

Surrogacy White Paper Addendum: 2020 Update

Since the publication of the white paper on surrogacy in 2015, there have been additional cases of concern as well as some legal developments. While surrogacy has become increasingly lauded due to its use by celebrities, its troubling aspects continue to receive short shrift in media and culture. This addendum to that paper provides some updates and examples related to laws, cases, and surrogacy stories which have emerged that raise highlight the risks and problems associated with the practice.

Examples of changes in laws related to surrogacy

Due to concerns about surrogacy tourism and exploitation, India took steps to limit its surrogacy industry in 2018. The Surrogacy (Regulation) Bill 2016 banned commercial surrogacy and prohibited foreigners from contracting with surrogates.¹ Under the law's provisions, surrogates must be a close relative and may only be reimbursed for medical expenses, in hopes of ensuring that vulnerable poor women are not exploited.² The law also restricted altruistic surrogacy to infertile, married heterosexual couples.³ As of 2020, the legislature was considering some changes to the law based on recommendations from a committee, such as allowing divorced or widowed women access to surrogacy, removing the requirement that a surrogate be a close relative, and removing the five year infertility requirement.⁴

Turkey had already prohibited surrogacy, but has sought to strengthen its rules, including criminal penalties. A 2017 report noted that the Health Ministry proposed an amendment to the law to criminalize in vitro fertilization except when carried out between married spouses.⁵ Despite this, and despite bans on advertising surrogacy services or in search of a surrogate, the practice continues, with arrangements made online and surrogates going abroad to give birth.⁶ Many potential surrogates cite financial need as their motivation.⁷

On the other hand, New York State in the U.S., which had long banned commercial surrogacy, legalized it in 2020 under the Child Parent Security Act.⁸ The bill also made "second parent adoption" easier, allowing partners of the biological parents a shorter route to legal

¹ Saptarshi Ray, *India bans commercial surrogacy to stop 'rent a womb' exploitation of vulnerable women*, TELEGRAPH (Dec. 20, 2018), <https://www.telegraph.co.uk/news/2018/12/20/india-bans-commercial-surrogacy-stop-rent-womb-exploitation/>.

² *Id.*

³ *Id.*

⁴ *Cabinet approves surrogacy Bill*, THE HINDU (Feb. 26, 2020), <https://www.thehindu.com/news/national/cabinet-clears-surrogacy-regulation-bill/article30921456.ece>.

⁵ Meltem Özgenç, *Turkish Health Ministry calls for jail time for those involved in surrogate motherhood*, HURRIYET DAILY NEWS (Sept. 13, 2017), <https://www.hurriyetdailynews.com/turkish-health-ministry-calls-for-jail-time-for-those-involved-in-surrogate-motherhood-117907>.

⁶ *Number of Turkish women illegally seeking surrogate mothers online, abroad on rise: Report*, HURRIYET DAILY NEWS (Feb. 5, 2018), <https://www.hurriyetdailynews.com/number-of-turkish-women-illegally-seeking-surrogate-mothers-online-abroad-on-rise-report-126825>.

⁷ *Id.*

⁸ Ryan Tarinelli, *Cuomo Signs Bill to Legalize Gestational Surrogacy, Creating Standards for Contracts*, NEW YORK LAW JOURNAL (Apr. 03, 2020), <https://www.law.com/newyorklawjournal/2020/04/03/cuomo-signs-bill-to-legalize-gestational-surrogacy-creating-standards-for-contracts/?slreturn=20200306154724>.

parenthood.⁹ Governor Andrew Cuomo championed the bill, saying it included the strongest protections for surrogates and intending parents.¹⁰ Critics, including state legislators and well-known feminist Gloria Steinem, raised objections based on the commodification of women and children to no avail.¹¹

International travel can also undermine laws related to the practice, and not only by allowing wealthy residents of countries that ban it to travel abroad. Cambodia discovered that, despite tightening its own surrogacy law, Cambodians were still participating in surrogacy arrangements by crossing into neighboring Laos, which has permissive laws.¹² In 2018, thirty-three pregnant Cambodian women were charged with surrogacy and trafficking, along with four Cambodian women and one Chinese man for their role in running the illegal surrogacy business.¹³ When one country acts to protect vulnerable women and children, the market swiftly moves elsewhere.

