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Commercial Surrogacy

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Surrogacy is not merely a technology but rather the use of a woman's body and reproductive capacities to fulfill the procreative purposes of others (the intending/intended parents). Surrogacy employs assisted reproductive technology (ART), typically in the form of in vitro fertilization (IVF) and potentially genetic selection of embryos.

Commercial surrogacy typically involves four parties: intending/intended parent(s), surrogate mother, intermediaries, and child. Gamete donors may also be involved. The term "intermediary" includes surrogacy agencies but can be broader, as it includes any person, organization, or network facilitating the initiation, continuation, and/or finalization of surrogacy arrangements. The parties who play that role can include agencies, doctors, medical clinics, or attorneys, but those who merely provide medical or legal services are not included as intermediaries.[1]

Typically, there are multiple contractual relationships: between the intending parents and the intermediary, between the intending parents and the surrogate mother, and sometimes between the intermediary and the surrogate mother. The child alone remains unrepresented even though he or she is the purpose of those contracts.[2]

Surrogacy in the United States, both domestic and international, is governed almost exclusively by state laws, which vary considerably. Federal law generally does not directly address surrogacy, but some federal regulations may incidentally address components of surrogacy, such as citizenship rules for surrogate-born children.[3]

What Are Intending Parents Paying For?

Intending parents are the paying customers of surrogacy, but there is controversy about how to characterize what they are paying for. Certainly, intending parents are paying for various kinds of services (gestational, intermediary, legal, medical, etc.). But intending parents are not merely paying for a child to be created, gestated, and birthed, for they certainly would not be satisfied unless they were also given exclusive physical and legal custody of the child. Commercial surrogacy contracts are often explicit in requiring the surrogate mother to participate in the legal and physical transfer of the child to the intending parents. These contractual provisions commonly appear even in states that employ the legal fiction that the child was never in the physical or legal custody of the woman who gestated and birthed the child. Thus, it may be fair to interpret commercial surrogacy contracts as facilitating the sale of a child, or at least as providing payment for legal and physical transfer of a child.[4]

1 David Smolin and Maud de Boer-Buquicchio, "Surrogacy, Intermediaries, and the Sale of Children," in *Research Handbook on Surrogacy and Law*, eds. Katarina Trimmings, Sharon Shakargy, and Claire Achmad (Edward Elgar Publishing, 2024); International Social Service, "Principles for the Protection of the Rights of the Child Born Through Surrogacy (Verona Principles)," February 25, 2021, https://www.iss-ssi.org/wp-content/uploads/2023/03/VeronaPrinciples_25February2021-1.pdf (see Glossary, page 7, and Principles 2–4, 6–9, and 16).

2 Smolin and de Boer-Buquicchio, "Surrogacy."

3 "Surrogacy Laws by State," Legal Professional Group, American Society for Reproductive Medicine, accessed March 2, 2025, https://connect.asrm.org/lpg/resources/surrogacy-by-state?ssopc=1.

4 United Nations General Assembly, "Report of the Special Rapporteur on the Sale and Sexual Exploitation of Children, Including Child Prostitution, Child Pornography and Other Child Sexual Abuse Material," January

The Rights of Surrogate Mothers

There is often an ongoing power struggle between the intending parents and surrogate mother, centered on the body, health care, and life of the surrogate mother. For example, contracts may state that the surrogate mother is expected to undergo an abortion if chosen by the intended parents, including a "reduction abortion" in a multiple pregnancy or abortion if the unborn child is diagnosed with a disability. Sometimes these conflicts lead to litigation.[5]

For example, in *Cook v. Harding* (2018), the surrogacy agency matched a forty-seven-year-old surrogate mother, Melissa Cook, with a fifty-year-old single intending father. Three embryos were transferred, leading to a triplet pregnancy. Conflicts arose when the intending father demanded a reduction abortion and Cook refused. The intending parent's attorney informed Cook in writing that by refusing the abortion she was in breach of the contract and liable for monetary damages. Cook still refused the abortion and went on to unsuccessfully litigate for parental rights, claiming that the intending father was neglecting the children's needs.[6]

