

## Surrogacy – Practical Considerations (Ontario)

### OVERVIEW

The introduction of the *All Families are Equal Act 2016* (the “Act”) has changed Ontario’s surrogacy and parental landscape. This is the province’s first update to its parentage laws since 1978. The Act recognizes the status of all parents regardless of their sexual orientation and provides greater clarity and protections for all parties involved in a surrogacy or pre-conception parental arrangement.

### KEY POINTS

- Unless specified in the surrogacy agreement, parentage rights are shared equally between the surrogate and the intended parent(s) until the child is seven days old;
- If a dispute arises (e.g. parentage, decision-making disputes, failure to provide consent or suspected coercion) obtain expert legal advice.

### Surrogacy Definitions

**Surrogate:** A person who agrees to carry a child conceived through assisted reproduction if, at the time of conception, the person intends to relinquish entitlement to parentage of the child, once born, to one or more persons.

**Intended Parent:** A party to a surrogacy agreement other than the surrogate.

**Surrogacy Agreement:** A written agreement between a surrogate and one or more persons respecting a child to be carried by the surrogate in which the surrogate agrees to not be a parent of the child and, each of the other parties to the agreement agrees to be a parent of the child. Up to four persons can be part of the agreement.

### THINGS TO CONSIDER

#### Conditions

The Act sets out the following conditions with respect to surrogacy:

1. The surrogate and one or more persons enter into a surrogacy agreement before the child to be carried by the surrogate is conceived;
  2. The surrogate and the intended parent or parents each received independent legal advice before entering into the agreement;
  3. Of the parties to the agreement, there are no more than four intended parents;
  4. The child is conceived through assisted reproduction.
- If these conditions are met, once the surrogate provides the intended parent(s) consent in writing relinquishing her entitlement to parentage of the child, the child becomes the child of each intended parent and each intended parent is recognized in law to be a parent of the child.
    - The child ceases to be the child of the surrogate and the surrogate ceases to be a parent of the child.
    - The surrogate’s written consent *must be not be provided* before the child is seven days old.

#### Parental Rights & Responsibilities

- Unless the surrogacy agreement provides otherwise, the surrogate and the intended parent or parents share the rights and responsibilities of a parent in respect of the child from the time of the child’s birth until the child is seven days old.

#### Antepartum Care

Once the healthcare organization or healthcare providers are aware of a surrogacy agreement under the Act, schedule a meeting with the surrogate and intended parent(s), together if possible, to discuss the surrogacy arrangement.

- If there is a separate meeting with the intended parent(s), ensure consent to disclose personal health information (PHI) has been given by the surrogate (i.e. for herself and her fetus) before disclosing any PHI. If granted, the consent should be clearly recorded (e.g. release of PHI form or documented discussion in the health record).

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- The healthcare team is discouraged from *requesting a copy of the agreement(s) or reviewing, verifying or providing ad hoc or legal advice* as to the merits of the agreement(s). Further, they are discouraged from *filing a copy of the agreement(s) in the surrogate's/birth parent's and infant's health record records*, respectively.
  - As a replacement, adopt a standardized surrogacy/pre-conception parentage policy/protocol requiring i) a *meeting* with the surrogate and/or intended parent(s) during the antenatal period and ii) the use of a **standardized checklist/decision aid/local form** to clarify wishes and post-partum decision making authorities.

Leave the pronouncement of parentage rights and responsibilities and the enforcement of agreements to the courts. *It is not* the role of healthcare providers or the healthcare organization to validate parenthood or enforce an agreement but to ensure the best possible care and treatment is provided to the surrogate and infant while complying with surrogacy legislation. Listen without judging and do not provide ad hoc legal advice

- Ensure the meeting is a safe place for all to speak freely. It is important that the surrogate and intended parent(s) feel empowered to discuss their wishes and concerns. Encourage the surrogate and intended parent(s) to seek separate and independent counsel should they have any legal questions or concerns.
- Confirm with the surrogate and the intended parents:
  - The existence of a surrogacy agreement, that neither party disputes the validity of the agreement and that it complies with the following:
    - i.) The surrogate and one or more persons entered into a written surrogacy agreement before the child was conceived;
    - ii.) The surrogate and the intended parent(s) each received independent legal advice before entering into the agreement;
    - iii.) There are no more than four intended parents who are parties to the agreement; and
    - iv.) The child was conceived through assisted reproduction.

- In respect of parentage after the child is born until the child is seven days old, the Surrogacy Agreement does not provide for anything other than the surrogate and the Intended Parent(s) sharing the rights and responsibilities of parentage.
- If the above is all confirmed, when the child is born, the surrogate and the intended parent(s) share the rights and responsibilities of parentage.
- Review expectations for infant care and the surrogate's birth plan and communicate the care plan to the healthcare team.
- Consider advising risk management of a pending surrogacy birth.
- Ensure to obtain a signed copy of Governing Law and Jurisdiction Agreement (GLJA) by all **international intended parent(s)**.
- Obtain photocopies of each intended parent(s)' contact information and government issued photo identification (e.g. passport) to be placed on the health record of the surrogate and the newborn.

### Documentation

- Ensure complete and timely documentation of antenatal, labour/delivery and post-partum discussions with surrogate and intended parents, including the plan regarding birth and participation in infant care, post-delivery
- Document newborn care and discharge summary as per usual practice

Insurance/legal protection/assistance may not be available should the intended parent(s) or future child successfully sue outside of Canada. For further details, please refer to HIROC's [website](#) or contact HIROC at [inquiries@hiroc.com](mailto:inquiries@hiroc.com).

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### Disagreements between the surrogate and intended parent(s)

- Unless otherwise specified in the Agreement, the surrogate and intended parent(s) share parental responsibilities until the child is seven days old.
- If a dispute arises (e.g. parentage, decision-making disputes, failure to provide consent or suspected coercion) obtain expert legal advice; the surrogate and intended parents should also be encouraged to also seek separate and independent legal advice.

### Pre-conception parentage agreement

**Pre-conception parentage agreement:** is a written agreement between two or more parties (up to four) in which they agree to be, together, the parents of a child yet to be conceived. No surrogates are involved in these agreements. The agreement allows the parties to automatically be recognized as parents of the child at law if the following criteria are met:

1. There are no more than four parties to the Agreement;
  2. The intended parent is not a surrogate, and is a party to the Agreement;
  3. If the child was conceived through sexual intercourse and not insemination by a sperm donor (sexual intercourse where, prior to conception, the birth parent and the person whose sperm is being used agree in writing that the sperm donor does not intend to be a parent of the child), that the person whose sperm was used is a party to the Agreement; and
  4. If the child was conceived through assisted reproduction or insemination by a sperm donor, the spouse, if any, of the birth parent, is party to the pre-conception parentage agreement unless prior to conception, the spouse provides written confirmation that he or she does not consent to be a parent of the child and does not withdraw the confirmation.
- When healthcare organizations or healthcare providers become aware of the existence of a pre-conception parentage agreement, they should discuss the criteria above during a meeting with all parties and document their conversation.



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## REFERENCES

- All Families are Equal Act (Parentage and Related Registrations Statute Law Amendment), Statutes of Ontario. (2016, c.23, Bill 28).