Case updates

Paradiso & Campanelli v. Italy

As discussed in the white paper, this case involved an Italian couple who had sought surrogacy services, which are illegal in Italy, in Russia, with the goal of having a child genetically related to the husband.¹⁴ Italian authorities took the child into custody, determined by genetic testing that he was not genetically related to the husband, and made him legally available for adoption.¹⁵ Paradiso and Campanelli, the intending parents, brought the case to the European Court of Human Rights, which found that Italy's actions had violated the right to respect for family life under article 8 of the European Convention on Human Rights, although in light of the child's long residence with an adoptive family, it did not return him to their care.¹⁶

Both sides appealed various aspects of the decision to the Grand Chamber of the court, which issued a judgement in 2017.¹⁷ In its review, the court concluded, contrary to the previous decision, that the requirements to show *de facto* family life under article 8 had not been met, due to the lack of biological ties, the short time spent together, and the unclear legal connections.¹⁸ The court did find that actions did interfere with the intending parents' right to private life under the

⁹ Press Release: Governor Cuomo Unveils 16th Proposal of 2020 State of the State: Legalizing Gestational Surrogacy (Dec. 30, 2019), <https://www.governor.ny.gov/news/governor-cuomo-unveils-16th-proposal-2020-state-state-legalizing-gestational-surrogacy>.

¹⁰ Denis Slattery, *Cuomo vows to renew fight to lift paid surrogacy ban in New York*, N.Y. DAILY NEWS (Dec. 30, 2019), <https://www.nydailynews.com/news/politics/ny-legalize-paid-surrogacy-cuomo-proposal-legislative-session-20191230-kk3biwtcdbgxdfns3rxeiedxnm-story.html>.

¹¹ 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>.

¹² *Cambodian surrogate moms charged with human trafficking*, Tribute India (Jul 7, 2018), <https://www.tribuneindia.com/news/archive/world/cambodian-surrogate-moms-charged-with-human-trafficking-616729>.

¹³ *Id.*

¹⁴ *Paradiso and Campanelli v. Italy*, no. 25358/12 §§ 6-7, 14, Eur. Ct. H.R., Jan. 27, 2015 (2d Section).

¹⁵ *Id.* §§ 12-13, 16, 22-23, 30-33.

¹⁶ *Id.* §§ 81-88.

¹⁷ *Paradiso and Campanelli v. Italy*, no. 25358/12 §§ 82-87, Eur. Ct. H.R., Jan. 24, 2017 (Grand Chamber).

¹⁸ *Id.* §§ 157-58.

same article.¹⁹ It then examined whether Italy's actions were "pursuing one or more of the legitimate aims" in accordance with law and necessary to achieve those aims.²⁰ The court found that Italy had followed its own law in a foreseeable, rather than arbitrary manner,²¹ and that its aims of preventing disorder and safeguarding children's rights and freedoms were legitimate aims.²² In light of the lack of consensus on surrogacy arrangements,²³ the lack of biological connection between parent and child,²⁴ and Italy's action to address swiftly illegal conduct and take care of a child considered abandoned under its laws,²⁵ the court determined that Italy's actions were proportionate and that therefore no violation of the intending parents' article 8 right to private life had occurred.²⁶

Baby Gammy

The Baby Gammy case, included in the white paper, made international headlines over the reported discrimination against a surrogate-born twin with Down syndrome, and was a major impetus behind the decision of Thailand to restrict surrogacy. Additional concerns emerged when news broke that the intending father had a previous sex offense conviction, prompting an investigation by local authorities.²⁷ This highlights a key difference between surrogacy arrangements and adoption, namely the lack of checks which would likely have prevented the intending father from being allowed to adopt.

In light of this and an investigation by social services, the Family Court of Western Australia took up the question of how best to ensure the welfare of Gammy's twin sister, Pipah, who was taken home by intending parents David and Wendy Farnell.²⁸ The court ultimately found that, with certain protective measures in place, Pipah was best suited to remain with the Farnells, who were the only family she had known.²⁹ However, the court also made a number of factual findings related to Gammy which demonstrate the persistent challenges in safeguarding children within surrogacy arrangements.

For example, a major element of news reports focused on a dispute over the intending parents' request to abort Gammy. The court accepted the Farnell's assertion that they did not ask the surrogate, Pattaramon Chanbua to have an abortion as the pregnancy was too advanced to allow it under Thai law, although they would have asked for one had they known earlier.³⁰ The court also did not find that staff at the surrogacy agency had communicated to Mrs. Chanbua to have an

¹⁹ *Id.* §§ 163-65.

