Bargaining in the Shadow of (Confusing) Law: The Case of Surrogacy Contracts

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Rachel Rebouché, Contracting Pregnancy, 105 **Iowa L. Rev.** 1591 (2020).

The literature on surrogacy regulation has recently taken a turn towards a more pragmatic understanding of the field. Scholars have attempted to describe surrogacy regulation as it already exists and analyze the different interests involved, under conditions of legal fragmentation and uncertainty.[1] Rachel Rebouché's *Contracting Pregnancy* is an important contribution in this vein.

The article contributes several advances to our knowledge of surrogacy contracts in action. First, Rebouché analyzes statutory developments alongside standard terms included in surrogacy contracts. Doing so allows her to notice a tension between the law on the books and the law in action. The newest statutes attempt to balance the interests of intended parents and surrogates, recognizing parentage for the former, while safeguarding the surrogate's autonomy interests, by emphasizing that decisions about termination ultimately reside with the surrogate. Lawyers involved in the drafting process, however, regularly include language "that contradicts state efforts to level the playing field for parties." (P. 1596.) Rebouché finds this recurrent tension between state statutes and contractual language in the areas of pre-pregnancy genetic testing, prenatal screening and testing, lifestyle decisions during pregnancy, and abortion. In other words, the contracts that lawyers draft regularly try to vest intended parents with decision-making power over these areas, against the backdrop of a statutory (and constitutional) framework that vests that authority on the surrogate.

The second contribution of the article is related to Rebouché's attempt to understand how and why this gap occurs. Why do lawyers insist on including clauses that are likely unenforceable, either through specific performance or through damages? Rebouché pushes us to understand this practice in the context of the literature on relational contracts, in which the negotiation and inclusion of certain clauses in a contract have value as a vehicle for obtaining valuable information about the other party and building trust between parties who will need to collaborate over a period of time if the arrangement is to succeed. (P. 1631.) Noticing that surrogacy contracts may share characteristics with other types of contracts that create long-term relations and studying them under a regular contracts lens is a move against family law exceptionalism that is likely to contribute to more clarity about what this legal practice actually looks like on the ground.

A third contribution of the article is a detailed account of the role that healthcare professionals, lawyers, and surrogacy agents play in managing conflict between parties in a surrogacy contract. Rebouché's analysis brings a legal sociological approach that is attentive to the multiplicity of incentives and motivations that may be present beyond profit, such as reputational integrity and ethics, at different stages of the process. One of the more interesting observations is that the balance of power between intended parents and surrogates shifts at different points in the process, with the surrogate gaining more of it as a pregnancy takes hold. The fertility agencies and the lawyers often associated with the agencies mediate to balance out these shifts in power, in order to maximize the chances that the arrangement will not devolve into a conflict. This often means keeping the intended parents' micromanagement of the surrogate under control and safeguarding the surrogate's autonomy, while maximizing the chances that the surrogate will actually collaborate with obligations she signed up for, even if unenforceable, such as waiving her medical confidentiality in order to allow access to pregnancy information for the intended parents.

Despite the observation that the vast majority of surrogacy arrangements don't seem to devolve into a court battle,

Rebouché remains troubled by the role of professional intermediaries, calling for more transparency about the process these professionals use to balance the shifting power dynamics in the relationship. In this vein, her suggestion that perhaps structuring fertility agencies as non-profits with a right to receive compensation for their services is an interesting one that calls for more examination, perhaps in future work.

Rebouché also cautions about the pitfalls of genetic tests in the context of surrogacy. She focuses on non-invasive prenatal testing (or NIPT), which currently detects big genetic abnormalities, such as a missing or an extra gene, through a blood test in the first trimester. The test is likely to be further developed in the future to reveal detailed genetic information, creating possibilities of termination on the basis of preferred traits rather than seriously debilitating illnesses or conditions. Rebouché suggests that the bioethical concerns on the test might be even more troubling in the context of surrogacy. She notes: "[C]oncerns about the use of prenatal genetic testing when controlled or heavily influenced by intended parents might be exacerbated. An intended parent is not pregnant and does not make testing decisions as a pregnant person might, perhaps feeling distance between themselves and the pregnancy without the physical experience of gestation." (P. 1619.)

Concerns about frivolous demands for testing, however, could be less, not more, acute in cases of surrogacy, especially if protracted infertility is the background. Even when the background is single people or gay couples attempting to become parents with a genetic link, the financial and emotional cost of the process and the very genetic essentialism that Rebouché cautions against could result in significant compunctions about frivolous demands on the surrogate's bodily autonomy and perhaps more acceptance of a less than "perfect" genetic combination. After all, it may be easier to imagine there will be a next pregnancy at all if what it takes to get to a pregnancy is sex-rather than hiring a soccer team of professionals for the cost of a small house in a rural area. While it is uncertain which way this will actually cut, without more evidence, the assumption about surrogacy exacerbating these concerns may need more finetuning. Anecdotal evidence suggests that NIPT in the surrogacy process may lead to less, not more, pregnancy testing, and is especially useful in avoiding more invasive procedures such as amniocentesis, hence less pressure on the surrogate's bodily autonomy.

Overall, the article opens up a rich vein of inquiry into surrogacy contracts that is bound to prove fruitful. One possible future theoretical investigation would be further formalizing the bargaining dynamics involved in negotiating, executing, and enforcing a surrogacy contract, by examining further, the actual fallback positions of each party involved. Another fruitful direction would be digging deeper into the analogies between surrogacy and other kinds of contracts, as well as other mechanisms for perhaps evening out the parties' bargaining power borrowed from even further afield. Labor law anyone?

1. *See*, *e.g.*, Courtney G. Joslin, *(Not) Just Surrogacy*, __ **Cal. L. Rev.** __ (forthcoming 2021), available at SRRN and previously reviewed on Jotwell by Douglas NeJaime.

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