

What you need to know First

A Collection of useful
information based on
years of client experience

By Lisa Feldstein



Introduction

About Lisa Feldstein

Lisa Feldstein is a surrogacy lawyer who has helped over a hundred people create families through assisted reproduction. She drafts surrogacy agreements, helps clients obtain birth certificates and passports for their babies, and provides legal advice to surrogates, gamete donors and fertility clinics.

Lisa has presented on reproductive law at numerous institutions including the University of Toronto, Mount Sinai Hospital, Markham Fertility Centre and the 519 Church Street Community Centre. She is also an adjunct professor of Health Care Law at York University, and has a forthcoming book chapter on Reproductive Law.

Lisa has been widely published and interviewed in the media, including in the Canadian Journal of Family Law, CTV, and the National Post.

The feedback Lisa most loves hearing from clients is that she made the process feel simple.



Do I need a Surrogacy Agreement?

Yes!

A contract can seem very formal when you know and trust your sister/cousin/friend enough that you are willing to pursue surrogacy with them. But there are many reasons to have a surrogacy agreement, even if the surrogate and intended parents are related.

1. To anticipate potential issues

A key benefit to surrogacy agreements is that they force the intended parents and surrogate to think about difficult situations that could arise. While most surrogacy journeys are smooth, there is always the potential for something unexpected to happen. Like anything else in life, it is far easier to handle curve balls if you have planned for them. For example, if genetic testing reveals serious problems with the fetus, it would be devastating for the parties to find out at that time they have different philosophies about abortion. While this is a very serious and more extreme example, there are other potential disputes that could also arise. We believe that the surrogacy process should be as conflict-free as possible, and agreements are one tool for achieving this goal.

2. To avoid going to court after the birth

Prior to 2017, parents who had a child born in Ontario through surrogacy needed a lawyer to go to court on their behalfs before they could register their child's birth with the government and obtain a birth certificate. The law in Ontario was changed and the process is now much more stream-lined. However, the new simplified process is only possible IF the parties have a surrogacy agreement in place before the surrogate is pregnant AND the surrogate received independent legal advice (meaning from a different lawyer than the one who drafted the contract). The resources (financial, emotional and time) involved with going to court are best avoided in virtually every case.

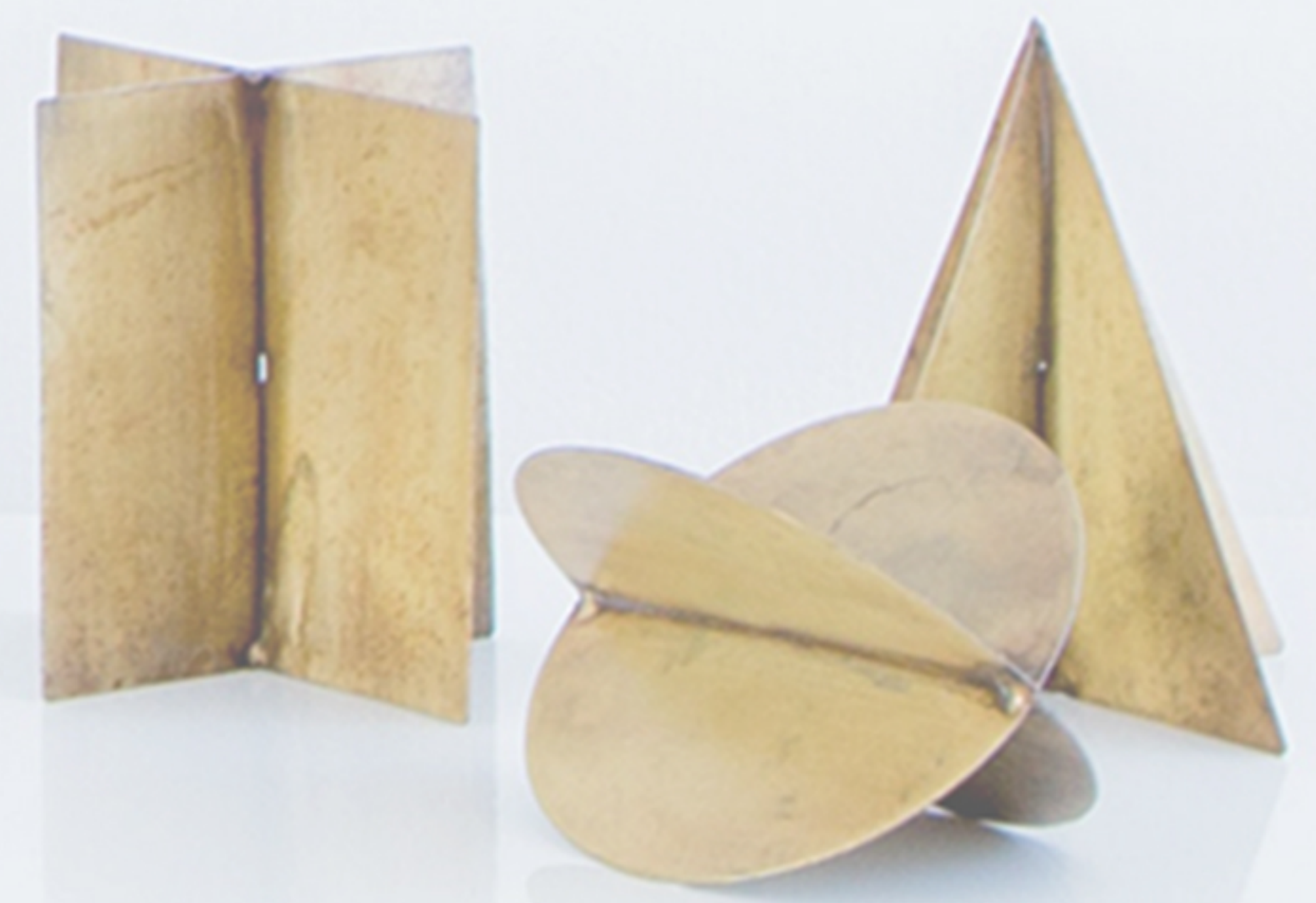
3. To ensure everyone understands the law