²⁰ *Id.* § 167.

²¹ *Id.* §§ 171-74.

²² *Id.* §§ 175-78.

²³ *Id.* §§ 181-84, 194-95.

²⁴ *Id.* §§ 195, 207.

²⁵ *Id.* §§ 196-99.

²⁶ *Id.* §§ 203-04, 209-14, 215-16.

²⁷ Bridie Jabour & Brendan Foster, *Child abuse convictions of Gammy's father prompt investigation*, GUARDIAN (Aug. 5, 2014), <https://www.theguardian.com/world/2014/aug/05/gammy-father-child-abuse-convictions-investigation>.

²⁸ *Farnell et al.* [2016] FCWA 17 ¶¶ 1-3 (WA).

²⁹ *Id.* at ¶¶ 763-789 (outlining the requirements for Pipah's safety and assigning custody to the Farnells).

³⁰ *Id.* at ¶ 577.

abortion,³¹ although it accepted also that Mrs. Chanbua believed she was expected to do so.³² One of the staff did contact the Farnells about the possibility in an email which bears quoting at length:

I spoke to several doctors in Bangkok and they all told me that no doctor in Thailand will do “Selective Reduction” at 23 weeks because it is too risky losing the healthy baby [sic]. They left us with no choice but to deliver both babies...

Amber and I know how sad this news must be. Believe me, if it happened to us, we would want to abort the Down baby too. So please don’t feel bad about that. Just think though that you have a healthy baby girl and you will want to keep her. What we are thinking is since Wendy has family in Guangzhou maybe she can find a doctor there in China that would be will [sic] to do “Selective Reduction.” ... I hate to leave you with little choices [sic], but that is basically your only two options. Either to have both babies delivered in Thailand and accept that one has Downs or to take your surrogate mother to China for the selective reduction procedure.³³

At one point, the Farnells also demanded a refund, and the judge found it possible that the agency staff member who worked most closely with Mrs. Chanbua communicated a request for abortion to her in light of that statement.³⁴

In light of communications with family about twins and their preparation for both, rather than just Pipah, the court did not believe that the Farnells abandoned Gammy.³⁵ However, the court suggested that they had prior knowledge that Mrs. Chanbua was interested in keeping him.³⁶ The court also found that she came to love the twins and view them as her own, and viewed Gammy as good luck.³⁷ Both parties also lied in various documents at different times, the Farnells that they were both biologically related to the children (when only the father was),³⁸ and Mrs. Chanbua about her name and age.³⁹

Despite the court’s finding that there was probably not an abortion request, the Baby Gammy story remains a troubling one. Miscommunications, poor checks by the agency, and mistrust between all parties about each other’s dedication to the children’s welfare characterize the experience. Both children are living removed from one or both biological parents and from each other. Mrs. Chanbua’s love for the children also highlights an often-hidden burden born by both surrogate and child, the breaking of maternal bonds formed during pregnancy. And the agency’s treatment of Gammy as a defective product raises questions about whether it also had an interest in avoiding a “success story” that included a child with a disability.

³¹ *Id.* at ¶ 582.

³² *Id.* at ¶ 584.

³³ *Id.* at ¶ 575.

³⁴ *Id.* at ¶¶ 582-82.

³⁵ *Id.* at ¶¶ 587, 18.

³⁶ *Id.* at ¶¶ 16, 585.

³⁷ *Id.* at ¶ 15.

³⁸ *Id.* at ¶ 155.

³⁹ *Id.* at ¶ 596.

Other examples and concerns

Other stories have come to light since the white paper's publication which raise concerns about regulation and the safety and well-being of surrogate mothers. Thailand, which had strengthened its laws in light of the Baby Gammy case to restrict surrogacy to citizens, discovered through an Interpol investigation an apartment with nine nannies, nine children between two weeks and two years, and no furnishings, in 2014.⁴⁰ Authorities later learned of four more Thai-born children, and possibly three in India, all fathered via surrogacy arrangements by then-24-year-old Mitsutoki Shingeta, the unmarried son of a Japanese tech billionaire.⁴¹

Authorities took the children into custody, fearing child trafficking, but eventually granted Shingeta custody in light of lack of evidence of criminal behavior and the financial ability to care for them.⁴² All the children were conceived using the same IVF clinic, although the surrogacy agency he initially used broke ties with him over his stated desire for "more than 1,000 babies" and "plans for 10-20 surrogacies every year, or more."⁴³ Authorities also identified six more children fathered by him via surrogacy.⁴⁴ The children will be raised with the assistance of Shingeta's mother and numerous nannies.⁴⁵ The closure of loopholes in Thai law only sends wealthy would-be parents to other countries with laxer laws, allowing women and children there to be exploited and commodified.

