



West Coast Family Law Centre

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Surrogacy Agreements*
A "Cheat Sheet" for Surrogates**
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A. WHO ARE THE PARTIES?

In any Agreement, the parties are always identified at the beginning. According to the law, every Surrogacy or Gestational Carrier Agreement (GCA) has two sets of parties, the Surrogate or Gestational Carrier (GC) and the Intended Parent(s) ("IPs"), legally defined in British Columbia and, generally, in other jurisdictions, as follows:

i)"Intended Parent" or "Intended Parents" means a person who intends, or two persons who are married or in a "marriage-like" relationship who intend, to be a parent of a child and, for that purpose; and,

ii)the Surrogate or Gestational Carrier who will be the birth mother of a child conceived through assisted reproduction, regardless of whether that person's or those persons' human reproductive material was used in the child's conception, unless the Surrogate lives in a province that requires a genetic link for the IPs, for ex., Nova Scotia (Check with your local fertility lawyer).

Be forewarned, GCAs can be fairly long so you need time to review it thoroughly before your contract review. Make sure you print out a copy or at least have one available well before your contract review and set aside approximately two hours to go through the GCA section by section with your lawyer! Remember this is a negotiation process so you will need to negotiate!

The key principles of the federal legislation governing the parties' GCA are under the *Assisted Human Reproduction Act* ("AHRA").

The AHRA prescribes key principles that govern assisted reproduction including that the Surrogate must be over 21 years of age, is not a parent and is acting on an altruistic basis.

New federal regulations under the AHRA are expected in June 2020 that will define important terms including lost wages, reimbursement of expenses.

Does the Surrogate have a partner? Does the Surrogate or IPs want their partner included on the GCA?

How many other children does the Surrogate or IP's have?

Does the Surrogate have a pre-existing relationship with the IPs? **Tip:** Nurture your relationship with IPs to ensure it is a strong bond throughout your journey!

Does the Surrogate have a maiden name? (Will be needed for Birth registration).

Name, address, occupation, age of Surrogate's married or life partner.



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B. RESIDENCE OF PARTIES - Next set of questions

Do the IPs reside outside of Canada? Do they require a Declaration of Parentage in their home jurisdiction? If so, have they consulted with a fertility lawyer from the home jurisdiction in advance of the contract stage? (This, and what follows in this section, is fully the responsibility of the IPs).

Will the Child be born in a province that recognizes surrogacy? If not, what additional legal arrangements have been made to have IPs' parentage recognized in that province?

What law applies and will it require extra steps by the Surrogate? if so, be sure to request ALL costs are covered, not just legal costs.

IPs arrange for the Declaration of Parentage prior to birth.

C. TERMS OF THE GCA

Recitals - Background

- Parties
 - Marital Status, ages of the parties
 - Relationship of the parties (married or single). Is Surrogate dating (exclusively?) or living together?
 - Motivation for participating must be altruistic.
- Any other circumstances that are important, for ex., are you about to be separated?

General Terms-Give lots more thought to areas in BOLD!

- Background (re: recitals, see above).
- Warranty, Representation/Acknowledgments and Undertakings – promises with legal consequences.
- Jurisdiction - where you live.
- Definitions - parties, clinic, term of agreement including various number of weeks pertaining to type of recovery post-birth (for ex., C-section could be up to 8 weeks of recuperation etc.).
- Pre-natal health insurance to be arranged by international IPs in advance of contract stage.
- Pre-natal obligations-make sure that you understand the medical information provided by the clinic or ask more questions!

Special Expenses - as per AHRA

- **KEEP IN MIND** the amount of the CAP for monthly expenses includes:
 - groceries, communication costs, reasonable travel expenses, mileage, actual childcare, household maintenance expenses, expenses related to recuperation including household help, clothing and day care, how many weeks will payments continue after a miscarriage, an abortion, a c-section, a stillbirth or a birth? (this not a complete list).



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- Lost wages must be supported by doctor's note according to new AHRA regulations.
- Do you agree to use your EI or your employee benefits, if available, during your journey?

Expenses in addition to Special Expenses will usually include:

-life insurance: ensure your life insurance is for a 2-year term and ask for first \$100,000 to go to beneficiary(ies) of Surrogate, not IPs, in case of loss of fetus.
 -legal fees, counselling, Bed Rest including home care, childcare & wage loss, travel expenses including for a companion, a Doula, maternity clothing for singleton & multiples and Post-Birth Wage Loss etc., (this is not a complete list).

- Confidentiality - includes social media.
- Severability.
- No waiver by conduct – fancy legal term, ask your lawyer!
- Schedules including Stages of Pregnancy and Bed Rest Form – important terms can be set out here so make sure you read entire from start to finish GCA carefully.

