

Principles to Inform Practice and Policy on Contractual Surrogacy in the U.S.

Our Bodies Ourselves, November 2022

Introduction

Marriage equality in the U.S. has seen a groundswell of public and legislative support in the past several years. Close upon the heels of marriage equality is the growing issue of the right to form a family for those who have previously been unable to do so – people with infertility, unmarried and single individuals, and LGBTQ+ couples. New opportunities to form a family run alongside a unique set of concerns in the technologies, practices, and contractual arrangements of assisted reproduction.

A case in point is contractual surrogacy, which presents an unprecedented opportunity in family formation for intended parents, and at the same time can pose major risks for others, especially women who provide their bodies and services to make these arrangements possible, notably surrogates and egg providers. And in recent years, adult children born through surrogacy have stepped forward to reveal issues similar to those raised by adoption advocates and donor-conceived children for decades, issues relating to one's origins.

Legislation is slow to catch up. There is no federal legislation on contractual surrogacy in the U.S. and, as the practice grows, state legislatures work to resolve a range of regulatory issues that can arise for the various participants in surrogacy arrangements. Often several competing bills make their way through state legislatures, each with a different emphasis.

Our Bodies Ourselves (OBOS), with its 50+ year history of providing evidence-based information on women's health issues, is sometimes invited to weigh in on pending surrogacy bills. In our most recent work with colleagues in New York State, together we developed a set of key concepts that underlie the specific recommendations made to state legislators by our working group.

While regulation of surrogacy varies from state to state, many of the same issues are relevant and more widely applicable to surrogacy arrangements across the country. The principles OBOS and the NY State Group of Ad Hoc Experts devised are intended as an aid to public understanding for those unfamiliar with surrogacy and the unique issues it presents. The principles might also serve as a

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foundational base for legislators before they get into the weeds with the technical detail embedded in various bills.

The overarching purpose of these principles is to promote better understanding of the complexity of surrogacy arrangements and help ensure that the health and rights of all participants are respected and protected.

Principles to Inform Practice and Policy

- New forms of family formation are occurring in the U.S. and around the world and are considered by some to represent a beneficial change in cultural norms. Contractual surrogacy is an arrangement that allows for a new way of forming a family, especially for those previously not able to do so.
- The practice of surrogacy can be greatly improved and better accepted as a way to form a family if the health and rights of all participants in the arrangement are protected, and all persons involved are respected.
- If surrogacy is to be permitted at all, regulation should be cutting edge as regards new and unique social arrangements and recognize multiple progenitors.
- One of the key issues in surrogacy is winning respect and secure legal standing for LGBTQ+ parents, and such recognition is far from secure in the United States and beyond. However, this parentage should not be won at the expense of others' health or rights.
- In respecting the rights of people to form families in new ways, we cannot ignore the rights of the people who make these new practices possible (surrogates, egg providers) or the future adult children born as a result.
 - Vis-à-vis the surrogate, we must be exceptionally careful to avoid seeing her as a vessel and to avoid depriving her of standing vis-à-vis the fetus and newborn. We should not diminish the biological importance of pregnancy and the surrogate's role as the biological/gestational parent. Policies should not diminish her autonomy, agency, health, or rights, including by foreclosing her standing in any proceeding regarding the fetus and birth of the child.
 - Vis-à-vis the egg provider, we must be exceptionally careful not to diminish her contribution to the reproductive process, the genetic tie to the future child, and her rights to quality health care as she undergoes and recovers from the egg extraction process.
 - Vis-à-vis the fetus, we have to be exceptionally careful not to assume the fetus is an independent entity inside the body of the surrogate, nor that the intended parents have

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a claim to either “ownership” or parenthood of the fetus. Claims of ownership by third parties and/or of parenthood before birth imply such fetal independence; they dismember the surrogate and undermine her physical integrity and potentially strengthen the notion of “fetal personhood,” which is particularly dangerous in a post-Roe world.

- Vis-à-vis the rights of children born via surrogacy, it is a matter of *intergenerational justice* to respect their future rights as adults. We have decades of advocacy from adoptees and donor-conceived adults to guide us on what those rights and needs might be regarding the importance of access to medical information, birth records, and knowledge of one’s origins.
- All biological and genetic connections are significant in surrogacy and one of the challenges of surrogacy law is to recognize multiple progenitors, while simultaneously securing the status of intended parents to assume parentage. Conflating the terms “biological” and “genetic” causes confusion and increases misunderstandings as to the important and various connections between the multiple progenitors and the future child. Common inconsistencies include the following.
 - Some surrogacy law enables intended parents (IPs) to pick and choose which biological connections they deem to be important and legally significant during pregnancy, and once the child is born. For example, genetic connection may be considered to substantiate a claim of fatherhood if the sperm provider is an IP (but not if he is not) whereas the equal genetic contribution of the egg provider is not considered significant.
 - “Not a biological parent” is a phrase often ascribed to a surrogate because she is not a “genetic” parent. Her biological connection to the fetus and future child is indeed profound, but is often downplayed and not considered meaningful despite nine months of gestation, the biological interdependence between her and the fetus, and the important biological influence she has on the developing fetus via epigenetic programming.

Some IPs may want to erase all connections except their own, thinking this will secure their own parentage/family formation, but regulatory efforts need to consider how this will serve and respect all participants in surrogacy arrangements in the long run, especially the children born of these arrangements. In short, as mentioned above, *intergenerational justice* necessitates that appropriate measures be included in surrogacy contracts to acknowledge, in provisions TBD state by state, all the connections -- social/legal/familial; biological/gestational; and biological/genetic.

- Insisting on non-genetic surrogacy (not using surrogate’s own egg) may be detrimental to the surrogate as well as offspring, and as such it should be avoided without extenuating circumstances. Non-genetic surrogacy exposes the surrogate to higher risk of pregnancy complications from the use of donor eggs and requires the use of IVF, high dose hormones,

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embryo transfer, and other assisted reproductive technologies, thereby increasing health risks for both the surrogate and the future child as well as increasing expenses for the IPs.

- Contract law should not be used to settle legal disputes in the case of surrogacy conflicts. In particular, surrogates should not be subject to specific performance; that is, obligatory performance of the contract, rather than the more customary payment of monetary damages for breach of contract. Specific performance is most commonly applied to real estate and not to contracts involving personal services. Instead, family law should be used in surrogacy disputes within a best-interests-of-the-child framework.

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