Surrogacy is often treated as a primarily altruistic endeavor, framed as helping those who want to be parents have children. However, it is a growing industry with significant money behind it, much of which goes to agencies, doctors, clinics, labs, and lawyers. The industry was estimated to be worth \$6 billion annually in 2012,⁴⁶ and a market analysis firm predicts industry revenue will top \$27.5 billion by 2025.⁴⁷ Cheery news reports obscure serious and persistent issues.

As noted in the white paper, many women become surrogates out of financial need. It is not a coincidence that wealthy couples use surrogates, but rarely do wealthy women serve as them. Although direct coercion is rare, at least one Indian surrogate claimed she was harassed, threatened, and falsely imprisoned after she changed her mind against being a surrogate as a way to make money.⁴⁸ She later attempted suicide.⁴⁹ Financial and other pressure can be indirectly coercive or exploitative. An article describing a surrogacy arrangement between an American

⁴⁰ Vanessa Romo, *Japanese 'Baby Factory' Man Gains Custody Of 13 Surrogate Children*, NPR (Feb. 20, 2018), <https://www.npr.org/sections/thetwo-way/2018/02/20/587297870/japanese-baby-factory-man-gains-custody-of-13-surrogate-children>.

⁴¹ *Id.*

⁴² Jonathan Head, *'Baby factory' mystery: Thailand's surrogacy saga reaches uneasy end*, BBC NEWS (Feb. 26, 2018), <https://www.bbc.com/news/world-asia-43169974>.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Claire Fenton-Glynn, *Surrogacy: Why the world needs rules for 'selling' babies*, BBC NEWS (Apr. 26, 2019), <https://www.bbc.com/news/health-47826356>.

⁴⁷ *Surrogacy Market revenue to cross \$27.5 billion by 2025: Global Market Insights*, GLOBENEWSWIRE (Dec. 16, 2019), <https://www.globenewswire.com/news-release/2019/12/16/1960684/0/en/Surrogacy-Market-revenue-to-cross-27-5-billion-by-2025-Global-Market-Insights-Inc.html>.

⁴⁸ *'Surrogate mom' attempts suicide, alleges harassment by IVF doctor, lawyer*, NEW INDIAN EXPRESS (Oct. 9, 2018), <https://www.newindianexpress.com/states/andhra-pradesh/2018/oct/09/surrogate-mom-attempts-suicide-alleges-harassment-by-ivf-doctor-lawyer-1883057.html>.

⁴⁹ *Id.*

couple and a Ukrainian surrogate has the intending mother describe how “lucky” they were that the surrogate agreed to carry two children.⁵⁰ The surrogate, “Kateryna,” on the other hand, said she wanted a single pregnancy, but the doctor pressed for twins: “It’s not like I have a choice of how many I will carry.”⁵¹ She cited financial need as a major concern, as did the head of the surrogacy agency.⁵²

Disputes can arise between commissioning parents and surrogate mothers both before and after birth. Melissa Cook, a 47-year-old surrogate from California, tried to have her contract voided and get custody of the children after the intending father asked her to abort one triplet due to the costs of raising three children; her case failed in both state and federal courts.⁵³ An arrangement between a 50-year-old couple and a 37-year old African American surrogate and her Latino husband went sour over disputes over their roles, the use of racial slurs by the commissioning parents, and the surrogate’s threat to abort the children.⁵⁴ The surrogate stated through her attorney, who also represented the surrogate in the famous *Baby M* case, that the experience led her changing her mind about surrogacy, viewing it as “the purchase of a child,” enough that she concealed the birth at first.⁵⁵

