

# ABOVE THE LAW

## Denmark Passes New Pro-Surrogacy Regulations

The new rules in Denmark focus on two areas of surrogacy.

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On February 5, 2024, the Danish government [announced](#) new surrogacy-supportive rules scheduled to come into effect on January 1, 2025. The rules address parentage for families formed by surrogacy — including commercial (compensated) surrogacy outside of Denmark — as well as for families formed by altruistic (noncompensated) surrogacy within Denmark.

### **The Problem — Children Without Legally Recognized Parents**

Denmark, like most Europe countries, has struggled for decades with its complicated views on surrogacy and how to address families formed through surrogacy abroad. In Denmark, compensated surrogacy is illegal, and altruistic surrogacy has traditionally fallen into a legal gray area, pushing most hopeful parents who want to have a genetic connection to their child, but who are unable to carry a pregnancy themselves, to go abroad. The Danish government estimates that about 100 children are born to Danish parents each year by surrogacy outside of Denmark, while about five children each year are born within Denmark in altruistic surrogacy arrangements.

Among those statistics are married Danish same-sex couple Lambang and Kaspar. The pediatrician and communications director always knew they wanted children, but with unhelpful Danish laws and the difficulty in finding an altruistic surrogate, their best option was to pursue surrogacy abroad. The couple's twins were born in my home state of Colorado, which has rapidly become one of the friendliest states for surrogacy arrangements. Here in the United States, both dads were recognized as parents to both children. However, that was not the case at home in Denmark. Each dad was only recognized as a parent of one of their twins, each to the child he is genetically related to. So while they live as one family in Denmark, they are still legally seen as two separate families, with one dad able to make legal claims of parenthood to only one of their two children. For years, their family has lived in this legally precarious situation, worried that if something were to happen to one parent, one child would be at risk of not being recognized as part of their family.

Lambang and Kaspar have been vocal about sharing their family's story and advocating for better laws in Denmark (including this [podcast interview](#) with Kaspar). So the announcement last week was cause for real celebration.

### **European Court Of Human Rights' Major Decision**

Denmark has a history of denying parental rights to the intended parents of children born by surrogacy abroad. But on December 6, 2022, the European Court of Human Rights ruled against Denmark in [K.K. and Others v. Denmark](#). In that case, a married heterosexual couple had twins with the assistance of a Ukrainian surrogate. Under Ukrainian law, both Danish intended parents were recognized as parents of the child, and the surrogate was not a parent of the child.

However, the Danish courts failed to see it that way. The father was recognized as a parent of both children based on his genetic connection to them; but the intended mother, because she did not give birth to the children, was denied legal recognition as their mother. For more than six years, the intended mother worked to adopt her children, but the adoption was ultimately denied by the Danish Supreme Court, because the Ukrainian surrogate had received compensation.

The ECHR found that Denmark's refusal to recognize the parent-child relationship between the mother and child was a human rights violation — not a violation of the mother's human rights, but of the two children, to have a recognized legal relationship with their mother.

To its credit, Denmark is reacting to the ECHR's definitive ruling. In the announcement by the Danish government last week, the government made it clear that the country's new rules are intended to go beyond the minimum requirements of the ECHR to merely not violate the human rights of Danish children. (The bare minimum requirement would be to just allow stepparent adoptions.) Instead, the Danish government's new rules go farther to protect children and their parents.

## **Recognition Of Parents Of Children Born By Surrogacy Abroad**

The new rules focus on two areas of surrogacy. First, the rules recognize that children, like those of Lambang and Kaspar, born by surrogacy abroad, should have both parents recognized as such from birth, in the best interests of the child. The new rules permit Danish family courts to quickly make a decision on parenthood in the case of a foreign surrogacy agreement, even permitting a court ruling to be made prior to the family's return to Denmark. The rules also require that the court assess the best interest of the child, but with a presumption that it is, of course, in the child's best interest to have a timely recognition of their parents.

Moreover, the court decisions are permitted to be retroactive to the birth of the child, permitting parents to have access to parental leave work benefits, inheritance rights, and all other benefits of that legal relationship. And, in contrast to a stepparent adoption, the new rules will allow recognition of the parent-child relationship with the mother or nongenetic parent even if parents have separated, or if one parent died before they had a chance to apply for parenthood.

In a stated attempt to address the risk of child trafficking, the rules require that at least one intended parent be genetically related to the child. Additionally, the surrogate is required to confirm in a notarized declaration after the birth that she wishes to transfer parenthood of the child to the intended parents.

## **Altruistic Surrogacy Approved Within Denmark**

The new rules also explicitly approve a process for recognition of parenthood in an altruistic surrogacy arrangement within Denmark. The rules allow a Danish family court to approve and register an altruistic surrogacy agreement before a pregnancy is established. Many of these rules actually look similar to many American surrogacy regulations:

- The surrogate must be at least 25. (Most U.S. states that regulate surrogacy have a minimum age requirement, although that requirement tends to be a bit lower at 21, consistent with the American Society for Reproductive Medicine guidelines.)
- The surrogate must not be under a guardianship. (Seems like a given!)
- The surrogate must have given birth to at least one child of her own. (This is a common requirement in the United States as well.)
- The surrogate must not receive remuneration as part of the agreement. If there is no close relationship between the surrogate and the intended parent, there will be a presumption that the arrangement is commercial and not in line with the rules. (This is in contrast to American regulations which often explicitly permit compensation of a surrogate for her time and efforts, as well as the risks she undertakes.)
- The surrogate retains the right to make decisions about her own body, including whether to terminate the pregnancy. (This is consistent with many American surrogacy regulations, such as Colorado's laws, which require that a surrogacy

contract permit the surrogate to make all health and welfare decisions for herself and the pregnancy.)

- The surrogate can withdraw from the agreement. (This is consistent with American regulations for many states so long as the surrogate is not pregnant.)
- The surrogate resides in Denmark at the time of the conclusion of the agreement and the establishment of the pregnancy; but the actual conception does not have to occur in Denmark. (Most American laws have relevant residency requirements relating to the jurisdiction of that state.)

If a surrogacy arrangement meets the requirements, the intended parents will be registered as the parents of the child at birth.

Kaspar explained, “This new political agreement is the result of years of advocating for better rights for surrogacy families in Denmark so obviously we are elated. This new approach will provide a whole new level of peace and security for Danish families formed through surrogacy both internationally and domestically as intended parents will no longer have to fight for basic legal rights and registration.” However, Kaspar also noted that, “much can still be done to educate the Danish political establishment. We need to be able to have a national, fact-based conversation about how agencies and professionals — both legal and medical — are key to a successful journey.”

The new rules are worth celebrating. Kudos to Denmark for recognizing the precarious situation families by surrogacy have been placed in and taking active steps to fix the country’s outdated laws.



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