

## COMMERCIAL SURROGACY IN THE UNITED STATES

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Surrogacy is a complex and controversial issue with various legal, ethical, and scientific implications. In the United States alone, commercial surrogacy is a patchwork of competing views because surrogacy regulation is determined by the individual states. Despite this hurdle, commercial surrogacy's popularity has surged in recent years. In 2015, 2,807 children were born in the United States by a surrogate. This is a significant increase from 2004 when only 738 births were via a surrogate.<sup>1</sup> Even with commercial surrogacy's popularity, the trend is not without its critics.

Generally defined, commercial surrogacy is any arrangement in which the woman is compensated for her services beyond reimbursement for her medical expenses.<sup>2</sup> This is the opposite of altruistic surrogacy, an arrangement in which a woman volunteers to carry a pregnancy to term without receiving any compensation.<sup>3</sup> Altruistic surrogacy mostly occurs between close family members and friends.<sup>4</sup> Commercial surrogacy, on the other hand, is a thriving business where surrogacy professionals work on a person or couple's behalf to find all the components necessary to fit their individualized needs and bring their child into the world.

There are two types of surrogacy arrangements. Full surrogacy, also known as gestational surrogacy, refers to an arrangement where all the genetic material involved is either from the intended parents or the donors. As such, this requires the use of artificial reproductive technology. Commentators believe the innovation gained from artificial reproductive technology has directly contributed to surrogacy's rise in popularity.<sup>5</sup> On the other hand, partial surrogacy, also known as traditional surrogacy, is an arrangement in which the surrogate uses her own genetic material to help conceive the child as part of the surrogacy contract.<sup>6</sup>

In the United States, there is no federal regulation in place that oversees surrogacy. As a result, it is left to individual states to handle this important and complex issue. There are two states where surrogacy is expressly prohibited: New York and Michigan.<sup>7</sup> In contrast, there are fourteen states in which surrogacy in some form is permitted by statute; the regulations, however, vary considerably.<sup>8</sup> For example, California allows and regulates full surrogacy

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<sup>1</sup> Elizabeth Chuck, *The Long Wait for Legalized Surrogacy May End in New York*, NBC NEWS (Feb. 9, 2019, 4:25 AM), <https://www.nbcnews.com/news/us-news/long-wait-legalized-surrogacy-may-soon-end-new-york-n968541#targetText=The%20number%20of%20babies%20born,trade%20group%20for%20infertility%20specialists>.

<sup>2</sup> Alex Finkelstein, et al., *Surrogacy Law and Policy in the U.S.: A National Conversation Informed by Global Lawmaking*, COLUM. L. SCH. SEXUALITY & GENDER L. CLINIC 5 (2016), [https://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/files/columbia\\_sexuality\\_and\\_gender\\_law\\_clinic\\_-\\_surrogacy\\_law\\_and\\_policy\\_report\\_-\\_june\\_2016.pdf](https://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/files/columbia_sexuality_and_gender_law_clinic_-_surrogacy_law_and_policy_report_-_june_2016.pdf).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> See Surrogate Parenting Act, MICH. COMP. LAWS ANN. § 722.851 (West 1988); NY DOM REL LAW § 122 (McKinney 1992).

<sup>8</sup> Finkelstein, et al., *Surrogacy Law and Policy*, *supra* note 2, at 9.

contracts only.<sup>9</sup> The intended parents are also able to receive pre-birth parentage orders in which the court designates legal parentage status before the birth of the child, but it does not take legal effect until the child's actual birth. Moreover, California places no limitations on who can be a surrogate and there is no residency requirement.<sup>10</sup> As a result of these friendly regulations, California has become one of the top surrogacy destinations in the world.<sup>11</sup> Virginia law, in contrast, also allows surrogacy but includes a number of restrictions, such as a requirement that the surrogate receive no compensation for her services. Additionally, there is a residency requirement and the intended parents must meet the same fitness standards required of adoptive parents.<sup>12</sup> Lastly, many states do not clearly address surrogacy either through legislation or case law and therefore, there is a lot of variation between whether and how the practice is able to operate.<sup>13</sup>

Where permitted, commercial surrogacy offers numerous benefits. It has allowed single people, those who suffer from infertility or disabilities, and others who have traditionally been unable to produce children, such as members of the LGBTQ community, to do so. It has also allowed society to push the boundaries of what a family can be. Additionally, on its face, surrogacy benefits two mutually contracting parties.

However, commercial surrogacy has faced deep opposition from commentators who argue that the desires of those wanting children need to be balanced with other equally important rights and interests. A central argument has been the rights of the child and encouraging surrogacy advocates to consider what is in the child's best interest, and not only the interests of the intended parents.<sup>14</sup> Issues include the risk of a child becoming stateless (this is of particular concern if a child is considered 'less desirable' if they are found to have a disability and as a result, the intended parents try to shirk their parental responsibilities or pressure the surrogate to abort the pregnancy), the right of a child to know their ancestry as well as their biological parentage and hereditary history, and the broader question of whether commercial surrogacy is a form of child trafficking or commodifies children.<sup>15</sup>

Equally important as the interests of the child is the welfare of the surrogate. Critics raise the issue of surrogate exploitation, especially for surrogates from disadvantaged backgrounds.<sup>16</sup> Also at issue is the concern that women's bodies, specifically the womb, are being commoditized. In the United States, surrogacy is expensive with the average cost ranging from \$90,000 to \$130,000.<sup>17</sup> As a result, those seeking commercial surrogacy arrangements generally have wealth, education, and social status.<sup>18</sup> This raises the concern of whether such a power

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 7.

<sup>12</sup> *Id.* at 10.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 18.

<sup>15</sup> *Id.* at 18-22.

<sup>16</sup> *Id.* at 24.

<sup>17</sup> West Coast Surrogacy, *West Coast Surrogacy Costs and Fees*, WEST COAST SURROGACY, INC., <https://www.westcoastsurrogacy.com/surrogate-program-for-intended-parents/surrogate-mother-cost#targetText=Every%20surrogacy%20case%20is%20unique,depending%20on%20the%20individual%20arrangements> (last visited Oct. 25, 2019).

<sup>18</sup> Finkelstein, et al., *Surrogacy Law and Policy*, *supra* note 2, at 26.

imbalance between the contracting parents and the surrogate truly allows the surrogate to make a reasonable decision and provide consent if they are vulnerable to being manipulated by surrogacy brokers, medical personnel, and the intended parents.<sup>19</sup>

Despite these concerns, the trend in the United States has been that commercial surrogacy is here to stay. In this respect, the United States is moving in the opposite direction when compared to other countries. As an example, earlier this year, New York's State Senate passed a bill to legalize paid surrogacy; however, it is unclear whether the bill will pass in the State Assembly where there is strong opposition.<sup>20</sup> In contrast, India recently banned commercial surrogacy because of alarming reports and concerns over the exploitation of poor, disadvantaged women. The practice is also banned in most European countries.<sup>21</sup> Nevertheless, as surrogacy remains popular both in the United States and abroad, it is important to inform and bring awareness for advocates and interested parties on both sides of the new developments occurring in the industry.

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<sup>19</sup> *Id.*

<sup>20</sup> Vivian Wang, *Surrogate Pregnancy Battle Pits Progressives Against Feminists*, NY TIMES (June 12, 2019), <https://www.nytimes.com/2019/06/12/nyregion/surrogate-pregnancy-law-ny.html>.

<sup>21</sup> Chuck, *supra* note 1.