Just because the parties are related does not mean they are knowledgeable about surrogacy law. Part of the process of making the surrogacy contract involves receiving legal advice about surrogacy laws in Ontario, and the parties' rights and obligations to each other. It is an opportunity to understand what is and is not legal. Much of what is written about surrogacy in the public domain is from other countries, is not written by lawyers, or reflects different circumstances. There is no substitute for receiving proper advice and obtaining answers to the questions you didn't even know you had.

4. To satisfy the clinic

Many fertility clinics will not proceed until they have received a letter from a surrogacy lawyer indicating that a surrogacy agreement has been signed.

When do I need a Surrogacy Lawyer?



While you can seek advice from a surrogacy lawyer at any time, the primary time is after your surrogate has been approved by the clinic (medical clearance and counseling completed) and BEFORE the embryo transfer. If you hire a lawyer too early, you risk spending time and money on services you don't need if your prospective surrogate is not approved.

If you wait until days before the embryo transfer, you risk not having enough time to complete an agreement. Or, it may be rushed for the sake of completion. This would be a critical error because the most important part about a surrogacy agreement is the thoughtful process that goes into building it.

In Ontario most portions of a surrogacy agreement would not be enforced in a court. We do not enter them so that we can use them as litigation tools later. We use them to have meaningful discussions, ensure everyone is on the same page, and avoid conflict during what should be a smooth process. Surrogacy agreements are about so much more than signing on the dotted line. They are a valuable tool in your surrogacy journey.

Am I allowed to pay my surrogate?

No!

In Canada, it is against the law to pay a surrogate to carry your child. It is also against the law to provide surrogates with items of value in lieu of payment (for example, contributing to her mortgage or buying a car as a gift). However, you are allowed to reimburse a surrogate for out-of-pocket expenses (for example, maternity clothes and paying for parking at the clinic). You should also expect to pay for certain expenses directly, such as the cost of fertility treatments.

When you meet your surrogacy lawyer you will have a detailed discussion about this topic and which items you intend to reimburse. There are different ways you can draft your agreement. It is a highly customizable process and what matters is that your contract reflects what you and your surrogate have agreed to. Your lawyer will provide you with options as to what items you may wish to reimburse, and how you want to handle the transfer of money.

What should I look for in a Surrogate?

A Woman Who...

Is in a committed relationship – with a partner who supports her plan to be a surrogate.

- While a surrogate could be single, it is preferred that she have a partner. This is partly for convenience so that she has someone to help around the house and/or with children if she has morning sickness, is exhausted or on bed rest.
- It can be hard for a surrogate's partner to see his/her other half pregnant with another person's child. The surrogate's partner is an important part of the surrogacy journey (often undergoing medical tests and counselling as well) and should ideally be on board.

Is financially stable

- There is a financial cost to being pregnant, whether that is taking time off work to attend dozens of appointments, or hiring caregivers to take care of her kids. While many items will be reimbursed, it takes away a lot of stress (and concern about motives) if a surrogate is financially stable.

Has no criminal record

- You or an agency may want to ask for a criminal record. Criminal activity – such as a recent fraud conviction – may be a serious red flag.

Had healthy past pregnancies

- Being pregnant is risky. Terrible things can happen during pregnancy, labour and delivery. It may not be wise for a high risk woman to become pregnant again. And remember – anything that happens to her affects her family as well (which is why I suggest clients consider life and disability insurance for surrogates). As well, risky pregnancies could be an indicator of a risk to your precious embryo(s).

Has completed her family

- It is best that a surrogate has completed her family so that there is little risk she will have mixed emotions about relinquishing the child. A great sign is if her or her partner have elected to become sterile (for example, via vasectomy).
- A surrogate should have gone through the process of pregnancy, labour and delivery so that her consent is truly meaningful.

Your instincts approve

- If your gut is telling you to run the other way – listen. Ask your closest friends and family what they think. In your desire to find a surrogate, you may ignore the little voice telling you to tread cautiously. You are trusting someone – possibly a stranger – to carry your child. This is the most important arrangement you will ever enter. You should feel confident that your surrogate will act honestly and in good faith.