Screening and testing: does GC agree to invasive tests? Suggest Harmony tests and IPS

Embryo transfer procedure described - Ask the clinic questions if you are unclear about the procedure! (Your lawyer can't answer medical questions).

If pregnancy results – **Discuss with IPs beforehand**

- Selective reduction.
- Determination of genetic abnormalities.
- Right (re: termination of pregnancy).

D.PRE-BIRTH: How are we making this child?

Which IP's sperm will be used?

Whose egg will be used thereby determining if it is a Known or Anonymous egg donation?

Agreement is required between IP, Egg Donor and possibly her spouse.

What clinic is being used? Are you prepared to travel?

Has the transfer been scheduled? Will you be available?

How many transfers will be tried? Are you comfortable with the number of transfers being proposed?

Do you have any upcoming commitments that will coincide with the planned transfer dates, including school, and/or work.

Consider your availability when planning a transfer, so no last-minute, rushed preparation is necessary.

Give your lawyer plenty of warning if you are about to change jobs and your wages increase or you become employed prior to or during your journey which is called "material changes".

Are you an experienced Surrogate? if so, this will increase the Cap on Special Expenses.



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E. PREGNANCY – addressed in GCA but think about:

Will GC have pregnancy and deliver in same province?

See: GCA about prenatal care.

Agreement about where GC will be during last 3 months of pregnancy (travel restriction).

Confidential health information release including for Psychological Assessment and Counselling section.

Who is in birthing room as hospital can limit number of visitors, so it is Surrogate's choice.

F. POST BIRTH – addressed in GCA including post birth wage loss but think about your obligations to:

-sign consent to surrender child to IPs as per *Family Law Act* (BC).

-facilitate decision making by IPs related to child.

-sign statutory declarations in support of registration of birth of child and the IPs as parents on the birth certificate (only IPs allowed in BC)

-sign authorization for IP's to make emergency medical decisions, if requested.

-consent to add the Agreement as required for the Birth Registration Application and the Parentage Declaration Application, if IPs are required to establish parentage in foreign jurisdiction by Court Order.

G. BIRTH REGISTRATION

IPs lawyer will prepare birth registration application around time of birth

The IPs lawyer will ensure that only legally entitled parties will be on the birth certificate under the law of the jurisdiction i.e., in BC no surrogate on birth certificate

Do IPs live in a surrogate friendly jurisdiction?

H. OTHER TERMS TO CONSIDER (kind of unusual)

Abortion: make sure to discuss with IPs before contract stage.

Stillbirth: are you concerned who gets body of the stillborn.

Death: even if child lives only briefly, in BC must register birth.

Adoption: if child is born in another place requires GC consent and could be additional expense to GC if adoption necessary because she do not comply with travel restrictions.

What happens if Surrogate becomes ill, dies or breaks up.

What happens if IP(s) becomes ill, dies or breaks up.

Appointment of guardian.

I. CONFIDENTIALITY

Are you aware of your IPs preferences for disclosing information related to your journey? Or is



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their concern only related to identifying information related to the child or IPs? Includes health and personal information but in this section, only refers to the following:
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Social media but state your preference for your profile.
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Up to IPs to tell the child about their journey?
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Relationship with the child, if any.

J. WHAT ARE RELEASES AND INDEMNITIES?
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These terms may appear harsh to address worst case scenario:
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IPs agrees to take child regardless of birth defect.
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IPs release surrogate for all post birth expenses.
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Surrogate releases IPs (re: access to child).

Surrogate responsible for reimbursing IPs if birth defects as a result of engaging in hazardous activities or can be proven GC did not follow sexual abstinence clause.

K. DISPUTE RESOLUTION – What to do when you don't see eye to eye

Counsellor to mediate a dispute? Arbitration? If so, have IPs cover costs of arbitration process. Court?

L. TERMINATION OF AGREEMENT

When would the GCA terminate? When are the IPs or Surrogate entitled to terminate the GCA?
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When would a second/third transfer attempt be made?

*This document is not intended as a substitute for legal advice. The Cheat Sheet does not cover every contingency as it is only intended to be used as a guide through the surrogacy negotiation process. Independent Legal Advice is strongly recommended for every journey. This Cheat Sheet is specifically designed with BC Surrogates in mind but applies, in general, to Surrogates across the provinces. Please keep in mind that specific legal requirements to establish parentage vary from province to province as well as the law respecting surrogacy arrangements, so the parties MUST consult with local fertility lawyers.

**This document was adapted from materials prepared for a CLE BC, April 8, 2016 Seminar "Baby Making: Fertility Law and Assisted Reproductive Technologies."