. It is therefore important that the Surrogate Mother is counselled of this risk and offered testing accordingly. The guidance also recommends that the intended father is tested prior to the insemination.

What if the Surrogate Mother tests positive for a transmittable disease?

Should the Surrogate Mother be identified as having a transmittable disease, staff are prohibited from sharing this information with the Intended Parents or other third party without the consent of the Surrogate Mother. To do so would be a breach of patient confidentiality. The Surrogate Mother should however be counselled of the risks of transmission of infection to the child and any recommended steps at birth to minimise the risk of transmission, in the usual way.

2.3 Ante-natal screening for fetal abnormality

The Surrogate Mother should be offered all applicable ante-natal screening tests for abnormalities. Staff should only perform tests that the Surrogate Mother has consented to. The Intended Parents have no authority to demand testing that the Surrogate Mother does not consent to.

Should an abnormality be identified in the unborn child, staff should not share this information with the Intended Parents or other third party without the consent of the Surrogate Mother.

3. Termination of pregnancy

A Surrogate Mother has the right to a termination (provided her circumstances fall within the standard legal framework for abortion). The Intended Parents have no right to prevent a termination taking place. The Intended Parents should not be informed about a termination unless the Surrogate Mother has given her consent for this information to be shared.

4. Mental Capacity of the Surrogate Mother to make decisions

Should staff have any concerns regarding the mental capacity of the Surrogate Mother to make decisions about her pregnancy, a formal assessment of capacity should be performed (staff are advised to follow the Trust's consent policy). In the event that the Surrogate Mother lacks capacity to make a particular decision, treatment should be given having regard to the best interests of the Surrogate Mother – however, staff are advised to consult the Trust's Lead on the Mental Capacity Act prior to administering non-emergency treatment in such circumstances.

5. Birth planning

A Surrogate Mother and the Intended Parents will often sign up to a written agreement (for example, the organisation, COTS (Surrogacy in the UK), provide a template agreement and guidance on the issues this may include. This agreement usually sets out the preferred method of birth, who will hold the baby after birth and who will make decisions about the child's welfare etc. Staff should be aware that these agreements are not legally binding and should be used as a guide as opposed to a binding agreement.

In the absence of a pre-prepared written agreement, staff should work with the Surrogate Mother and, where possible, the Intended Parents (in so far as the Surrogate Mother consents to their involvement) to develop an agreed birth plan. This will assist in ensuring a workable and clear plan is in place relating to e.g. the preferred method of delivery, attendance at delivery, who the baby will be passed to at birth, use of drugs during delivery etc. However, whilst it is clearly beneficial for these discussions to take place with the Intended Parents, final decisions about delivery must be made by the Surrogate Mother.

Where a birth plan is completed with the involvement of the community midwife, a copy of this should be filed in the hospital records and discussed with a senior midwife.

The Surrogate Mother, with the advice of healthcare professionals where appropriate, will make the final decisions both during and immediately after the pregnancy. Where, following birth, the Surrogate Mother delegates responsibility for the child to the Intended Parents, this should be written clearly in the medical notes. Further details of how responsibility passes to the Intended Parents can be found in paragraph 7.2 of this Guidance.

It is important to remember that even where a birth plan has been agreed in advance (either within the unit or a formal written agreement drawn up independently by the parties); the Surrogate Mother can change her mind at any time.

6. Confidentiality

The Surrogate Mother's confidentiality should be respected at all times. This means that no information about the Surrogate Mother or the unborn child should be shared with the Intended Parents or any other third party without the consent of the Surrogate Mother.

Whilst a breach of patient confidentiality can be justified in certain circumstances, such circumstances are limited and are subject to strict criteria. As noted above, where staff become suspicious of a commercial arrangement, they should contact the Lead for Safeguarding Children for further advice and guidance.

7. The baby following birth

7.1 What is the legal status after Birth?

7.1.1. The Legal Mother

The Surrogate Mother is the "carrying" mother and therefore, in law is the legal mother of the child at birth. This applies even where there is full surrogacy and the Surrogate Mother has no genetic link to the child.

7.1.2. The Legal Father

a. **Where the Surrogate Mother is married** the husband is deemed to be the legal father of the child at birth unless he can prove he did not consent to the surrogacy process.

b. **Where the Surrogate Mother is unmarried** the intended father will only gain parental responsibility for the child once he is named as the father on the birth certificate. At this point he becomes the legal father of the child. The General Register Office makes no distinction between births that have arisen by way of self-insemination or by IVF at a licensed clinic. Once named on the birth certificate, the intended father shares parental responsibility with the Surrogate Mother.