Such intimidation tactics rest on shaky legal grounds, as the surrogate mother has common law and constitutional rights to refuse unwanted medical procedures, even after the overruling of the constitutional abortion right.[7] Yet, intending parents commonly use contracts and communications to attempt to control the lifestyle of the surrogate mother, including not only obvious restrictions on smoking, drinking, and drug use but also specific dietary restrictions and restrictions on the surrogate mother's sexual activity. There may also be power struggles regarding the health care of the surrogate mother and the details of the medical aspects of the surrogacy. For example, intending parents may prefer the transfer of multiple embryos into the surrogate mother because it increases the odds of pregnancy ensuing in each cycle, with a backup plan of reduction abortion for multiples, while surrogate mothers may object to the risks of transferring multiple embryos.[8]

In the Global South, frequently the surrogate has virtually no control over her own life and health-care decisions. She may live in a dormitory with other surrogate mothers and have her daily schedule, diet, access to her own children and husband, and permission to leave the clinic controlled by intermediaries. The huge economic and social inequalities between intermediaries and surrogate mothers and between wealthy intending parents and surrogate mothers often leave surrogate mothers in the Global South with little practical scope of autonomy. This scope of autonomy is even more restricted when intermediaries take surrogate mothers across national boundaries, removing them from their own countries.[9]

The Rights of Surrogate-Born Children

Surrogate-born children in the United States lack even basic protections in many jurisdictions. Intending parents are not subjected to criminal

15, 2018, https://docs.un.org/en/A/HRC/37/60; Smolin and de Boer-Buquicchio, "Surrogacy"; David M. Smolin, "Surrogacy as the Sale of Children: Applying Lessons Learned from Adoption to the Regulation of the Surrogacy Industry's Global Marketing of Children," *Pepperdine Law Review* 43, no. 2 (2016): 265–344, https://digitalcommons.pepperdine.edu/plr/vol43/iss2/2/.

5 Emma Cummings, "The [Un]enforceability of Abortion and Selective Reduction in Surrogacy Agreements," *Cumberland Law Review* 49 (2018): 85–124, https://heinonline.org/HOL/LandingPage?handle=hein.journals/cumlr49&div=4&id=&page=; Courtney G. Joslin, "(Not) Just Surrogacy," *California Law Review* 109 (2021): 401, 444–49, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3561081; Hillary L. Berk, "The Legalization of Emotion: Managing Risk by Managing Feelings in Contracts for Surrogate Labor," *Law & Society Review* 49, no. 1 (2015): 143–77, https://doi:10.1111/lasr.12125.

6 Cook v. Harding, 190 F. Supp. 921 (C.D. Cal. 2016), on appeal No. 16-55968 (9th Cir. 2018).

7 Cruzan v. Director, Missouri Department of Health, 497 U.S. 261 (1990); Washington v. Glucksberg, 521 U.S. 702 (1997).

8 Cummings, "The [Un]enforceability"; Joslin, "(Not) Just Surrogacy"; Berk, "The Legalization."

9 Smolin and de Boer-Buquicchio, "Surrogacy"; United Nations General Assembly, "Report of the Special Rapporteur."

conviction or child abuse screenings; courts do not conduct suitability reviews and do not make best interests of the child determinations. This lack of protection is an intended consequence of recently enacted surrogacy laws, based on an ideology of a "right to procreate," rather than an accident or oversight. Under such state laws, the trial court must award exclusive and full parental rights to the intending parents so long as the contract was entered into prior to pregnancy, the surrogate mother had independent counsel, and the financial arrangements and escrow procedures were in place. The trial judge is not permitted to consider matters relevant to suitability or best interests, which are deemed irrelevant.[10] A child, in short, is obtained with a credit card and a contract, and the court has no power to protect the child from inappropriate placements.

Surrogate-born children in many jurisdictions in the United States lack identity rights, meaning that information about their genetic and gestational origins is not recorded and stored for their access as adults. This is in contrast to developments in state adoption laws, which have increasingly acknowledged that adult adoptees very commonly wish to obtain, at a minimum, information about their origins information that is basic to their identity. Thus, particularly regarding new adoptions, truly closed adoptions are rare. The legal fiction that adoptees have no relationship to their genetic and gestational parents and relatives has increasingly shifted into a recognition of the necessarily complex identity of adopted persons, even in the most loving and successful adoptive homes. The failure of surrogacy systems of law and practice to implement the lessons learned from adoption is another indication of the way that children are viewed as paid-for products of surrogacy systems rather than as persons with rights and interests of their own. Indeed, this model of commercial surrogacy without suitability reviews, best interest determinations, or identity rights has been proffered to the world as an American model suitable for global export, with unsurprising rejection and critique by many concerned with children's rights.[11]

