

Independent Surrogacy

Many couples choose to pursue an independent surrogacy, rather than contracting with an agency. Agencies provide some or all of the following services: finding a surrogate, ascertaining whether your surrogate is a good candidate for being a surrogate, securing background checks on all the parties involved, securing medical checks on the surrogate, securing a review of the surrogate's health insurance to make sure it is surrogacy-friendly, securing insurance for the surrogate in the event that the coverage she has is not surrogacy-friendly, securing an escrow agency to hold the funds for satisfying the Intended Parents' obligations to the surrogate, facilitating the various stages of the surrogacy, locating and coordinating legal services, and other matters. Intended Parents who pursue an independent surrogacy need to be prepared to handle all of this themselves. Many people start out intending to pursue an independent surrogacy and, upon learning how much they have to figure out in order to do the independent surrogacy, realize their time and energy is better spent preparing for the new baby and leaving all these steps to the experts.

Others determine that they do feel confident in learning all about this and handling it independently.

A significant part of my practice is representing families in independent surrogacies. I do not undertake all the things that an agency will do for you. I will, however, give you suggestions for how to handle these things on your own.

Who Should Intended Parents Consider as a Surrogate?

Many people find friends or family members who agree to be their surrogates. Others find surrogates online from various sites and FaceBook groups.

As they are making their choices, Intended Parents should consider the factors such as:

- Age – ideally 21 – 42 years old
- Pregnancy history – carrying at least one child of their own to term with no complications and having had no more than three C sections
- Weight – a body mass index of no more than 32 is ideal
- Substances – not smoking, using drugs, or abusing alcohol is crucial
- Financial stability – a surrogacy candidate who receives welfare, public housing or cash assistance from the government is not financially stable
- Support – a stable home life and emotional and child care support
- Mental Health – a candidate should not have any issues which have required medication within the last 6 months.

You can learn more through the information provided by All Things Surrogacy, a company providing services to both sides of surrogacy arrangements. You can access their information at <https://allthingsurrogacy.org>.

If you're working with an agency, the staff at the agency will gather all the data to ascertain if your candidate actually meets these requirements. When you're in an independent surrogacy, you will need to have your potential surrogate sign releases so you can gather this information yourself. Intended Parents should not ask their potential surrogates to gather this information for them. For one thing, the surrogate will have enough to do and doesn't need this burden. For another thing, people sometimes are not truthful. This is a really vital matter. You will make your decisions about whether this woman will carry your baby based on these records. You should ask the providers directly for the records and you should receive them directly from the providers. Do not run the risk that your potential surrogate will alter the records or draft them herself in an out-right forgery. Trust me. It happens.

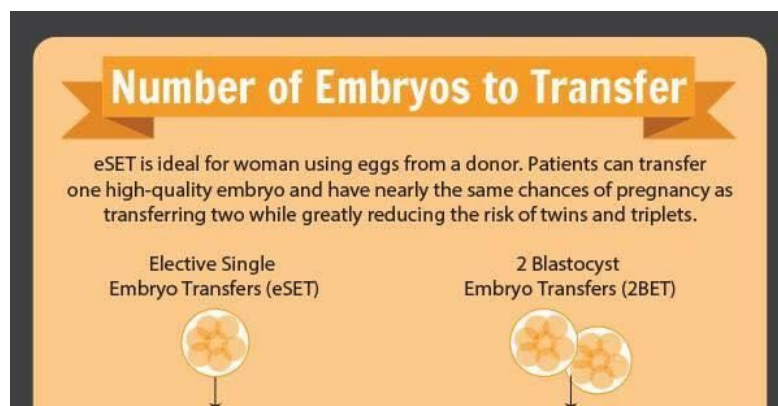
The ideal candidate to be a surrogate has her own health insurance in place before she seeks to become a surrogate. The Intended Parents will then review the insurance and assess whether there are any exclusions for surrogacy. The Intended Parents may use the services of a company such as ART Risk Solutions to review the potential surrogate's coverage. They can give the Intended Parents plenty of information upon which to rely in making this important choice.

How Many Embryos to Transfer

IVF has progressed so much that the chance of an embryo transfer being successful is now pretty high. Many people, however, still feel like it doubles their chances of a pregnancy if they transfer two embryos in any one embryo transfer attempt. This is not really true. Much of what contributes to an embryo transfer being successful is the uterine environment. If that environment isn't just right at any one time, there won't be a pregnancy regardless of how many embryos you transfer.