The Intended Parents, if married, can then apply for a Parental Order. This will transfer all legal rights over the child to the Intended Parents and relinquish the legal rights of the Surrogate Mother. There are other methods of obtaining legal parentage such as adoption. The Intended Parents should seek legal advice when seeking to obtain a Parental Order or adopt the child.

For further details regarding the registration of the birth, see section 8.3 of this Policy.

c. **Where the intended father dies.** Where the sperm of the intended father, or an embryo created with his sperm, is used after his death, that man will not be treated as the father of the child.

7.2 How do the Intended Parents become the legal parents of the baby?

7.2.1 Heterosexual couples

In order for the Intended Parents to become the legal parents of the baby, they must either apply to adopt the baby or apply for a Parental Order. This is true even if both the Intended Parents are the genetic parents of the baby.

It is important to realise that whilst a Surrogate Mother and/or the Intended Parents may wish responsibility for the child to pass to the Intended Parents at birth, the Surrogate Mother remains legally responsible for the baby until a Parental Order has been confirmed or the baby has been legally adopted by the Intended Parents. The Intended Parents have no formal legal rights over the baby until this time.

7.2.2 Same sex couples

The Civil Partnership Act 2004 set up a framework to allow same sex couples to achieve legal recognition of the their relationship. Civil partners may apply to adopt the child or apply for a residence order. Currently however, civil partners cannot apply for a Parental Order.

7.2.3 Foreign Intended Parents and British surrogate

If neither Intended Parent is domiciled in the UK, they will not be eligible to apply for a Parental Order. Adoption would therefore be the only available option to obtain legal parenthood.

7.3 Care of the baby in the postnatal period

As the Surrogate Mother is the legal mother at birth, the baby cannot be removed from the hospital by the Intended Parents without her consent. Staff should ensure they have written consent from the Surrogate Mother before handing over the baby and that this is done, wherever practicable, in the presence of the Surrogate Mother and the Intended Parents. Staff should consider whether the Duty Social Worker should be informed of the Surrogacy arrangement to ensure that both the Surrogate Mother and the Intended Parents are able to receive support and advice in the post natal period where appropriate.

The intended mother should not be admitted as a patient of the Trust. If the surrogate mother requests that the intended mother be permitted to stay with her until the baby is discharged, this should be accommodated and recorded in the notes. Where, following birth, the Surrogate Mother delegates responsibility for the child to the Intended Parents, this should be written clearly in the medical notes. If this is the case, wherever possible, the intended mother may be accommodated separately with the baby in a side room on the postnatal ward. Parenting support and advice will then be provided to the intended mother until the baby is discharged. This arrangement must be recorded in the surrogate mothers notes and also the baby's notes, stating that this is the request of the surrogate mother. The intended mother's presence on the ward should then be recorded in the ward day book. If this is not possible, owing to capacity, the baby will be transferred for care in the NICU where the intended parents may visit in place of the surrogate mother.

The surrogate mother will require a community midwife to visit. When discharged from hospital this should be communicated to the community midwife, GP and Health visitor in the normal way. Whilst there is no conclusive data on the incidence of postnatal depression in surrogate mothers, Reame (1990) suggested that 75% experienced a degree of postnatal depression for 2-6 weeks following the birth. For this reason, access to a community midwife should be encouraged for 28 days.

The intended parents and the baby will require a community midwife to visit and the baby's discharge should be communicated to the Community midwife, Health visitor and GP in the normal way. This may be an out of area discharge, if so it is vital that during the antenatal period the

intended parents address, telephone number, local hospital and GP contact details are recorded in the antenatal records.

The immediate postnatal period is a time of great emotional upheaval, which may be compounded in a surrogacy arrangement. Great sensitivity is required in handling both the surrogate and intended parents. Where there is conflict the midwife must focus her care on the surrogate mother and the baby.

7.4 What happens if there is a dispute between the Intended Parents and the Surrogate Mother?

The Trust should attempt to work with the Surrogate Mother and the Intended Parents at all times. Should a dispute arise, the Surrogate Mother's wishes should be respected at all times and staff may wish to consider contacting the Lead for Safeguarding Children for further advice and guidance.

If the Intended Parents attempt to remove the baby from Trust premises against the Surrogate Mother's wishes, staff should consider informing the Police, subject to the consent of the Surrogate Mother.

Should staff have any concerns about the welfare of the baby, staff should follow standard procedures in terms of risk assessment, involvement of other appropriate agencies as well as invoking child protection procedures (if applicable).

8. What if the Intended Parents change their minds?

If the Intended Parents change their minds about taking the child, for example, if their circumstances have changed or if the child is born physically or mentally disabled and they feel unable to take on the responsibility, the Surrogate Mother (and her partner if she has one) will be legally responsible for the child.