Surrogacy in the United States: Costs, Clients, International Options, and Legal Rights

The United States represents the high end of the global surrogacy market. Intending parents from around the world pay around $150,000 per surrogacy arrangement.[12] They often come to the United States to evade restrictions on commercial surrogacy in their own countries, intending to bring the child after birth to their own country.[13] The children of foreign intending parents born in the United States acquire American citizenship, which is one of the benefits justifying the high cost of American surrogacy. Surrogacy agencies in the United States intentionally advertise surrogacy to intending parents from countries that restrict surrogacy, offering facilitators who speak their languages and advertising the benefits of attaining American citizenship.[14] Foreign intending parents may constitute half or more of the customers of particular American surrogacy agencies; the majority of them come from China, Western Europe, and Australia. Foreign intending parents constitute

10 Cal. Family Code §§ 7960–62 (2024); Uniform Parentage Act of 2017, Uniform Law Commission, accessed March 2, 2025, Parentage Act: https://www.uniformlaws.org/committees/community-home?CommunityKey=c4f37d2d-4d20-4be0-8256-22dd73af068f; David M. Smolin, "The One Hundred Thousand Dollar Baby, " Cumberland Law Review 49, no. 1 Cumberland Law Review 1 (20198): 1–54, https://works.bepress.com/david_smolin/20/download.

11 American Bar Association, report and resolution 112B, critiqued and quoted in United Nations General Assembly, "Report of the Special Rapporteur," para. 23, 26–27.

12 Smolin and de Boer-Buquicchio, "Surrogacy," 63 (documenting costs of $100,000 to $200,000).

13 United Nations General Assembly, "Report of the Special Rapporteur," para. 17.

14 "Become a Parent Through International Surrogacy in the United States," Circle Surrogacy, accessed March 2, 2025, https://www.circlesurrogacy.com/intended-parents/who-we-help/international-parents (stating "Your child is a U.S. citizen" as the first benefit for foreigners conducting surrogacy in the United States and indicating having worked with intending parents from more than seventy-three countries).

about a third of surrogacies in the United States.[15] Protections for children with foreign intending parents are even more difficult to implement since there can be no pre-surrogacy cooperative mechanism with countries that prohibit commercial surrogacy, and, even if there were a desire to access information about intending parents, it would be very difficult to verify. In effect, foreign intending parents come to America to buy access to the bodies of surrogate mothers and to create a child who will be an American citizen and yet will likely leave America immediately to be raised in the nation of his or her intending parents.

Intermediaries profit the most from commercial surrogacy. Of the approximately $150,000 cost of American surrogacies, $40,000 to $70,000 goes to the surrogate mother, and then there are various costs for medical and legal services. Intermediaries receive much less than surrogate mothers *per arrangement*, but of course intermediaries can arrange innumerable surrogacies while surrogate mothers are necessarily limited by time and biology. Hence, intermediaries benefit the most financially from an industry that, in the United States, likely receives more than $750 million per year, including both domestic and international surrogacies. (Some make much higher estimates, but those seem speculative.)

In order to avoid the high costs of American surrogacy, some American intending parents go to other countries for surrogacy. Eastern European nations such as Ukraine and Russia have comprised the middle of the market, while a variety of Global South nations have constituted the low-cost segments of the market. National policies on surrogacy change over time; for example, Russia and India have, in recent years, enacted rules purporting to end their roles in international surrogacy. The global international surrogacy market thus is not stable but is constantly subject to shutdowns and scandals. Most countries prohibit commercial surrogacy or lack laws on commercial surrogacy, and thus the number of nations that have officially sought roles as international surrogacy hubs is limited and constantly changing.[16]

Surrogacy: Reproductive and Economic Freedom or Moral Harm?

