

COVID-19, SURROGACY, AND UNPLANNED CHILDCARE: WHY THE COMMERCIAL SURROGACY INDUSTRY NEEDS NEW CONTRACTUAL PROVISIONS AFTER THE PANDEMIC

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The Coronavirus (COVID-19) pandemic created unforeseen legal and logistical challenges for the commercial surrogacy industry, while illuminating the uniqueness of surrogacy, a long-controversial form of labor.¹ COVID-19 proved that the commercial surrogacy industry is not prepared to operate during a global health crisis. New contractual provisions are needed to ensure care for surrogate-born infants and to protect surrogates from unplanned care work.

Commercial surrogacy is legal in some parts of the United States — although governed by varying state-specific regulations² — as well as in a handful of countries around the world, including Ukraine and Russia.³ Given the restrictions on commercial surrogacy, and the less expensive cost of surrogacy in regions, such as, Eastern Europe, it is not unusual for intended parents to enter into a contract with a surrogate living on different continent.⁴ It is no wonder that at the height of the pandemic, when international travel restrictions went into effect, thousands of surrogate-born children were inaccessible to their intended parents. In July 2020, news reports suggested that as many as one-thousand surrogate-born children in Russia could not be united with their intended parents,⁵ and that hundreds more infants were stranded across the United States⁶ and Ukraine.⁷

This situation demonstrated that assumptions intertwining surrogacy and motherhood still abound. Traditionally, birth parents are expected to care for their children after they are born, but surrogacy fundamentally reshapes the link

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¹ On the left, many LGBTQ+ rights activists see bans on surrogacy as infringements on fundamental rights protected by the Fourteenth Amendment, whereas some feminists see surrogacy as at odds with reproductive justice. See Vivian Wang, *Surrogate Pregnancy Battle Pits Progressives Against Feminists*, N.Y. TIMES (June 12, 2019), <https://www.nytimes.com/2019/06/12/nyregion/surrogate-pregnancy-law-ny.html?action=click&module=RelatedLinks&pgtype=Article>.

² See Alicia Gonzalez, *Commercial Surrogacy in the United States*, 21 GEO. J. GENDER & THE L. (Online) 1 (2019).

³ See generally 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 ed., 2016).

⁴ Lizzie Widdicombe, *The Stranded Babies of The Coronavirus Disaster*, NEW YORKER (Jul. 20, 2020), <https://www.newyorker.com/news/news-desk/the-stranded-babies-of-the-coronavirus-disaster>.

⁵ Andrew Roth, *Up to 1,000 Babies Born to Surrogate Mothers Stranded in Russia*, GUARDIAN (Jul. 29, 2020, 10:39 AM), <https://www.theguardian.com/lifeandstyle/2020/jul/29/up-to-1000-babies-born-to-surrogate-mothers-stranded-in-russia>.

⁶ Sirin Kale, *Surrogacy: New Parents Stuck in US Amid Covid-19 Shutdown*, GUARDIAN (Mar. 26, 2020, 7:38 AM), <https://www.theguardian.com/world/2020/mar/26/surrogacy-new-parents-stuck-in-us-amid-covid-19-shutdown>.

⁷ Mary Ilyushina, *Dozens of Surrogacy Babies Stranded By Coronavirus Lockdown in Ukraine, Lawmaker Says*, CNN (May 16, 2020, 8:53 AM), <https://www.cnn.com/2020/05/15/europe/ukraine-surrogacy-babies-lockdown-intl/index.html>.

between childbirth and motherhood. Surrogates do not enter a surrogacy contract with the intent to parent — rather through their labor, surrogates create parental duties for the intended family. Simply put, surrogates are paid to gestate, not to parent. The COVID-19 pandemic, however, exposed that this rupture is not complete. During the height of the crisis, many surrogates were asked,⁸ or in some cases expected,⁹ to parent the children they gave birth to until the intended parents arrived. There is no other form of labor that creates a situation similar to that faced by surrogates asked to assume unplanned parenting duties. Surrogates left to care for a newborn are forced to perform all-encompassing care work that does not cease until the baby is placed with its intended family.

The pandemic could have long-term developmental effects on surrogate-born children, as well as legal ramifications for surrogates. Infants — who thrive on human contact — cared for by surrogates are likely to be better off developmentally than those temporarily sent to orphanages,¹⁰ or in the case of Ukraine, make-shift nurseries that housed dozens of babies inside of a hotel.¹¹ However, surrogates performing this care work need protections.