Think of it like the difference between the soil in the strawberry patches near Portland Tennessee versus the red clay dirt in West Tennessee. That soil in Portland is this rich, dark dirt and seeds germinate with abandon when planted there. On the other hand, the red clay in West Tennessee isn't so rich and you're probably not going to get many strawberries from that soil. Other than cotton and soybeans, not much grows there.

Fertility clinics keep track of their success rates and report them to the Society for Assisted Reproductive technology (SART). One of the larger clinics (Shady Grove) prepared this graphic to



assist people in deciding whether to transfer one or two embryos. What this graphic shows is that transferring two embryos only slightly increases the chance of a pregnancy but, if a pregnancy does result, the chances of it

being a multiple pregnancy are much greater.

Some folks think “Cool! Twins! Two for the price of one.” That’s not really accurate. First of all, it doesn’t take into account the dramatically greater risks that twins and the women who carry them face. Second, it doesn’t take into account the added expenses of having a surrogate who is carrying multiples. You’ll have a provision in your contract for an added amount just because she’s carrying multiples. You’ll also incur the added chance that she’ll be off work because of the multiple pregnancy and you’ll be paying her more in lost wages. She’ll most certainly be off work longer after she gives birth and you’ll be responsible for those increased lost wages.

Most doctors urge you not to transfer more than one embryo. The American Society for Reproductive Medicine has prepared materials about this choice to help doctors and patients understand when a double embryo transfer is appropriate.

Intended Parents and Any Kind of Surrogate

When an agency matches a Surrogate and Intended Parents, the agency checks out both sides in advance of the match. The agency does background checks on both sides and finds out all about the Surrogate’s insurance situation. When Intended Parents act independently, they have to take care of these things themselves.

I strongly recommend that each side have background checks. Even if you like each other tremendously and feel like you are amazing judges of character, you still need a background check. If someone is setting out to deceive you, they wouldn’t be very good at their goals if they couldn’t convince you of their goodness when you have just met them, would they? The consequences of being deceived at this early stage can be tremendous for either side.

There are multiple different sources for background checks. The cost of the most basic process of getting both of the Intended Parents, the Surrogate, and her partner reviewed should be about \$400. Of course, it can get as expensive as you want it to be.

Next, you have to make certain that your potential Surrogate has health insurance that does not have an exclusion for surrogacy. These exclusions are unusual but, when a policy does have this, it means that the Surrogate’s insurance will not cover any of the maternity costs or the labor and delivery if she’s carrying as a Surrogate for someone else.

Most times, when an insured person calls and asks “Does my policy have an exclusion for surrogacy?” the answer will be “Yes!” That’s not necessarily what her policy actually says. Somewhere in the maternity benefits or in the fertility treatment provisions of the policy there will be something that says that if the Insured Person needs a Surrogate in order to have a baby the insurance company won’t pay for that. So, if the person you called types “surrogate” into the search bar, they find this and they say that there is an exclusion. They don’t look any deeper to see if there’s a provision which says that the insurance company won’t cover it if the insured person is carrying as a Surrogate for someone else. That’s what you need to know.

The Intended Parents need a full copy of the Surrogate's insurance policy. The insurance company will usually give you a summary of the policy and expect you to be satisfied with that. This is inadequate. If all they want to give you is about five pages long, you do not have the policy and all the riders. The policy is likely to be fifty pages or more.

Insurance policies are complex and drafted to protect insurance companies from their insured policy-holders. I do not review insurance policies for anyone. You may be secure in your own ability to review and understand an insurance policy. I know I am not! Hence, I refer clients to professionals who will review policies and give you a report about whether they have found there to be any exclusions in the policy. These professionals have reviewed many, many insurance policies. They generally charge around \$300. I think it's money well-spent. I think reviewing your own insurance policy is like doing your own root canal. It is possible but it's also likely to be quite painful and you're likely to mess it up.

Intended Parents pursuing an independent surrogacy also need to secure a psychological evaluation for themselves and the Surrogate. They need to make sure that the Surrogate's psychological make-up is consistent with a successful surrogacy journey. They also need to know a bit about their own make-up and they need the education that a psychological evaluation with an appropriate mental health professional can provide. I recommend that these evaluations be conducted in-person with a skilled and knowledgeable mental health professional. Online evaluations or telephonic evaluations do not provide the mental health professional with the opportunity to fully evaluate a person's demeanor and presentation.