In the event that the Surrogate Mother also refuses to take on the responsibility, social services should be contacted in the usual way.

8.1 What if the Surrogate Mother changes her mind?

If the Surrogate Mother changes her mind and wishes to keep the baby, the Trust must respect her wishes. In this situation, the Courts will usually allow her to keep the baby. If there is disagreement between the Surrogate Mother and the Intended Parents, the Lead for Safeguarding Children should be contacted.

8.2 What if the child becomes ill and is in need of treatment?

Where possible, decisions about the baby's treatment should be made jointly, by the Surrogate Mother and the Intended Parents in conjunction with the health professionals.

In most circumstances, the Surrogate Mother will hand over responsibility to the Intended Parents on an informal basis, at birth. However, the Surrogate Mother remains legally responsible for the baby until a Parental Order has been confirmed or the baby has been legally adopted by the Intended Parents. The Intended Parents have no legal rights over the baby until this time.

The BMA, in their "Considering Surrogacy" guidance, state that provided the baby has been "passed" to the Intended Parents by the Surrogate Mother; responsibility for decision making should pass to them.

Therefore, where a Surrogate Mother informs staff that she has handed over responsibility for the baby to the Intended Parents, staff should consult with the Intended Parents in respect of decision making and seek their consent to procedures accordingly.

Staff should request that the Surrogate Mother records in writing that she is delegating responsibility for the baby to the Intended Parents. Whilst the Surrogate Mother cannot surrender or transfer any part of her responsibility to the Intended Parents without the permission of the court, she can arrange for some or all of it to be met by one or more person acting her behalf (i.e. the Intended Parents). This arrangement is not however legally binding.

Therefore, as a matter of law, even where the Surrogate Mother has delegated the care of the baby to the Intended Parents, this does not mean that she relinquishes all legal rights or

responsibilities to the baby or that the Intended Parents automatically assume the legal right to make decisions about the baby.

As a matter of law the Surrogate Mother has parental responsibility at birth and therefore, has the legal right to consent/refuse treatment on behalf of her child. This is the position until the Intended Parents have obtained a Parental Order/adoption proceedings are finalised.

In the event of a dispute between the Surrogate Mother and the Intended Parents, it is the Surrogate Mother who has parental responsibility in law to consent/refuse treatment on behalf of the child (subject to the usual test of best interests).

Should a dispute between the Surrogate Mother and the Intended Parents arise, staff are advised to contact the Lead for Safeguarding Children for further advice.

8.3 Registering of a Surrogate Child

The law requires a birth to be registered within 6 weeks.

8.3.1 Where the Surrogate Mother is married

If the Surrogate Mother is married, she and her husband will be named on the birth certificate as the parents. If the husband of the Surrogate Mother writes a letter stating that he did not give permission for the arrangement, the intended father can be named as the father.

8.3.2 Where the Surrogate Mother is unmarried

If the Surrogate Mother is unmarried and the intended father is present when the birth is registered, he may be named as the father on the birth certificate and thus obtain parental responsibility. This is true whether the birth came about by self-insemination or by IVF at a licensed clinic. The Intended Parents will need to obtain a Parental Order to become the legal parents. The birth can then be re-registered to show the Intended Parents as the parents of the child.

In both cases the baby can be given the Intended Parents surname.

9. Sources of advice and support.

- Lead Nurse/ Midwife for Safeguarding Children
- Senior Midwife
- Line Manager

Appendix 1

Checklist for Surrogacy documentation

Antenatal period

Please ensure that the following information is collected and documented in the pregnancy records during the antenatal period.

- Birth plan completed with surrogate mothers intended wishes for birth / postnatal period
  - Include her wishes for the intended parents i.e. to be present at the birth / present during postnatal inpatient stay
- Full contact details for the Intended parents
  - Names
  - Telephone numbers
  - Home address

  Address / fax / telephone numbers for the following
  - Local maternity hospital
  - Community Midwives
  - Local GP surgery

Intrapartum

- Ensure birth plan discussed with the midwife caring for the surrogate mother
- Ensure surrogate wishes for the Intended parents is clear i.e. present at the birth

Postnatal period

- Ensure postnatal ward staff are clear of the surrogate mothers wishes relating to the intended parents.
- Check the intended parents discharge details
  - Address
  - Telephone contact numbers

  Address / fax / telephone numbers for the following
  - Local maternity hospital
  - Community Midwives
  - Local GP surgery
- On discharge please obtain a photocopy of the birth certificate (if available) and file in the surrogate mother's records.

To ensure surrogate mother and baby receive follow up care in the community please

- Fax the surrogate mother's details to the community midwife and GP
- Remember to fax the baby's discharge details to the community midwife and GP of the intended parents.