

International Surrogacy Information Sheet

INTRODUCTION

This information sheet sets out the background to international surrogacy, and outlines some of the key issues for New Zealanders thinking about international surrogacy. If you are considering international surrogacy you must seek independent legal advice before beginning the process. You should also contact Immigration New Zealand (INZ), Child, Youth and Family (CYF) and the Department of Internal Affairs (DIA), before you begin the process.

What is international surrogacy?

International surrogacy is defined as a surrogacy arrangement, regardless of how it is organised, involving a surrogate mother who lives in an overseas country. This includes surrogacy involving either an altruistic or commercial arrangement.

Altruistic surrogacy is when the surrogate mother does not make a profit. She might, however, be reimbursed by the commissioning parents for the cost of reasonable medical and legal expenses. Altruistic surrogacy is legal in New Zealand. Commercial surrogacy, however, is illegal in New Zealand and many other countries. Commercial surrogacy is when payment is made to the surrogate mother that is beyond the recovery of medical costs and the surrogate mother and the fertility clinic make a profit from the arrangement.

With international surrogacy the commissioning parents may or may not be genetically related to the child.

New Zealand law applies

In all cases of international surrogacy, where you arrange for a child to be born to a surrogate mother overseas, and you intend to bring the child back to live with you in New Zealand, New Zealand law will apply.

In New Zealand the legal status of a child born as a result of a surrogacy arrangement is determined by the Status of Children Act 1969, whether the child is born in New Zealand or outside New Zealand. A genetic relationship between you and a child born as a result of a surrogacy arrangement does not mean that you are the legal parent of that child. The surrogate mother and her consenting partner if she has one are the legal parents of the child under New Zealand law.

In addition, eligibility for New Zealand residency or citizenship for a child that is born as a result of a surrogacy arrangement in an overseas country is governed by New Zealand law. It is your responsibility to ensure that any child born as a result of a surrogacy arrangement is able to enter and reside permanently in New Zealand, if that is your intention.

ESTABLISHING A LEGAL PARENT-CHILD RELATIONSHIP

Commissioning parents should establish a permanent legal parent-child relationship with the child. This can only be done through an adoption order (domestic or intercountry). Commissioning parents with no legal relationship to the child are not guardians and have no ability to make decisions about the child's needs such as schooling and medical

treatment. Without legalising this relationship, the child will not have an adult legally responsible for him/her in New Zealand. This is also very important for establishing a family environment and a sense of belonging for the child.

An intercountry adoption of a child born as a result of an international surrogacy arrangement will require you to make an application to the New Zealand Family Court (the Court) for an adoption order. The Court will require a CYF social worker to assess you to determine if you are fit and proper persons to adopt a child, before an adoption order is granted. An assessment cannot be undertaken if you are residing overseas. You must be resident in New Zealand in order to be assessed.

If an adoption order is lodged in the New Zealand Family Court and it is reported that one or both of the commissioning parents is genetically linked to the child, the Court may ask for DNA evidence of this genetic link (which will also be required for Immigration purposes as discussed below). You will also need to provide evidence of the birth mother's consent and information about the circumstances of the surrogacy arrangement.

You should also be aware that the adoption process can be lengthy and there is no guarantee of any particular outcome.

Other important considerations

According to the United Nations Convention on the Rights of the Child, every child has the right to family relationships and parental guidance, the preservation of identity and access to appropriate information. Therefore, although it may not be required in the jurisdiction where the surrogacy arrangement is made, when an egg or sperm donor is being used you will need to have as much information as possible about the identity of that person available. This information will become very important for the child in the future, should he/she wish to find out more about his or her genetic and/or ethnic identity. It could also be useful in addressing any future medical concerns.

IMMIGRATION

There is no immigration policy to facilitate the entry of children born as a result of a surrogacy arrangement into New Zealand. The decision to grant a visa in an international surrogacy case is made by the Minister of Immigration. This process could be lengthy and there is no guarantee that the child will be able to enter New Zealand.

Information that the Minister may consider when deciding whether or not to approve a visa is listed in Annex one and may include (but is not limited to):

- DNA information
- intention to adopt the child
- any relevant information held by CYF
- criminal records.

DNA samples (for visa purposes) must be taken by an approved sampler in accordance with the approved process. The relevant immigration office would provide you with further details of where to go at the time an application is made. You would need to pay for the DNA tests and it can take up to 6-8 weeks to receive the results. It is likely that the child will have to remain outside New Zealand while you wait for the results. As explained above, there is no guarantee that a visa will be approved, even with a positive DNA test result. If a visa is approved, it is likely it would be a visitor visa to allow the adoption process to run its course.

CITIZENSHIP

Applications for New Zealand citizenship are administered by the Department of Internal Affairs. New Zealand law applies when determining eligibility for citizenship, regardless of whether or not you intend to live in New Zealand with the child. The applicable legislation for applications involving international surrogacy is the Citizenship Act 1977, and the Status of Children Act 1969.

The effect of the Status of Children Act is that a child born outside New Zealand as a result of a surrogacy arrangement in most cases is not eligible to claim New Zealand citizenship by descent through one of the commissioning parents, and consequently not eligible to hold a New Zealand passport.