I strongly recommend that parties in independent surrogacies have the funds for meeting the Intended Parents' financial obligations held by an independent third party escrow agent. That's not me. I don't hold any escrow funds for meeting Intended Parents' obligations. There are several different escrow companies in this graphic who do this work all the time. They really know what they are doing. They can help the parties not get into disputes over money. They can help keep Intended Parents from being manipulated. They can protect Surrogates from getting into arrangements where there aren't sufficient funds to meet the contract's requirements.

Finally, any Intended Parent working with a Surrogate needs to purchase a life insurance policy for her. It's generally more affordable to purchase her a five or ten year term life insurance policy before she gets pregnant. The risk that a pregnant woman will die is greater than the risk that a non-pregnant woman will die. Thus, the premiums for a



Escrow Account Management Companies

Surrogacy Escrow Account Management
Dominique Side
<http://www.surrogacyaccount.cpm>
929.277.SEAM
Surrogacy Escrow Account Management, LLC
P.O. Box 96143, Houston, TX 77213

Allison McCloskey Escrow Agency
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SeedTrust Escrow
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Office: 888.223.9818
Fax: 561.921.8787
info@seedtrustescrow.com

Surrogate Fund Management
<http://www.surrogatefundmanagement.com>
founded by Melissa Brisman
201.505.0078
One Paragon Drive, Suite 160
Montvale, NJ 07645
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non-pregnant woman are generally lower than for a pregnant woman. So I recommend that, as a part of the contracting process, the parties start looking for insurance. Before the first embryo transfer, the parties should have the life insurance in place. Depending on their planned timeline, this may mean that the insurance is established before the contract is signed because, often, we only have a little while between contract signing and the first embryo transfer.

Intended Parents using their own Eggs and Sperm with a Married Surrogate

Intended Parents who are able to form their embryos with their own genetics but need a Surrogate to carry their baby have the simplest surrogacy path. They will take care of all the considerations above. Then we will prepare their Agreement and proceed to the embryo transfer.

After their Surrogate enters the second trimester, we will go to Court and get a Pre-Birth Order of Parentage which allows the hospital to prepare the birth certificate to reflect both the Intended Mother and the Intended Father as the legal parents.

Even parents who thought they would be using sperm from the Intended Father and eggs from the Intended Mother can run into problems. Because problems can arise, every surrogacy contract should include provisions about the legal consequences of using donated eggs, donated sperm, or donated embryos. If everyone is well-informed of these legal consequences, the Agreement which is initially drawn up can cover these different situations. The parties won't need a new contract just because things didn't work out like they had hoped.

Intended Parents using donated Eggs and using Sperm from one of the Intended Parents with a Married Surrogate

When Intended Parents can not provide both the eggs and the sperm from their own bodies, they can't both be, initially, recognized as the child's legal parents. The non-genetic parent will need to secure an Adoption Decree so that the non-genetic parent and the genetic parent can both be recognized, ultimately, as legal parents.

This rule in Tennessee arose out of cases involving heterosexual, married Intended Parents, who needed to have donated eggs in order to form their embryos which a Gestational Carrier carried for them. In those cases, the Intended Mother secured donated eggs from either a known egg donor or an anonymous egg donor. The eggs were fertilized with the Intended Father's sperm. The Gestational Carrier got pregnant and the parties sought Court Orders that the Intended Mother and the Intended Father are both the legal parents. In these cases, the Appellate Courts have stated unambiguously that the Gestational Carrier must be named as the mother on the Certificate of Live Birth for the child. The Courts have pointed to data reporting requirements as a justification for this ruling. We appealed these cases as far as we could and we have not been successful in getting the Courts to recognize an Intended Mother as the legal mother of a child conceived with donated eggs and carried by a Gestational Carrier. We need legislative action, but, given the make-up of the Tennessee legislature, it seems fruitless to

seek that legislative change at this time.

Fortunately, it is almost always pretty simple for the married, non-genetic Intended Parent to secure full legal recognition as a parent. Since Obergefell, both same-sex and opposite-sex couples can seek related-parent adoptions (also referred to as step-parent adoptions). If the Intended Parents are Tennessee residents, we can get their adoption done here. If they are not Tennessee residents, usually, it is simpler for the Intended Parents to return to their home State or Nation and secure their adoption decree. If the particular circumstances of the Intended Parents make it difficult for them to get the adoption done in their own State, we have a new statute, which appears to create a tiny loophole through which we can get non-residents their step-parent adoption in Tennessee. If you don't think you can do your related-parent adoption at home, please talk with an attorney about this.