Anti-surrogacy viewpoints predominated across left–right perspectives for some years, as evident in the 1988 *Baby M.* case, in which the New Jersey Supreme Court invalidated a commercial surrogacy contract. Commercial surrogacy was viewed as exploitative of women and as commodifying (or selling) children.[17] These concerns with exploiting women and commodifying children have increased relevance in today's globalized commercial surrogacy industry, where women are moved across national boundaries to global surrogacy hubs, as in the recent case in which a Chinese fertility company moved Thai women to the nation of Georgia for purposes of harvesting and selling eggs and surrogacy, with the children in effect being sold to foreign intended parents. Three of the women claimed they were held in a house against their will, and a trafficking investigation was opened.[18]

The transition from traditional surrogacy using artificial insemination, in which the surrogate mother was genetically related to the child, to gestational surrogacy using IVF, in which the surrogate mother is genetically unrelated, provided a claimed rationale for a reassessment toward a positive view of commercial surrogacy, as exemplified by the 1993 *Johnson v. Calvert* case from the California Supreme Court.[19] Nonetheless, the real change has been ideological. Commercial surrogacy has been embraced

15 Alexandra Herweck, Carol DeSantis, Lisa M. Shandley, Jennifer F. Kawwass, and Heather S. Hipp, "International Gestational Surrogacy in the United States, 2014–2020," *Fertility and Sterility* 121, no. 4 (2024): 622–30, https://pubmed.ncbi.nlm.nih.gov/38176517/.

16 Smolin and de Boer-Buquicchio, "Surrogacy," 60–65.

17 Matter of Baby M., 109 N.J. 396 (1988); Joslin, "Not (Just) Surrogacy,"403.

18 Nino Tarkhnishvili, "Accusations of Egg-Harvesting Rock Georgian Surrogacy Industry," *Radio Free Europe/Radio Liberty*, February 13, 2025, https://www.rferl.org/a/georgia-surrogacy-surrogate-mothers-assisted-reproduction/33312337.html.

19 Johnson v. Calvert, 19 Cal. 2d 494, 851 P.2d 776 (1993).

by some on the right as a form of economic freedom. These supporters use reasoning similar to that of Elizabeth Landes and Richard Posner in "The Economics of the Baby Shortage," who infamously argued for laws allowing the sale of parental rights for adoption, a position defended for decades by Judge Posner and others in the law and economics movement.[20] Many on the left have strongly supported commercial surrogacy as a matter of reproductive freedom and equality.[21] These ideological emphases on economic and reproductive freedom and the shift to gestational surrogacy do not provide convincing answers to the intrinsic and practical critiques of commercial surrogacy. Indeed, the emerging model of commercial surrogacy typified by California law[22] and by the Uniform Parentage Act of 2017 (enacted in various forms into some state laws)[23] exacerbates these problems by unleashing a large commercial surrogacy industry that has successfully insisted on a form of contractual, for-profit surrogacy with little regard for the interests and rights of children and the rights and humanity of surrogate mothers.

Recommendations

Federal law should address the abusive practices of the commercial surrogacy industry in targeting foreigners from countries that restrict commercial surrogacy. The United States has an interest in not allowing this industry to facilitate the evasion of the laws of other countries. The United States has an interest in not allowing American citizenship to be sold by American surrogacy agencies. The United States has an interest in not allowing surrogacies to be conducted within its borders under circumstances where it is virtually impossible to protect the children since the foreign intending parents are not screened and there are no criminal background checks. Indeed, these children are American citizens born to American-citizen surrogate mothers but then are immediately taken by unscreened foreign intending parents to other countries beyond the protections of the United States. The United States has an interest in not permitting these children to become the paid-for products of an almost billion-dollar industry.

20 Elizabeth M. Landes and Richard A. Posner, "The Economics of the Baby Shortage," *Journal of Legal Studies* 7, no. 2 (1978): 323–48, https://www.journals.uchicago.edu/doi/10.1086/467597; David M. Smolin, "The One Hundred Thousand Dollar Baby (summarizing and critiquing law and economics arguments applied to surrogacy).

21 John A. Robertson, Children of Choice (Princeton University Press, 1994); Smolin, One Hundred Thousand Dollar Baby (summarizing and critiquing right to procreate, reproductive freedom arguments applied to surrogacy).

22 *Johnson*, 19 Cal. 2d 494, 851 P.2d 776; Cal. Family Code §§ 7960–62.

23 Uniform Law Commission, Map of Adoptions, Uniform Parentage Act of 2017, https://www.uniformlaws.org/committees/community-home?CommunityKey=c4f37d2d-4d20-4be0-8256-22dd73af068f.

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