Citizenship through adoption

In most cases, if the commissioning parents legalise their parental relationship with the child through an adoption in an overseas court, the child will be a New Zealand citizen by descent if:

- an adoptive parent is a New Zealand citizen otherwise than by descent at the time of adoption; and
- the adoption meets the requirements of the Citizenship Act.

If the commissioning parents legalise their parental relationship with the child through an adoption in the New Zealand Family Court, the child will be a New Zealand citizen otherwise than by descent if an adoptive parent is:

- a New Zealand citizen; or
- entitled in terms of the Immigration Act 2009 to be in New Zealand indefinitely; or
- entitled to reside indefinitely in the Cook Islands, Niue or Tokelau.

Citizenship by grant

The only way the child can become a New Zealand citizen if an adoption order is not issued is by way of a grant of citizenship.

In general, applicants for a grant of citizenship must meet the requirements of the Citizenship Act. However, the Minister of Internal Affairs has discretion to grant citizenship to applicants who do not meet these requirements in certain circumstances. This includes cases where the applicant is under the age of 16 or where the Minister is satisfied that granting citizenship would be in the public interest because of exceptional circumstances of a humanitarian or other nature relating to the applicant. The Minister will make a decision on any application on a case-by-case basis and is likely to take into account the non-binding guidelines listed in Annex One.

There is no guarantee that the Minister would approve an application under these circumstances.

THE HAGUE CONVENTION ON THE PROTECTION OF CHILDREN AND CO-OPERATION ON RESPECT OF INTERCOUNTRY ADOPTION

The Hague Convention on the Protection of Children and Co-operation on Respect of Intercountry Adoption (the Convention) governs the practice of intercountry adoption. The recent Special Commission on the practical operation of the Convention indicated that the Convention was created and intended to be applied with respect to intercountry adoption, where an existing child is in need of being placed with a family overseas, not for international surrogacy (where the intention is to create an embryo and new human life). However, the spirit of the Convention is relevant to international surrogacy in that all decisions regarding international surrogacy should be made in order to uphold the best interests of the child.

KEY CONTACTS

You should contact Immigration New Zealand (INZ) Child, Youth and Family (CYF) and the Department of Internal Affairs (DIA) **before** you begin any surrogacy process.

Immigration New Zealand, a service line of the Department of Labour that takes care of all New Zealand immigration issues, including visa and residence applications.

To send a query use the following link: <http://dol.govt.nz/immigration/knowledgebase/contact>

Visit: <http://www.immigration.govt.nz>

Phone: 0508 558 855 within New Zealand but outside Auckland

Phone: 09 914 4100 Auckland

Phone: ++64 9 924 4100 from outside New Zealand

Child, Youth and Family, a service line of the Ministry of Social Development that takes care of domestic and intercountry adoption processes.

Email: webadoption@cyf.govt.nz

Phone: 0508 FAMILY (0805 326 459) from within New Zealand

Phone: ++64 9 912 3820 from outside New Zealand.

Department of Internal Affairs (administers applications for New Zealand citizenship and issues New Zealand passports).

Contact - Email staykiwi@dia.govt.nz

Freephone 0800 22 51 51 (New Zealand only)

0064 4 474 8123 (outside New Zealand)

Related legislation

All legislation referred to in this information sheet can be found at this website:

www.legislation.govt.nz.

If your enquiry involves domestic surrogacy, please contact your local CYF office for advice. Please also check the New Zealand Ethics Committee on Assisted Reproductive Technology website for its guidance and advice: <http://www.ecart.health.govt.nz>.

Failure to have adequate arrangements in place in relation to any international surrogacy arrangement you undertake will create difficulties for you and the child. The New Zealand government will not participate in the irregular movement of children.

Annex 1: Non-binding Ministerial guidelines

Below are the non-binding guidelines that Ministers are likely to take into account if and when they are deciding to exercise statutory discretion to issue a visa or grant citizenship for a baby born as the result of a surrogacy arrangement overseas, who would otherwise not be able to enter New Zealand or be granted citizenship. These guidelines are non-binding and serve as a guide only.

Minister may consider
Whether there is a genetic link between at least one of the commissioning persons and the child.
The outcome that is in the best interests of the child.
New Zealand's international obligations.
The nature of the surrogacy arrangement, i.e., is it altruistic or commercial?
Whether the commissioning persons intend to or have taken steps to secure legal parenthood or other legal rights in respect of the child in NZ.
What the commissioning persons have done in the child's country of birth to secure legal parenthood or other legal rights in respect of the child.
Whether the applicants have demonstrated respect for the laws of the jurisdiction in which the surrogacy was carried out.
Whether there is satisfactory evidence of informed consent from the: - gamete (egg/sperm) donor (if relevant) - surrogate mother for the surrogacy arrangement to take place (was she a willing party?) - surrogate mother (and her partner if relevant) for the child to depart the country of birth and enter New Zealand - surrogate mother (and her partner if relevant) for the child's adoption.
Steps taken by the commissioning persons to preserve the child's identity, e.g. do the commissioning persons intend to retain information about the child's origins?
Whether the recognised authority of the birth country has agreed or objects to the child leaving the country permanently.
Any other considerations that the Minister wishes to take into account.