When I seek a related-parent adoption, I file the case in the County where the Gestational Carrier resides or in the County where the Intended Parents reside. There may be other options but these are my preferences. I do NOT file for these related-parent adoptions in Davidson County. The Judge who handles adoptions in Davidson County has the same discretion that all judges do to waive the home study requirement as well as the six-month waiting requirement and other requirements in related parent adoptions. He will not, under any circumstances, waive those requirements. These requirements add considerable expense and lengthen the process of securing the adoption. So I don't do these adoptions in Davidson County.

Please be aware of your egg donor's heritage. If your egg donor has Native American heritage, the federal Indian Child Welfare Act could come into play. Please make sure to discuss this early on with the attorneys involved. It can cause problems and delays if they learn of this late in the game. If they learn it early on, they can prepare the documents accordingly.

Intended Parents using donated Eggs and using Sperm from one of the Intended Parents with an Unmarried Surrogate

When the Intended Parents need to use a Surrogate and donated eggs, if their Surrogate is unmarried, they may be able to get their birth certificate done by having the Surrogate and the genetic father prepare a Voluntary Acknowledgement of Paternity (a VAP or VAOP) form. The best we can do, through a Court Order, for any couple using donated eggs and a Surrogate is to get the genetic father and the Gestational Carrier named on the birth certificate. If the Gestational Carrier goes to the hospital and delivers without a Court Order, she will be asked to identify the father of the baby and, if the father agrees that he is the father, the birth certificate will be prepared showing the Gestational Carrier and the genetic father as the parents – just like it would have shown if we had secured the Court Order.

This path does save the Intended Parents the cost of securing the Pre-Birth Order of Parentage.

This path, however, leaves the Intended Parents open to issues in the extremely unlikely event

that they have problems with the Gestational Carrier and she seeks parental rights. When we get the Order of Parentage we also state clearly that she is a Surrogate and that she recognizes she has to be named as the mother but she doesn't see herself as the child's mother. We also have all the parties affirm that they all believe it is in the child's best interest for the genetic Intended Parent to have custody and assume those obligations at the time of birth. This would present considerable protection to the Intended Parents if the Gestational Carrier, for whatever reason, sought parental rights.

I have never had a case with a Gestational Carrier who carried a baby not genetically related to her and who tried to "keep the baby." I don't even have any close colleagues who have had this situation. There is one case in California in which the Intended Parents and the Gestational Carrier got into a dispute over money and she tried to claim the child. She did not succeed. I point this out to show how extremely unlikely it is that this would be a problem. It is, nonetheless, a possibility so I don't recommend this path except in cases of very good friends or family members, and maybe not even then.

Once again, please be aware of your egg donor's heritage. If your egg donor has Native American heritage, the federal Indian Child Welfare Act could come into play. Please make sure to discuss this early on with the attorneys involved. It can cause problems and delays if they learn of this late in the game. If they learn it early on, they can prepare the documents accordingly.

Intended Parents using donated Eggs and donated Sperm (or donated embryos) with a Married or Unmarried Surrogate

Sometimes, despite the best plans, the genetic material from both Intended Parents is inadequate to form viable embryos. In that case, the Intended Parents often turn to dual donors for the eggs and sperm (or to an embryo donor) and a Gestational Carrier. This is a perfectly fine way to form a family, but it poses such significant legal problems in Tennessee that I never recommend it.

A family can only secure a related-parent adoption if one of the parents is already a genetic parent. If not, it is simply an adoption. If neither of the Intended Parents are the genetic parents then the Courts cannot view this as a related-parent adoption because there's not an Intended Parent who is already recognized as the legal parent. The requirements such as the home study, the six month waiting period, and other requirements are not waived if it's not a related-parent adoption. Perhaps more significantly, if this is a regular adoption, the potential adoptive parents are severely limited in how much support they can provide to the birth mother. These limitations will certainly mean that even the most modest of support disbursements over the course of a surrogacy will be too much. If the genetic father is also the Intended Father, he can support his child to whatever extent he feels is appropriate, throughout the entire pregnancy. This concern about the adoption being denied based on the disbursements in the surrogacy agreement is the most significant reason why I always suggest that people do not pursue a Surrogate birth in Tennessee unless one of the Intended Parents is also the genetic parent.

As set out in other sections, please be aware of your egg donor's heritage and your sperm donor's heritage or the heritage of the genetic contributors if you're working with donated embryos. If anyone of these folks has Native American heritage, the federal Indian Child Welfare Act could come into play. Please make sure to discuss this early on with the attorneys involved. It can cause problems and delays if they learn of this late in the game. If they learn it early on, they can prepare the documents accordingly.