Experts on the legality of surrogacy have proposed new additions to surrogacy contracts, intended to create a temporary childcare plan that would keep surrogates from being forced or pressured into care work.¹² These new contractual components include: (1) a provision naming a local guardian for the child in case an intended parent cannot access the infant at the time of its birth; and (2) legal protections for this temporary child-care provider. The guardian must be legally protected from liability in case the child is harmed — through no negligence on the part of the guardian — while in the guardian's care. Since it is unlikely that families will have contacts in the location where the surrogate lives, surrogacy agencies should have local individuals ready to be appointed as guardians and equipped to take on the childcare responsibilities.

If she is willing — and is provided with childcare necessities, such as a safe place to live, medical care, formula, diapers, and a crib — the surrogate could be the temporary guardian as long as she, too, receives (1) legal protections from negligence claims, and (2) reasonable compensation for this extra labor. However,

⁸ Sirin Kale, *Surrogates Left Holding the Baby as Coronavirus rules Strand Parents*, GUARDIAN (May 14, 2020, 4:00 PM), <https://www.theguardian.com/lifeandstyle/2020/may/14/surrogates-baby-coronavirus-lockdown-parents-surrogacy>.

⁹ Maria Varenikova, *Mothers, Babies Stranded in Ukraine Surrogacy Industry*, N.Y. TIMES (Aug. 15, 2020), <https://www.nytimes.com/2020/08/15/world/europe/ukraine-baby-surrogate.html>.

¹⁰ See generally Evan L. Ardiel & Catharine H. Rankin, *The Importance of Touch in Development* 15 J. OF THE CAN. PAEDIATRIC SOC'Y 153 (2010).

¹¹ Mary Ilyushina, *Dozens of Surrogacy Babies Stranded by Coronavirus Lockdown in Ukraine, lawmaker says*, CNN (May 16, 2020, 8:53 AM), <https://www.cnn.com/2020/05/15/europe/ukraine-surrogacy-babies-lockdown-intl/index.html>.

¹² Susan L. Crocchin, *The Impact of a Pandemic on International Surrogacy: An Interview with ART Attorneys Margaret Swain and Nidhi Desai*, AMERICAN SOC'Y. FOR REPROD. MED.: LEGALLY SPEAKING (Aug. 18, 2020), <https://www.asrm.org/news-and-publications/news-and-research/legally-speaking/the-impact-of-a-pandemic-on-international-surrogacy-an-interview-with-art-attorneys-margaret-swain-and-nidhi-desai/>.

in some countries the surrogate is the child's legal parent until the child is transferred to the intended family, which could create unwanted liability for the surrogate if she does not transfer childcare responsibilities directly after giving birth.¹³ Most surrogates are low-income or working-class, and many are women of color.¹⁴ Without robust legal protections, the disparity in socioeconomic power between intended parents and surrogates can make it difficult for surrogates to refuse when they are told to perform extra care work. Thus, contracts must include strict provisions that ensure surrogates are not exploited, but rather monetarily compensated, for additional care work.¹⁵ Surrogacy contracts must also stipulate that surrogates are not legally bound to care for the children to which they give birth.

Anti-surrogacy advocates may argue that the complications around commercial surrogacy, which are heightened by the Coronavirus pandemic, prove that surrogacy should not be commodified. However, commercial surrogacy is a fast-growing, multi-billion-dollar industry that is unlikely to cease,¹⁶ and legal measures need to be in place to protect surrogates as they partake in this unique form of labor, enabling families to have the children they desire.¹⁷

¹³ Stephen R. Latham, *The United Kingdom Revisits Its Surrogacy Law*, 50 THE HASTINGS CTR. REP. 6, 7 (2020).

¹⁴ Dorothy E. Roberts, *Why Baby Markets Aren't Free*, 7 UC IRVINE L. REV. 611, 615 (2017).

¹⁵ See generally *id.*

¹⁶ *Id.* at 616.

¹⁷ Surrogates' bills of rights, such as the one recently adopted in New York State, could ensure that the recommended contractual provisions are included and enforced in all surrogacy contracts. The Child-Parent Security Act in New York, FAMILY EQUALITY COUNCIL, <https://www.familyequality.org/resources/child-parent-security-act-new-york/#cpsa-changes-surrogates>.