Circumstances and facts which emerge after the birth can also complicate things. Alexandra Trent served as a surrogate for a well-known couple with a reality show.⁵⁶ She later learned that despite her express refusal, the producers had secretly filmed the birth, later airing the birth on tv.⁵⁷ She also found herself the subject of degrading comments, including about her anatomy, by the commissioning fathers.⁵⁸ Additional costs can also come up, leading to disputes and ill feeling. An American surrogate named Karen felt taken care of when she was pregnant, but abandoned by the commissioning fathers and the surrogacy agency when she had post-partum depression, after her insurance through them had concluded.⁵⁹ After a public post by her husband, the agency provided some additional support; but when the intending fathers refused to provide additional assistance, the agency followed suit.⁶⁰

Surrogate pregnancies also include risks that other pregnancies do not. For example, a retrospective review of found significant increased costs and care related to both surrogates and children born from surrogacy at the clinic studied, which included 45 surrogates resulting in 69

⁵⁰ Allison Herrera, *In Ukraine, surrogacy is legal, but some ask if its exploitation*, PRI World (June 29, 2018), <https://www.pri.org/stories/2018-06-29/ukraine-surrogacy-legal-some-ask-if-its-exploitation>.

⁵¹ *Id.*

⁵² *Id.*

⁵³ Kelly Puente, *California surrogate mom loses custody battle for triplets*, MERCURY NEWS (Jan. 17, 2018), <https://www.mercurynews.com/2018/01/17/woodland-hills-surrogate-mom-loses-custody-battle-for-triplets/>.

⁵⁴ Mike Kilen, *Who is Baby H’s parent? Iowa legal battle pits surrogate against couple who hired her*, DES MOINES REGISTER (Aug. 29 2017), <https://www.desmoinesregister.com/story/news/2017/08/29/who-baby-hs-parent-iowa-legal-battle-pits-surrogate-against-couple-who-hired-her/580737001/>.

⁵⁵ *Id.*

⁵⁶ Gene Maddaus, *‘Flipping Out’ Surrogate Mom Sues Bravo Over Filmed Birth*, VARIETY (June 12, 2018), <https://variety.com/2018/biz/news/flipping-out-bravo-trent-1202844060/>.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Sarah Toler, *What Happens When the Surrogate Gets Postpartum Depression?*, MEDIUM (Sept. 12, 2019), <https://medium.com/@sarahannetoler/what-happens-when-the-surrogate-gets-postpartum-depression-d14870bc355>.

⁶⁰ *Id.*

live-born infants.⁶¹ Of those, 52% of deliveries were by caesarian section, compared to 33% for natural pregnancies, and 78% were born before thirty-seven weeks gestation, including 17.4% under thirty weeks.⁶² These can have long term health effects on both the women and the babies.

The surrogates also tended to have longer hospital stays and higher hospital charges than non-surrogates.⁶³ More than half the women had been implanted with multiple embryos, and multiple births are known to carry additional risks. Many surrogacies are gestational, in order to prevent legal claims of motherhood via biological connection. A study in France found that pregnancies using donated eggs, as gestational arrangements do, have higher risks of hypertension in pregnancy, which can carry serious risks.⁶⁴

Surrogacy cannot regulate away these risks, and the permissive laws in some countries make it difficult to prevent the continued exploitation of women and commodification of children. Global action is needed to protect women and children from exploitation and commodification through prohibiting the practice of surrogacy.

⁶¹ Yona Nicolau et al., *Outcomes of surrogate pregnancies in California and hospital economics of surrogate maternity and newborn care*, 4 *WORLD J. OBSTETRICS & GYNECOLOGY* 102, 104-05 (2015). This resource and others related to surrogate health risks were found courtesy the helpful fact sheet from the Center for Bioethics & Culture Network, *What's Wrong With Surrogacy?*, available at <http://www.cbc-network.org/pdfs/What-is-Wrong-with-Surrogacy-Center-for-Bioethics-and-Culture.pdf>. CBC is an excellent and leading organization in this area, and their page on surrogacy also an excellent resource. See *Surrogacy*, CBC NETWORK, <http://www.cbc-network.org/issues/making-life/surrogacy/> (last visited June 14, 2020).

⁶² Nicolau et al, *supra* note 61, at 104-05.

⁶³ *Id.*

⁶⁴ *Pregnancies following egg donation associated with more than 3-fold higher risk of hypertension*, Science Daily (July 1, 2014), <https://www.sciencedaily.com/releases/2014/07/140701091446.htm>.